A Factual Assessment of the Draft Common Frame of Reference

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Preface by the General Editors of "The Common Core Project of European Private Law"

Writing a preface of a book is always a joyful occasion. It is even more joyful if the book is edited by brilliant young colleagues that one has followed since their days as students at the University of Trento. Methodologically this book is quite an interesting experiment. In a word, Antoniolli and Fiorentini's group has applied some of the results, and all the scholarly sensitivity of the Common Core of European Private Law Project (formerly at Trento and now at The International University College in Turin) to the Academic Draft Common Frame of Reference.

Doing so as part of an official evaluation process funded by the EU Commission, has been a major responsibility for the evaluation group and for the Common Core network in general, as it became clear by the important scholarly discussion carried on in Turin during the 15th General Meeting of the Common Core in 2009. For the General Editors of the Common Core the publication of this book is yet another sign of recognition of the importance of the humble, and relentless activity of data gathering that we have lead since 1993, at the very dawn of what later became the highly questionable academic "industry" of European Private Law.

The psychological context in which we draft this preface is thus very favorable, so that the temptation is that of just praising the excellence of this book. Nevertheless, as we write, the results of technocracy and of its attempt to naturalize a given status quo of power are before all of us in the images coming from Athens where the global financial technocracy is striking hard an ill-conceived Euro-politics and millions of people altogether. In such a dramatic scenario, the self-congratulatory mood that is usually a companion to the writings on European Private Law is not in order. Our responsibility in prefacing this book carries a duty of general political honesty.

Notwithstanding the work of the Common Core Evaluating Group has been constrained by its mandate, and funding, and therefore has not devoted enough energies in the overall critique of the whole process that has lead to the Academic Draft Common Frame of Reference, the implicit political value of the excellent and rigorous work of the team run by Antoniolli and Fiorentini cannot be by any means underestimated.

To be honest, the application of the Common Core method to the Academic Draft Common Frame of Reference may look like an attempt to reanimate a terminally sick patient. We do not believe that this effort will succeed, for the very reason that the Academic Draft Common Frame of Reference, even evaluated in its own technical terms, as it has been made by Antoniolli and Fiorentini, and many others, shows itself as a breathless cultural product. Thus, another valuable

feature of this book is to prove that not even an emergency medicine of the highest level can save an academic enterprise when it attempts to do an activity that does not belong there.

Indeed the life of the law can be found in the wealth of actual historical experience, of detailed rules governing real controversies between human beings. This is what the Common Core Project has attempted to describe as faithfully and structurally as possible in an ongoing process that is now in its seventeenth year.

The death of the law is in the normative black letters drafted by a self-appointed group of legal scholars pretending to be legislators. Scholars that have selectively incorporated the results of the other serious effort of knowing what we have out there in European Private Law, the so-called Acquis Group, to foster the academic agenda of their leadership. In order to carry on this agenda, promoting itself as a codification process while being instead an attack to the political nature of national Codes, these scholars have attempted to legitimize themselves by claiming roots in the early efforts to build European private Law. To do so they have bureaucratized the pioneering effort of the Lando Commission, a group whose success stemmed from the widely acknowledged academic prestige of all its members. Such bureaucratization process was initiated with the so-called "Study Group" on the European Civil Code (claiming to be the heirs of the Lando Commission) and has reached the climax in the method of deciding the different possible options with the typical procedure of electoral policy: taking a vote.

This quite paradoxical overall context should be present to the reader. By accepting to evaluate the Academic Draft Common Frame of Reference and incidentally injecting into it the real life of the law (as this book does remarkably well), the Common Core of European Private Law Project has not endorsed neither the process nor the results desired by its promoters.

Many of us have actually come to the conclusion that more study and less drafting would be in order.

Ugo Mattei and Mauro Bussani
Turin, The International University College – Trieste University Law School
May 8, 2010

Preface by the Editors in Chief of the Case-Based Assessment

The origin of this book is to be found in "The Common Core Project of European Private Law", first of all in its scholarly dimension. It is the result of an effort to apply the methodology that was developed over more than 15 years by a large group of scholars coming from all European countries to the most ambitious and large-scale effort to restate European private law, namely the Draft Common Frame of Reference (DCFR). Today it is far from clear what will be the use of the DCFR from a political point of view, since the European institutions do not seem to have a clear position on how to transform the DCFR into a Common Frame of Reference (CFR) to be employed in the legal harmonization process at the EU level. Yet, from a scholarly point of view it is clear that the impact of the DCFR is very significant and it will surely play an important role in the debate on the scope and content of European private law in the coming years.

Testing the DCFR content and structure through the methodology developed in the Common Core Group contributes to this important debate by analyzing the DCFR in relation to the outcomes and materials resulting from the many years of research that has been carried out in order to map in a complete and reliable way the similarities and differences that exists among European legal systems, without the aim of harmonizing them. Although the results of this assessment are not definitive, since the analysis could be conducted only on a selected number of topics, we consider that they are proof of the usefulness of such an analysis in order to evaluate the possible impact of the DCFR on national legal systems.

This book is moreover related to the Common Core Project not only as a scholarly endeavour, but also on a personal level: Ugo Mattei and Mauro Bussani have been our mentors and have worked with us for many years at the University of Trento and Trieste. We are consequently honoured and pleased that the members of the group have entrusted us with this work. It has been challenging for us to lead the team of scholars in this work, and we hope that we all have fulfilled the task that was envisaged.

We are very grateful to all contributors to the volume, both the national reporters and the scholars who have written essays containing a critical assessment, for their thoughtful and careful analysis, and for their work and commitment to this project. Finally, the book owes much to the careful editing of the English language by James Dallal.

The book truly reflects a team work. We have learned a great deal from our colleagues, and have enjoyed the friendly and cooperative environment. We hope that the book will contribute to

the discussion on European private law and promote the exchange and confrontation of different views and position on this subject.

Luisa Antoniolli and Francesca Fiorentini
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April 2010

Introduction*

Summary: 1. From the Europeanization of Private Law to the Project of a European Common Frame of Reference. – 1.1. Towards a European Private Law. – 1.2. The Academic Groups Working for a European Private Law. – 1.3. The EU Institutions and Harmonization of Private Law. – 2. The Draft Common Frame of Reference and Its Features. – 2.1. The Draft Common Frame of Reference. – 2.2. Content. – 2.3. Scope, Sources and Structure. – 2.4. The Drafting Process and Its Method. – 2.5. Language and Style. – 2.6. Purposes. – 2.7. Possible Use of the DCFR by the EU Institutions. – 2.8. Fundamental Principles, Overriding Principles and Clashing Values. – 3. The Common Frame of Reference and the EU Legal Process: Institutional Boundaries, EU Competences and Social Justice. – 3.1. EC/EU Competences and Legal Harmonization: Market v. Social Values. – 3.2. The DCFR as a Toolbox or a Code – "Constitutional" Implications. – 4. The Common Core of European Private Law and the Case-Based Assessment of the Draft Common Frame of Reference. – 4.1. Project's Aims. – 4.2. Method. – 4.3. Results and Long-Term Goals. – 4.4. Case-Based Assessment of the DCFR. Aims and Object. – 4.5. Method, Limits and Value of the Factual Assessment. – 4.6. Critical Essays.

1. From the Europeanization of Private Law to the Project of a European Common Frame of Reference

1.1. *Towards a European Private Law*. – There is no doubt that the building of a European private law is among the most important phenomena that European legal systems have experienced in the last decades. The engine of this process is gradually increasing its speed trough the interplay (not always coherent) between many actors: Besides the long-established players of European legal evolution, namely judges, legislators and professors[1], new ones are emerging, among which the technocratic apparatus governing the EU legal process is particularly relevant, together with other participants in law-making activity, such as national administrations with en-

* The Introduction was joint work by the two editors, nevertheless Luisa Antoniolli has written paragraphs nn. 3, 3.1, 3.2, 4.6, and Francesca Fiorentini paragraphs nn. 1, 1.1, 1.2, 1.3, 2, 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 4, 4.1, 4.2, 4.3, 4.4, 4.5.

[1] R.C. van Caenegem, *Judges, Legislators and Professors* (Cambridge, Cambridge University Press, 1987).

forcement duties. Their impact on the law–in–action has always been significant also at the national level, although their role has often been disregarded in legal analysis.

In the realm of the traditional law-makers, it is evident that nowadays judges are increasingly trained to use comparative law. Not only the European Court of Justice, but also national courts bound to apply EU law and to interpret domestic law in the light of the former, are active formants of the Europeanization of private law[2]. Over the last decades, the increase of EU law-making activity through directives in the core fields of private law – not to mention labour and company law – has promoted an approximation of national legislations that, although far from being complete and systematic, could not have been anticipated fifty years ago[3]. The significant achievements of legal history and comparative legal research in the twentieth century have shown similarities and diversities among legal traditions and demonstrated that different legal systems often tend to provide common solutions to common problems, despite the multiplicity of cultures, languages, legislations, styles and taxonomies which lawyers use in reaching particular outcomes[4]. In this way the basic cultural equipment needed to handle the many problems arising from European "legal integration"[5] was made available.

Yet, the making of European private law suffers from well-known limits that may impair the speed and results of its performance. Suffice it to mention that the European Court of Justice is far from being a Supreme Court of the European Union and that its action is not adequate to produce uniformity in the relevant areas. Not only is EC/EU legislation sectoral and fragmented in its contents and form, and limited by the narrow institutional boundaries of the subsidiarity principle and the lack of a general competence for the approximations of laws, but it is placed upon – and often overlaps with – a variety of national and local legislations that are related with local traditions and problems. This also has an impact on the focus of legal scholarship: legal doctrine in Europe is still mainly limited to traditional municipal law and legal education and its writings are mainly concerned with national law[6].

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[2] U. Drobnig (ed.), *The Use of Comparative Law by Courts* (The Hague, Kluwer, 1999); B.S. Markesinis & J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (London, UCL Press, 2006).

[3] Ch. Jorges, *Disintegrative Effects of Legislative Harmonization: A Complex Issue and a Small Example*, in M. Bussani & U. Mattei (eds), *The Common Core of European Private Law* (Den Haag, Kluwer, 2003) 105 ff.

[4] On the plurality of European legal traditions, each of which has a national and a common (i.e. European) dimension, in a mixture of *iura propria* and *ius commune*, see P. Glenn, *On Common Laws* (Oxford, Oxford University Press, 2005). On the results of comparative legal research see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (1991) 39 Am. J. Comp. Law 1 ff.

[5] On the variety of meanings connected to that expression in the context of the advancement of the European project, including socio-legal processes, language and culture, see the essays collected in H. Petersen, A.L. Kiær, H. Krunke and M. Rask Madsen (eds), *Paradoxes of European Legal Integration* (Aldershot, Ashgate, 2008).

[6] See arts 5 and 95 EC Treaty; H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems*, in (4/2008) 28 O.J.L.S. 659 ff., 660. See also below, n. III.1.

These contradictions have not hindered the progress of Europeanization of the law and the flourishing academic debate on European private law. Literature on roots and prospects, actors, structure and methods of this phenomenon is now more than abundant, but what deserves attention here is the fact that lurking behind the legal debate is one of the most important issues at stake, that is the role played by scholars in the process of Europeanization. To put it simply it seems that the fate of European private law– in terms of success or failure – is strictly linked to that of the strengthening of a class of scholars that everywhere in Europe has lost its social prestige and technical usefulness starting from the age of national codifications, but even more so with the establishment of a bureaucratic technocracy in the national and EU legal process[7].

This book focuses on the major project linking European private law and legal scholarship, the so-called "Draft Common Frame of Reference". It is in all but the name a codification-like effort that should improve and foster European legal integration, written by the largest network of scholars coming from different EU jurisdictions ever created in Europe. This volume gathers the results of a research that shifts the focus from the predominantly descriptive literature on European private law, which has been carried out by "The Common Core of European Private Law" Project (directed by Professors Mauro Bussani and Ugo Mattei). In short, it is a case-based assessment of the rules codified in the Draft Common Frame of Reference, aiming at setting the scholarly and abstract codification-like effort into the law-in-action dimension of the European legal systems.

There is already a large body of legal literature concerning the genesis of the Draft Common Frame of Reference. Yet, this story deserves to be briefly summarized also here in order to introduce the subject matter of this book.

1.2. *The Academic Groups Working for a European Private Law.* – Since the 1980's scholars coming from different European countries embarked on the study of private laws of Europe in the perspective of legal harmonization. They gathered in research groups that were the result of the private initiative of those academics. These research groups had different working methods and each tried to give substance to their own idea of harmonization, but shared the opinion that harmonization had to be carried out through the creation of a set of "European" black letter rules.

[7] M. Bussani, *The Driving Forces Behind a European Civil Code*, in Zbornig Pravnog fakulteta Sveučilišta u Rijeci. Supplement. Broj 3 (Rijeka (Croatia), 2003) 133 ff. (available on 'ssrn', at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322074). On the fate of legal scholarship as a source of law in the European civil law tradition see also M. Bussani and F. Fiorentini, *The Many Faces of Equity in Private Law. A Survey of the European Civil Law Tradition*, in D. Carpi (ed.), The Concept of Equity. An Interdisciplinary Assessment (Heidelberg, Winter, 2007) 101 ff.

The first enterprise of this kind has been the so-called "Lando Commission", set up in 1982 under the direction of Prof. Ole Lando (of the University of Copenhagen) to prepare a body of rules on general contract law and, partially, on the general law of obligations: the Principles of European Contract Law (PECL)[8]. These Principles, the result of years of comparative research and international cooperation among leading European scholars, have reached a remarkable degree of success as an authoritative reference for the development of national legal systems in Europe. In the mind of their authors, the PECL were deemed to serve a variety of goals, like being the initial basis for a European Civil Code, or a model law to be referred to by national legislators aiming to modernize their law; they could be also used as model both for future EU "legislation" and for judges and arbitrators in the adjudication of legal disputes, or as the governing law which could be chosen by the parties in private agreements, according to the applicable rules of international private law[9].

As successor of the "Lando Commission", the Study Group on a European Civil Code has been established in 1998 under the leadership of Prof. Christian von Bar of the University of Osnabrück. The name itself of this Group shows that its (initial) goal was to develop the idea expressed by the European Parliament to foster the creation of a European Civil Code[10]. The comprehensiveness of the codification scheme required this undertaking to enlarge the scope of the research from the general law of obligations and contracts to most private patrimonial law. Therefore, the work in progress of the Study Group includes not only specific contracts, but also benevolent intervention in another's affairs, unjustified enrichment, tort law, and some matters relating to property law, such as transfer of movables, security rights over movables and trust[11].

[8] O. Lando, H. Beale (eds), *Principles of European Contract Law, Parts I and II, Combined and Revised* (The Hague 2000); O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds), *Principles of European Contract Law, Part III* (The Hague 2003). For the story of the "Lando Commission" see O. Lando, *The European Principles in an Integrated World* (2005) 1 ERCL 3 f.

[9] O. Lando & H. Beale (eds), *The Principles of European Contract Law* (Dordrecht-Boston-London 1995) XVII.

[10] See below, n. I.3.

[11] The result of the research of the Study Group on a European Civil is published by Sellier (Munich) in the series "Principles of European Law" (PEL). They cover tort law (Principles of European Law. Study Group on a European Civil Code. Non-Contractual Liability Arising out of Damage Caused to Another, prepared by Christian von Bar, Sellier, Bruylant, Staempfli, Oxford University Press 2009) sales (Principles of European Law. Study Group on a European Civil Code. Sales, prepared by Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand, Aneta Wiewiorowska, Sellier, Bruylant, Staempfli, Oxford University Press 2008), leases (Principles of European Law. Study Group on a European Civil Code. Lease of Goods, prepared by Kåre Lilleholt, Anders Victorin†, Andreas Fötschl, Berte-Elen R. Konow, Andreas Meidell, Amund Bjøranger Tørum, Sellier, Bruylant, Staempfli, Oxford University Press 2007), services (Principles of European Law. Study Group on a European Civil Code. Service Contracts, prepared by Maurits Barendrecht, Chris Jansen, Marco Loos, Andrea Pinna, Rui Cascão, Stéphanie van Gulijk, Sellier, Bruylant, Staempfli, Oxford University Press 2006), commercial agency, franchise and distribution (Principles of European Law. Study Group on a European Civil Code. Commercial Agency, Franchise and Distribution Contracts, prepared by Martijn W. Hesselink, Jacobien W. Rutgers, Odavia Bueno Díaz, Manola Scotton, Muriel Veldmann, Sellier, Bruylant, Staempfli, Oxford University Press 2006), personal security contracts (Principles of European Law. Study Group on a European Civil Code. Personal Security, prepared by Ulrich Drobnig, Sellier, Bruylant, Staempfli, Oxford University Press 2007), and benevolent interventions in another's affairs (Principles of

The overall aim is to elaborate a basic set of rules for Europe, made of principles deriving from comparative research and distillation of the best rules by way of scholarly analysis. At the root in the project is the belief that European law can emerge only as *Professorenrecht*, a belief that is reflected in the method of the Study Group's work, based on comments and national notes devoted to explain the black letter rules and help developing a shared legal culture in Europe[12].

From the codification idea another academic group, the *Académie des Privatistes Européens*, draws inspiration. Since 1992 this Group is working on a *Code Européen des Contrats*, under the coordination of Prof. Giuseppe Gandolfi (of the University of Pavia)[13]. Aims and method of this team can be best explained in opposition to those of the Lando Commission: whereas the latter aimed at producing "Principles" of European law, i.e. rather general provisions based on broad concepts (such as good faith and reasonableness), the *Académie* chooses the more traditional concept of codification used in continental Europe, regarded as a set of more specific rules, intended to leave less scope to interpretative activity. The provision of the *Code Européen des Contrats* are largely based on the Italian Civil code, but are sometimes open to solutions coming from the common law tradition[14]. Also the official language of the text is different: English as a global language is superseded by French, considered the truly European and Community language[15].

In the specific sector of tort law the *European Centre of Tort and Insurance Law* (*ECTIL*) was set up in Vienna in 1999 as the institutional basis for the work of the *European Group on Tort Law*. Starting from 1992 under the leadership of J. Spier, this group has produced the *Prin-*

European Law. Study Group on a European Civil Code. Benevolent Intervention in Another's Affairs, prepared by Christian von Bar, Sellier, Bruylant, Staempfli, Oxford University Press 2006). Further books are forthcoming in 2010 on unjustified enrichment law, mandate contracts, loan contracts, donations, acquisition and loss of ownership of goods, proprietary security in movable assets and trust.

[12] Ch. von Bar, *The Study Group on a European Civil Code*, in European Parliament, *Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code*, Working Paper, Legal Affairs Series, JURI 103 EN (1999) 151 ff., 156. On the working method of the Study Group see also below, n. II.4.

[13] Until now a First Book on general contract law and a Second Book on Sale Contracts have been published: Académie des Privatistes Européens, *Code européen des contrats: Avant-projet, Coordinateur Giuseppe Gandolfi, Livre premier*, 3. éd. rev. (Milan, Giuffrè, 2002); Académie des Privatistes Européens, *Code européen des contrats: Avant-projet, Coordinateur Giuseppe Gandolfi, Livre deuxième*, vol. I (Milan, Giuffré, 2007); Académie des Privatistes Européens, *Code européen des contrats: Avant-projet, Coordinateur Giuseppe Gandolfi, Livre deuxième, vol. II, Des contrats en particuliers* (Milan, Giuffrè, 2008). See also www.accedemiagiusprivatistieuropei.it.

[14] G. Gandolfi, *Le code européen des contrats*, in J.-P. Dunand and B. Winiger (eds), Le code civil français (Bruxelles, Bruylant, 2005) 275 ff.; Id., *Una proposta di rilettura del quarto libro del codice civile nella prospettiva di una codificazione europea* (1990) Riv. trim. dir. proc. civ. 339. The common law paradigm followed by the *Académie* is the "Contract Code" drafted by Prof. H. Mc Gregor for the English Law Commission, but never enacted: H. Mc Gregor, *Contract code: drawn up on behalf of the English Law Commission* (Milan, Giuffrè, 1993).

[15] J.P. Gridel, *Sur l'hypothèse d'un Code européen des contrats: les propositions de l'Académie des privatistes européens (Pavie)*, in Gazette du Palais, 21/22 Février 2003, 3.

ciples of European Tort Law (*PETL*) in 2005[16], building a possible basis for the future codification of European law in this area, as well as a model for national reforms[17].

Beside these major "legislative" enterprises, another side of the academic debate and activities on European private law grew very fast, focusing on broader cultural aspects of this process. The starting point of many European scholars was – and still is – that we do not possess yet sufficient knowledge of each others' legal systems to form a sufficiently solid ground for a legislative endeavour, particularly if intended as a codification in the continental meaning. In this vein, the primacy of legal research rather than legislative drafting should be acknowledged, the building of a European legal culture being a prerequisite for all kinds of European legislation aspiring to be uniformly applied. Without a truly shared common culture, no black letter rule approach could really serve the purpose of convergence of legal systems. Though with different nuances among the various groups, this "cultural" perspective is advocated by "The Common Core of European Private Law"[18], the "Social Justice Group"[19], the "Society of European Contract Law"[20], and the "*Ius Commune* Casebooks for the Common Law of Europe"[21].

From the end of the 1980's, also the European Community Institutions started expressing their interest for the harmonization of private law as a means to achieve a single market among member States. The institutional inputs to the debate proved to be very influential in the evolution of the European private law process to the present stage and therefore deserve special attention.

1.3. *The EU Institutions and Harmonization of Private Law*. – The characteristics of the European Community legal process and the different role played in it by the various institutions

[16] These Principles are sub-divided in ten Titles (Basic Norm, Damage, Causation, Liability Based on Fault, Strict Liability, Liability for Others, Defences in General, Contributory Conduct or Activity, Multiple Tortfeasors, Damages) and have been translated in 10 languages. See European Group on Tort Law, *Principles of European Tort Law* (Vienna/New York, Springer, 2005).

[17] The results of the comparative analysis that constituted the basis for the reduction of the PETL have been published by Kluwer Law International (The Hague, London, New York) in the series 'Principles of European Tort Law'. A second series is published by Springer (Vienna-New York). For comparative observations on these Principles see B.A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law"* (1/2005) 53 Am. J. Comp. L. 189 ff.; M. Infantino, *Making European Tort Law. The Game and Its Players* (2010) 18 Cardozo J. Int'l Comp. L. (forthcoming) par. 3, also available at: http://works.bepress.com/marta_infantino/8.

[18] See below, n. IV.

[19] *Social Justice in European Contract Law: a Manifesto*, (2004) 10 ELJ 653. Among many contributions see M. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?* (2007) 15 ERPL 323 and U. Mattei & F. Nicola, *A Social Dimension in European Private Law? The Call for Setting a Progressive Agenda*, (2006) 31 New England L. Rev. 1 f.

[20] The so-called SECOLA has been founded in 2001 by C.M. Bianca, H. Collins and S. Grundmann. See W. Kerber & S. Grundmann, *An Optional European Contract Law Code: Advantages and Disadvantages* (2006) 21 Eur. J. Law & Economics 215; more information is available at http://www.secola.org/about.htm. The "European Review of Contract Law" has been set up by SECOLA to foster academic debate on European contract law.

[21] The project leader is W. van Gerven; see Id., *Casebooks for the Common Law of Europe: Presentation of the Project* (1996) 4 ERPL 67 and the web page http://www.law.kuleuven.ac.be/casebook.

explain why their position on the issue of European harmonization has not always been coherent. We will see further on how this lack of coherence on the institutional side has had a direct impact on the scientific activity of the Europeanization of private law[22].

The first Institution intervening in the debate on the approximation of private law regimes in the member States has been the European Parliament. Between 1989 and 2003 it has adopted a series of Resolutions[23] expressing the need to start exploring the feasibility of a European Civil Code as a politically charged and sensitive issue. The justification of this approach has been the need for a deeper degree of harmonization to foster a working and integrated common market. Harmonization supported by the EU Parliament has always been a wide-ranging idea, covering not only contract law, but also matters related to tort, restitution and property[24].

The Commission joined to the Parliament initiatives first with the 2001 Communication on European Contract Law[25]. This document started a wide consultation among EU Institutions and stakeholders (enterprises, consumer organizations, legal professions, scholars) on the obstacles to the single market stemming from divergences in contract law regimes of the member States and the way to overcome them. The Commission wanted to gather information on the need to go beyond the traditional, selective approach of the EC "legislator" through directives on specific contracts or marketing techniques. The Communication suggests a list of possible solutions, like (i) leaving the market free to regulate divergences in cross-border contract law; (ii) promoting the elaboration of non-binding principles; (iii) reviewing and improving existing EC legislation; (iv) adopting a new European instrument (directive, regulation or recommendation) covering general contract law and specific contracts, that could replace or coexist with national laws.

From the results of this consultation the 2003 Action Plan on European Contract Law of the EU Commission followed[26]. This confirmed the outcome of the consultation process launched by the 2001 Communication, i.e. that there is no need to abandon the use of directives, but there is a need for a uniform application of EC contract law in order to guarantee the smooth functioning of the internal market. The Action Plan suggested increasing the coherence of EC *acquis* in the field of contract law and promoting the elaboration of EU-wide general contract terms. The question

[22] See below, n. II. 7 and 8; n. III.
[23] *Resolution on acting to bring into line the private law of the member states*, of 26 May 1989, in OJ C 158 of 26 June 1989, 400; *Resolution on the harmonization of certain sectors of the private law of the Member States*, of 6 May 1994, in OJ C 205 of 25 July 1994, 518; *Resolution on the approximation of civil and commercial law of the Member States*, of 15 November 2001, in OJ C 140 of 13 June 2002, 538; *Resolution on the Communication from the Commission to the European Parliament and the Council - A More Coherent European Contract Law – An Action Plan*, of 2 September 2003, in OJ C 76, of 25 March 2004, 95.
[24] E.g., *Resolution on the approximation of civil and commercial law of the Member States*, of 15 November 2001, quoted fn. 23 above, at n. 13.
[25] *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM/2001/398fin.
[26] *A More Coherent European Contract law. An Action Plan*, COM/2003/68 fin., of 12 February 2003.

whether a non-sector-specific instrument (so-called optional instrument) had to be elaborated was considered as deserving further examination.

In this document, the project of a "Common Frame of Reference" was first announced. The Commission expressed the intention to develop the *acquis communautaire* through a newly created tool – the "Common Frame of Reference" (CFR) –, which had to be elaborated by European scholars, in cooperation with the stakeholders (EU officials, European consumer associations, banks, etc.). The CFR had to provide for "best solutions" in terms of common terminology and rules, establishing coherent core definitions of legal concepts (like "contract" or "damage") and rules that apply, for example, in the case of non-performance of contracts. To that aim, a review of the current European contract law *acquis* could identify and remedy inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the Common Frame of Reference was to build a starting point for an "optional instrument", i.e. a European Civil Code, in the area of European contract law.

This approach has been reinforced by the 2004 Communication of the Commission "European Contract Law and the revision of the *acquis*: the way forward"[27], where the Commission decided to finance research activities for the elaboration of the CFR within the Sixth Framework Programme for Research and Technological Development. Under that call, the "Joint Network on European Private Law - Network of Excellence" (CoPECL)[28] has started working in 2005. As indicated below (n. IV), it is precisely in the context of this Network that this work by the Common Core Evaluating Group is set.

Aims, scope and method of the activities of the CoPECL Network of Excellence will be the object of further analysis below (n. II). Suffice here to present it briefly, recalling that it is the widest research network ever created in Europe. It is directed by Prof. Schulte-Noelke of the University of Bielefeld and gathers the most prestigious academic research groups of Europe: the Study Group on a European Civil Code, the Research Group on the Existing EC Private Law ('Acquis Group')[29], the Project Group on a Restatement of European Insurance Contract Law[30].

[27] *Communication from the Commission to the European Parliament and the Council - European Contract Law and the revision of the acquis: the way forward*, COM(2004)651fin., of 11 October 2004.
[28] See http://www.copecl.org.
[29] This group has been set up under the sponsorship of the EU Commission and directed by Proff. G. Ajani (University of Turin) and H. Schulte-Noelke (University of Bielefeld). See http://www.acquis-group.org/. Differently from the other academic groups, this Team has focused on existing EC law to produce the "Principles of Existing EC Contract Law" (Acquis Principles), i.e. principles aiming to help national legislators in the implementation of EC law. The volumes of the Acquis Principles have been published by Sellier (Munich): *Principles of the Existing EC Contract Law: Contract I: Pre-contractual Obligations, Conclusion of Contracts, Unfair Terms* in August 2007; *Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services* in October 2009.

These groups have the task to draft the so-called 'Common Principles of European Contract Law' (CoPECL). In the network, "Supportive Groups" are added to these "Drafting Groups", with the aim of completing the "legislative" activities with critical assessments. These evaluation groups are the Association Henri Capitant, together with the Société de Législation Comparée[31], the Academy of European Law – ERA[32], the Economic Impact Group, set up by the Research Group on the Economic Assessment of Contract Law Rules (TILEC - Tilburg Law and Economics Center)[33] and The Common Core of European Private Law[34].

As already mentioned, the task of the Network is to deliver to the EU Commission the "Common Principles of European Contract Law" (CoPECL), that will constitute a possible basis for the future Common Frame of Reference of European Community law. The first Draft (Outline Edition I) of this work has been published by Sellier in December 2007 and a second Draft (Outline Edition II) in February 2009 and the final edition in October 2009[35].

In the framework of the revision of the *acquis* concerning consumer law, the EU Commission reopened the debate in 2007, inviting stakeholders to express their opinion on some core issues of the CFR. The Green Paper on the Review of the Consumer Acquis[36] covers the general question as to the better tool to be used to improve consumer law and more specific problems related to definitions.

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[30] Since 2004 the Group has been directed by Prof. Helmut Heiss. It focuses on general standard terms in insurance contracts of the European countries and especially on mandatory rules that are regarded as an obstacle to a single market in the insurance sector. The Group has recently published a set of minimal rules that could uniformly govern insurance contracts in Europe: Project Group "Restatement of European Insurance Contract Law", *Principles of European Insurance Contract Law (PEICL)* (Munich, Sellier, October 2009). See also A. Th. Müller, *Vers un droit europeéen du contrat d'assurance. Le "Project Group Restatement of European Insurance Contract Law"* (2007) 15 ERPL 59 ff.; J. Basedow, *The Case for a European Insurance Contract Code* (2001) JBL 569.
Beside these "legislative" groups, the Database Group, based at the "*Institut Charles Dumoulin - Contrats internes et internationaux*", set up in 1992 at the *Faculté de Droit Jean Monnet* of the Université Paris XI, is producing, under the direction of Proff. M. Ch. Seraglini and P. Remy-Corlay, a data base of case law on contract law in the EU Member States. This should help the research activity of the Drafting Groups. See http://icd.recherche.jm.u-psud.fr/.

[31] This group published its results in early 2008: Fauvarque-Cosson/Mazeaud and Wicker/Racine/Sautonie-Laguionie/ Bujoli (eds), *Principes contractuels commun. Projet de cadre commun de référence* (Paris, Société de Législation Comparée, 2008); Fauvarque-Cosson/Mazeaud and Tenenbaum, *Terminologie contractuelle commune. Projet de cadre commun de référence* (Paris, Société de Législation Comparée, 2008). These studies have been published also in English: *European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules,* produced by Association Henri Capitant des Amis de la Culture Juridique Française and Société de Législation Comparée; edited by Fauvarque-Cosson and Denis Mazeaud, prepared by Racine, Sautonie-Laguionie, Tenenbaum and Wicker (Munich, 2008).

[32] Within the network, ERA has the task of organizing conferences on the CFR in order to encourage a debate and promote the spreading of knowledge on these issues. See www.era.int.

[33] See http://www.tilburguniversity.nl/tilec/. See Economic Impact Group, *Economic Analysis of the DCFR* (Munich, Sellier, 2010) and G. De Geest & M. Kovac, *The Formation of Contracts in the Draft Common Frame of Reference – A Law and Economics Perspective* (2/2009) 17 ERPL 113 ff.

[34] See below, n. IV.

[35] Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group) (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (Full Edition) (Munich, Sellier, October 2009). On the Drafts – available at www.sellier.de – see below, in the text, n. II.

[36] COM/2006/744 fin., of 8 February 2007.

In the Second Progress Report on the Common Frame of Reference of July 2007[37], the Commission stresses the priority of consumer law (especially for issues such as consumer sales, pre-contractual information, unfair terms, right of withdrawal and right to damages) and specifies its idea of the CFR. It is considered as "a longer-term exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules of contract law when revising existing and preparing new sectoral legislation where such a need is identified"[38]. The Commission points out that the aim of the CFR is not a large scale harmonisation of private law or a European Civil Code[39].

The Commission's initiatives have been supported by the Council and the European Council. The former body has approved of the idea to limit the scope of the CFR to a review of the consumer *acquis*, dropping the project for a European Civil Code[40]. In the last official documents, moreover, emphasis is on contract law, rather than on private law at large[41]. In 2004 the European Council adopted a multi-annual programme (the so-called Hague Programme) dealing with all policy aspects relating to the area of freedom, security and justice, including approximation of civil laws and the development of the CFR[42].

More recently, the position of the European Parliament changed in comparison to that of the early Resolutions. Since 2006 other Resolutions[43] indicate as the way to follow that of the CFR – the European Civil Code is no longer on the agenda – and that the CFR should not be limited to the area of consumer law, but should cover also general contract law and other areas of private law. The Commission has been invited to involve the Parliament in the CFR project, stressing the problem of the democratic legitimation of the harmonization process. Finally, in view of the delivery of the DCFR by the CoPECL Network, Parliament[44] has invited the Commission to prepare an agenda concerning the way it will use the CFR and the possible parts of it

[37] COM/2007/447fin., of 25 July 2007, following the *First Annual Progress Report on European Contract Law and the Acquis Review*, of 23 September 2005 (COM/2005/456fin.).
[38] COM/2007/447fin., 11.
[39] COM/2007/447fin., 11.
[40] See *Council Resolution on "A More Coherent European Contract Law"*, in OJ C 246 of 13 October 2003.
[41] EU Council, Justice and Home Affairs, Conclusions of 18 April 2008, 8397/08 (Presse 96); EU Council, Justice and Home Affairs, Conclusions of 18 April 2008, EU Council, Justice and Home Affairs, 16325/1/08 REV 1 (Presse 344). See also the document for the EU Council written in June 2009 by the Committee on Civil Law Matters (Contract Law) for the COREPER (JUSTCIV 120, CONSOM 111, 15 May 2009).
[42] See European Council Presidency Conclusions, Bruxelles 4-5 November 2004, 14292/04. In December 2009 the European Council has adopted the new multi-annual programme (Stockholm programme), 16883/1/09 REV 1 (Presse 355), which does not contain any novelty concerning the CFR.
[43] *Resolution on European Contract Law and the revision of the acquis: the way forward*, of 23 March 2006, in OJ C 292 E, of 1 December 2006, 109; *Resolution on European Contract Law*, of 7 September 2006, in OJ C 305 E, of 14 December 2006, 247.
[44] *Resolution on European Contract Law*, of 12 December 2007, in OJ C 323E of 18 December 2008, 364; *Resolution on the Common Frame of Reference for European Contract Law*, of 3 September 2008, in OJ C 295E of 4 December 2009, 31.

to be selected, and how the selection process will be made. Parliament has adopted the opinion of the Council, according to which the CFR should be a tool for better law-making, forming a set of non-binding guide-lines to be used in the EU legislation process[45].

2. The Draft Common Frame of Reference and Its Features

2.1. *The Draft Common Frame of Reference.* – As already mentioned, the task of the Joint Network on European Private Law is to deliver to the EU Commission the "Common Principles of European Contract Law" (CoPECL), that will constitute a possible basis for the future Common Frame of Reference of European Community law, as first required by the EU Commission in the "Action Plan on A More Coherent European Contract Law" of 12 February 2003[46]. After a first Draft of these Principles had been delivered to the EU Commission in December 2007 and made available to public in February 2008, a second enlarged and reviewed edition was published by Sellier in February 2009 and the final full edition with comments and comparative notes was published in October 2009[47]. The drafters of such principles call it the "academic" Draft Common Frame of Reference (DCFR), in order to distinguish the results of their efforts from what they call the "political" Common Frame of Reference (CFR), i.e. the tool – whatever form, scope and purpose it will have – that the EU institutions will be willing to adopt in the (near?) future, as a consequence of a political decision. Since the Common Core Evaluating Group is called to assess this DCFR, a preliminary description of its features is needed.

2.2. *Content.* – According to the scheme set out in the Commission's Communication of 2004 "The Way Forward"[48], the DCFR contains "principles, definitions and model rules". The meaning of these words has not been made clear by the Commission and therefore is subject to a variety of interpretations. The drafters of the DCFR intend "principles" as a synonym of rules which do not have a binding character. This is the meaning adopted by the Lando Commission, as

[45] *Resolution on the Common Frame of Reference for European Contract Law*, quoted fn. above, n. 7.
[46] See above, fn. 26.
[47] See above, fn. 35.
[48] See above, fn. 27.

made clear in Art. 1:101 of PECL, as well as by the UNIDROIT Principles of International Commercial Contracts[49], as specified in the Preamble (Purpose of the Principles), paragraph 1[50].

The word "principles", however, can also mean rules of a general nature, with which all the member States are more or less familiar, like freedom of contract or good faith. Moreover, a third meaning of "principles" has also been adopted by the DCFR, i.e. the meaning that the EU Commission has sometimes used in connection with the adjective "fundamental". "Fundamental principles" reflect abstract basic values that underlie the rules, whether they are expressly stated or referred to or not. Such basic values have been included in the Outline Edition II of the DCFR and in the final Full Edition, as a consequence of the suggestions coming from the *Principes directeurs du droit européen du contrat* elaborated by the Supportive Group composed of The Association Henri Capitant and the Societé de législation comparée[51]. They have been grouped under the headings of freedom, security, justice and efficiency[52]. In addition, the DCFR recognizes "overriding principles", i.e. principles of high political relevance, such as protection of human rights, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity, protection and promotion of welfare and promotion of the internal market[53].

"Definitions" play a crucial role in the context of the DCFR. They serve the purpose of building a common European terminology that will be essential for the sake of a uniform interpretation of the model rules. The definitions have been distilled in part from existing EC law and in part from the model rules themselves. This explains why the model rules cannot work without the definitions and vice versa[54].

Finally, "model rules" are black letter rules which are not meant to have the force of law, but are rather soft law, in the same vein as the Lando Principles[55], and in this sense they resemble one of the meanings of "principle".

2.3. *Scope, Sources and Structure.* – The coverage of the DCFR is directly linked to the sources from which it draws. Since the CoPECL Network builds on the work of the Lando Com-

[49] *UNIDROIT Principles on International Commercial Contracts* (Rome 2004), also available at http://www.unidroit.org/english/principles/contracts/main.htm.
[50] DCFR, Outline Edition II, pt. 10, p. 9 (Full Edition, pt. 10, p. 4).
[51] See above, n. I.3, fn. 28. The suggestions coming from this Group have not resulted in a full reception of what elaborated in the *Principles directeurs*, but have brought to a consultation among the Drafting Groups, from which a different conception of those "fundamental principles" underlying the Model Rules arose.
[52] DCFR, Outline Edition II, pt. 15, p. 13 and pt. 22, p. 17 (Full Edition, pt. 16, p. 8; p. 37 ff.).
[53] DCFR, Outline Edition II, pt. 16-22, p. 14-17 (Full Edition, pt. 16, p. 8). See also below, n. II.8.
[54] DCFR, Outline Edition II, pt. 23, p. 17 f. (Full Edition, pt. 23, p. 10)
[55] DCFR, Outline Edition II, pt. 24, p. 18 (Full Edition, pt. 24, p. 10).

mission and its successor, the Study Group[56], the DCFR incorporates, with some changes, the PECL, as well as the books of the PEL series. To these, the work of the Acquis Group is added. The DCFR structures all those materials in 10 Books.

Book I is intended by the authors as a short guide for the reader that deals with the field of application of the text, the rules on its interpretation and development, some crucial definitions, and the rules on computation of time[57].

Book II and III have been the object of considerable debate. They were deemed to incorporate the Lando Principles, covering general rules on contract and other juridical acts as well as general rules on contractual and non-contractual obligations. The drafters have chosen to divide these materials into two parts: Book II, devoted to contracts and other juridical acts (formation, interpretation, cases of invalidity, determination of their content, etc.), and Book III, dealing with contractual and non-contractual obligations and the rights and duties arising from them. The very titles of these Books makes clear how the concepts of "contract" and "obligation" have been intended by the drafters. While "contract" is a type of juridical act (the most important one), "obligation" is what arises from a legal relationship, which usually results from a contract. Moreover, as far as possible, Book III treats uniformly contractual and non-contractual obligations; when a rule applies only to the former, this is explicitly spelled out[58].

Book IV contains the rules on specific contracts and the rights and obligations arising from them. It is divided in Parts, each devoted to a contractual type (Part A, Sales; Part B, Lease of goods; Part C, Services; Part D, Mandate contracts; Part E, Commercial agency, franchise and distributorship; Part F, Loan contracts; Part G, Personal Security; Part H, Donation). If the logic underlying the distinction between contract and obligation is – more or less – shared by both common law and civil law traditions[59], the structure and content of Book IV cannot always claim to represent the "common core" of European law. Sometimes the texts show a stronger influence of some national laws or traditions of the member States. For example, English law does not classify lease of goods as a contract (Part B). In other cases the approach chosen is rather new compared to that of national laws. For instance, the systematization effort of the DCFR treats as "typical" contracts relationships that under many domestic laws are not regulated by the codes and other statutes. This is particularly clear in Part C on Services, where specific rules are set out for processing, storage, design, information and advice, medical treatment[60]. Also the structure

[56] On both Groups see above, n. I.2 in text and fns. 5 ff.
[57] DCFR, Outline Edition II, pt. 43, p. 26 (Full Edition, pt. 34, p. 13).
[58] DCFR, Outline Edition II, pt. 44-46, p. 27 f (Full Edition, pt. 35-37, p. 13-14).
[59] But see below, fn. 74 and corresponding text.
[60] For these and other critical remarks see H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Prob-*

and terminology of the Part dealing with Personal Security is rather new when compared to the traditional European civil codes. The subject is subdivided in "dependent" and "independent" security contracts, abandoning the traditional terminology shared by most member States of "accessory" and "non-accessory" security. Differently from what happens in most European systems, binding comfort letters are presumed to be dependent securities (IV.G – 1:102(1)(a)) and "independent" securities are fully regulated as a typical contract (IV.G – Chapter 3). The novelty (or oddity) of many solutions probably depends on the fact that for special contracts the path of harmonization has been much less trodden than general contract law. Of course, the major exception to this is represented by the sale contract. Here a well-established scholarship[61] has prepared the most successful examples of legal integration, such as the United Nations Convention on International Sale of Goods of 1980 and the Consumer Sales Guarantees Directive (1999/44/EC); not surprisingly, Part A of Book IV is largely based on these models. Nevertheless, the DCFR sale regime departs from them to some notable extent, for example when it extends to B2B contracts some consumer protection rules, such as the "good faith and fair dealing" test of Art. III. 3:105 (2)[62].

Non-contractual obligations are dealt with in the following three books. Book V regulates Benevolent intervention in another's affairs; Book VI is devoted to Non-contractual liability arising out of damage caused to another and Book VII disciplines Unjustified enrichment. From a general point of view, the domain of non-contractual obligations is even more dependent from the specificities of national laws than that of contractual obligations. This is especially true for benevolent intervention in another's affairs and unjustified enrichment, for which comprehensive comparative work is still lacking[63]. To be sure, the scholarly debate on (European) tort law is more long-standing and mature[64]. Yet, the strong differences existing among legal systems not

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lems (4/2008) 28 OJLS 659 ff., 662 ff.; a severe criticism is expressed by H. Unberath, *Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmes* (2008) 16 ZEuP 745 ff., 764; a more positive view can be found in C. Wendehorst, *Das Vertragsrecht der Dienstleistungen im deutschen und künftigen Europäischen Recht* (2006) 206 AcP 205 ff., 290 ff.

[61] Going back at least to Ernst Rabel's work *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung* (Berlin, de Gruyter, 1936-1957). See P. Huber, *Comparative Sales Law*, in M. Reimann & R. Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford, OUP, 2008) 937 ff.

[62] On these aspects see widely the paper of Chris Willet below in this book. It has been noted that European harmonization in the field of (consumer) sales law might be undermined by the adoption of the Consumer Rights Directive, if the text remains the one currently contained in the proposal (COM(2008)614 final of 8.10.2008), which does not take over, nor make reference to, the rules of the DCFR: R. Zimmermann, *The Present State of European Private Law* (2009) 57 *Am. J. Comp. L.* 479 ff., 502; M. Hesselink, *The Consumer Rights Directive and the CFR: Two Worlds Apart?* (2009) Tidskrift Juridiska Föreningen I Finland 298 ff.

[63] R. Zimmermann (ed.), *Grundstrukturen eines Europäischen Bereicherungsrecht* (Tübingen, Mohr Siebeck, 2005); N. Jansen, Negotiorum gestio *und Benevolent Intervention in Another's Affairs: Principles of European Law?* (4/2007) ZEuP 958 ff.

[64] For an up-dated and detailed account on this topic see M. Infantino, *Making European Tort Law. The Game and Its Players*, quoted above, fn. 16. See also, in chronological order, W. van Gerven et alii, *Tort Law. Scope of Protection* (Oxford, Hart, 1998); Id. et alii, *Tort Law* (Oxford, Hart, 2000); Ch. von Bar, *The Common European Law of Torts*

only as to the form and general structure of tort law (e.g. general clauses, as opposed to specific torts; relevance or not of unlawfulness, the differences in the notion of fault in the legal systems), but also as to the treatment of some fundamental issues, such as, for instance, strict liability and pure economic loss[65], have made the harmonization efforts of the DCFR more difficult. The drafters have carved out models for European rules whose suitability to have a common role in all member States is highly questionable, also because shared needs in these sectors are still hardly detectable[66].

To the books I to VII, which were already included in the Outline Edition I, others have been added to the Outline Edition II: Book VIII on Acquisition and loss of ownership of goods; Book IX on Proprietary security in movable assets and Book X on Trusts. In the DCFR the novelty of the regime elaborated for Proprietary Security is very clear and deserves here brief mention. The drafters have gone far beyond the present state of European law in this field. Along the lines of the models of North-American Art. 9 U.C.C. and the UNCITRAL Legislative Guide on Secured Transactions of 2007[67] – although not merely copying them out – they have created a "functional" system, which subjects all legal devices that fulfil the purpose of security to the same legal regime. In a single notion of "security right" traditional pledges are included together with transfers of ownership or trusts for security purposes, security assignments of claims, sale and lease-back and sale and resale agreements (Art. IX. – 1:102). Furthermore, a new notion of "retention of ownership devices" has been created (Art. IX. – 1:103), to which the general regime of the rules is only partially applicable (Art. IX. – 1:104). The most important feature of Book IX is probably the European registration system, set up to guarantee the effectiveness of security rights as against third parties (Chapter 3, Section 3). The Book envisages a general regime for non-possessory security rights for Europe that is extremely modern and challenging[68]. Book IX is another illustration of an academic approach by the drafters producing theoretically new catego-

(Oxford, Clarendon, vol. I 1998, vol. II 2000); U. Magnus (ed.), *European Tort Law* (Frankfurt-Berlin-Wien, Lang, 2000); R. Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrecht* (Baden-Baden, Nomos, 2003); C. van Dam, *European Tort Law* (Oxford, OUP, 2006); M. Bussani (ed.) *European Tort Law. Eastern and Western Perspectives* (Bern, Staempfli; Munich, Sellier et alii, 2007).

[65] F. Werro & V.V. Palmer (eds) *The Boundaries of Strict Liability in European Tort Law* (Durham, Carolina Academic Press, 2004); M. Bussani & V.V. Palmer (eds) *Pure Economic Loss in Europe* (Cambridge, CUP, 2003); Iid. (eds) *Pure Economic Loss: New Horizons in Comparative Law* (Routledge-Cavendish, London-N.Y. 2008).

[66] For details on the merits and defects of the DCFR regimes in these fields see R. Zimmermann, *The Present State of European Private Law* (Spring 2009) 57 Am. J. Comp. L. 479 ff., 499-500; N. Jansen, Negotiorum gestio *und Benevolent Intervention in Another's Affairs: Principles of European Law?* (4/2007) ZEuP 958 ff., 960. Criticism on the opportunity to "codify" unjustified enrichment law can be found in the paper by J. Smits & V. Mak, below in this book. Doubts on the need of European harmonization in these areas as a means to foster the internal market are expressed by R. Zimmermann, *The Present State of European Private Law* above, at p. 499 and J. Basedow, *Kodifikationsrausch und kollidierende Konzepte – Notizen zu Marktbezug, Freiheit und System im Draft Common Frame of Reference* (4/2008) ZEuP 673 ff., 674.

[67] Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html.

[68] For a first assessment of Book IX see R.A. Macdonald, *Transnational Secured Transactions Reform: Book IX of the Draft Common Frame of Reference in Perspective* (4/2009) ZEuP 745 ff.

ries and rules for Europe, which has prevailed over a detailed distillation of a true "common core" of European legal solutions.

The Books from IV to X incorporate the work of the Study Group on a European Civil Code, published and in part still forthcoming in the PEL series[69], however with some differences and – particularly worth mentioning – omissions until the publication of the Full Edition in October 2009. In fact, comments and comparative national notes which accompany the black letter rules in the books of the PEL series have been omitted in the first two Outline Editions. This was due to the choice for simplification and accessibility of the draft model rules to the European readers who were called to contribute to the debate in the ongoing process of elaboration of the same rules. It must be noted that the Common Core Assessment of the DCFR took place on the basis of Outline Edition II, therefore comments and national notes were generally not available to our contributors[70]. As the Common Core evaluation will show, these omissions have been a true obstacle to the full understanding and appropriate evaluation of the rules, both for academics and other citizens and stakeholders with regards to the first phase of their publication[71].

As already mentioned, also the *acquis communautaire* has been partly incorporated into these ten books. In particular, the results of the Acquis Group, published in a separate series[72], have been taken into account as a source of existing EC law. According to the DCFR "Within the process of elaborating the DCFR, the Acquis Group and its output contribute to the tasks of ensuring that the existing EC law is appropriately reflected. The ACQP are consequently one of the sources from which the Compilation and Redaction Team has drawn"[73]. Yet, the method and scope of the merger between the results of the Study Group on European private law and those of the Acquis Group concerning the EC *acquis* on contract law have not been defined *ex ante*, but rather have been left to a subsequent unilateral decision of the Compilation and Redaction Team[74]. The methods employed by the two working groups have been independent and significantly dif-

[69] See above, fn. 11.
[70] An exception to this is the paper by Lars van Vliet on Acquisition and Loss of Ownership of Goods, for which the author gained confidential access by the competent Working Team of the Study Group on a European Civil Code (B. Lurger and W. Faber) to the complete materials before their publication in the PEL series.
[71] See below, n. IV.5. See also S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, November 2008, Assessment commissioned by the Ministry of Justice, U.K., p. 47, available at: http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm.
[72] *Principles of Existing EC Contract Law (Acquis Principles). Contract I – Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, prepared by the Acquis Group (Munich, Sellier, 2007); *Contract II (General Provisions, Delivery of Goods, Package Travel and Payment Services)* (Munich, Sellier, October 2009). Further volumes are in preparation. On this Group see also above, fn. 29.
[73] DCFR, Outline Edition II, pt. 57, pp. 35-36 (Full Edition, pt. 48, pp. 18-19).
[74] The ties between the two groups were of a personal nature. For instance, prof. Hans Schulte-Noelke of the University of Osnabrueck (Germany) was both co-ordinator of the Network of Excellence on European Private Law (Co-PECL), co-ordinator of the Acquis Group and member of the Compilation and Redaction Team of the network.

ferent[75]. Both relied on the tools of comparative law, but their approach diverged on fundamental elements: while the Acquis Group was aiming at restating existing EC law without changing it (even though it admittedly generalised some partial results), the Study Group was striving not only for shared solutions among European legal systems, but rather for best solutions, implying the possibility to draft rules that do not correspond to any existing national system[76]. Clearly, this is a major difference in the drafting approach, yet little systematic attention was given to the way in which these two different bodies of law should be connected from the beginning and finally merged, and consequently suitable institutional mechanisms were not created[77]. This fundamental difference is also mirrored in the scope of the work of the two groups: the Study Group emphasized the need to cover not only contract, but also non-contractual obligations and some matters of movable property[78]; on the contrary, the Acquis Group stuck to the idea that only contract law is a suitable field for further harmonisation within the European Union[79].

In spite of the difficulty in linking the two bodies, the influence of the *acquis communautaire* is important and can be detected in several parts of the DCFR. In Book II one may find rules

[75] See G. Ajani, S. Ferreri and M. Graziadei, *Introduzione ai Principi di diritto comunitario in materia di contratto* (1/2009) Riv. trim. dir. proc. civ. 271 ff., according to whom "il lavoro del *Gruppo Acquis* ha una propria autonomia e un proprio obiettivo, che non si confonde con quello di altri gruppi. (…) L'autonomia (…) non è incrinata dal fatto che il quadro comune di riferimento accademico preparato dallo *Study Group* abbia attinto da essi (…)". As a consequence "nel *Gruppo Acquis* non è certo prevalsa l'idea che la sorte dei Principi fosse legata a doppio filo a quella del quadro comune di riferimento accademico preparato dallo *Study Group* (…). Parlando per esperienza diretta, è stato ben chiaro a tutti i partecipanti al *Gruppo Acquis* che il lavoro dedicato all'elaborazione dei *Principi Acquis* non implicava affatto l'adesione al disegno più ampio coltivato dallo *Study Group*, proprio perché i due progetti avevano natura e scopi diversi" (p. 274).

[76] See R. Schulze, *The Academic Draft of the CFR and the EC Contract Law*, in R. Schulze (ed.), Common Frame of Reference and Existing EC Contract Law (Munich, Sellier, 2008) 4, 9-10, according to whom "there are two methodological weaknesses in terms of the overall structure: only particular parts of the DCFR are based upon the link between comparative law and Community law, whilst in the majority of parts the reference to Community law is missing. The structure of the draft (for example the central role of the General Law of Obligations) is largely neither derived from existing Community law nor from a convincing comparative law basis" (p. 10). In fact, this is related to a wider problem, namely defining the scope of the DCFR and CFR respectively: "Whilst the Common Frame of Reference should serve a "coherent European contract law" following the European Commission's Action Plan (…), the academic DCFR thus goes far beyond this objective and subject matter. (…) With this expansion the DCFR stretches across areas for which the principles of the *acquis communautaire* still have to be researched in more detail, and moreover more extensively in matters for which no *acquis communautaire* exists (and in part where there is no recognisable interest in rules on the part of the European Community). This leads to a methodological break within the draft (…)" (p. 11).

[77] For a specific example of the difficulty of matching the rules of the DCFR with those of the Acquis Principles due to the different method of selection (best solution v. restatement) in the area of pre-contractual duties see C. Twigg-Flesner, *Pre-contractual duties – from the acquis to the Common Frame of Reference*, in R. Schulze (ed.), Common Frame of Reference and Existing EC Contract Law (Munich, Sellier, 2008) 97- 126, particularly 125-126.

[78] DCFR, Outline Edition II, pt. 34-40, pp. 23-25 (Full Edition, pt. 25-31, pp. 10-12). The underlying fundamental idea is that it is for the EU institutions to define the desired scope of the "political" CFR, either contract law or a broader area, on the basis or the wider DCFR: DCFR, Outline Edition II, pt. 4 and 6, p. 7 and pt. 59-74, pp. 36-45 (Full Edition, pt. 5-6 and 49-61, pp. 3-4 and 19-23). See also H. Schulte-Noelke, *Contract Law or Law of Obligations? – The Draft Common Frame of Reference (DCFR) as a multifunctional tool*, in R. Schulze (ed.), Common Frame of Reference and Existing EC Contract Law (Munich, Sellier, 2008) 47-63, who describes the DCFR as a "a menu offering choice", from which "politicians can and should cherry-pick" (p. 54).

[79] R. Schulze, *The Academic Draft of the CFR and the EC Contract Law*, in R. Schulze (ed.), Common Frame of Reference and Existing EC Contract Law (Munich, Sellier, 2008) 17-18, 22-23.

on non-discrimination, information duties, unsolicited goods or services, right of withdrawal; the rules on consumer goods guarantees and consumer protection in the Part on Sale Contracts; a specific chapter on consumer protection in the Part on Personal Security, containing rules going sometimes even beyond the ones existing in the *acquis* or in the member States (e.g. IV.G. – 4:107)[80].

The private law subject matters that are excluded from the DCFR are listed in Book I. – 1:101(2). These are status and legal capacity of natural persons, wills and succession, family relationships, negotiable instruments, employment relationships, immovable property, company law, the law of civil procedure and enforcement of claims.

The text of the DCFR does not include the results of the Project Group on the Restatement of European Insurance Contract Law (Insurance Group), which is also part of the CoPECL Network. This working group has delivered to the Commission the final version of its "Principles" separately in 2009 and has published them with Sellier[81].

The "academic" DCFR has a much broader coverage that the "political" CFR – at least as it is now envisaged by the EU Commission[82]. This is because the drafters have built a text deemed to be an independent body of law. From the structure they have given to the materials, the result looks much more like a continental Civil Code, rather than an accessible "tool-box". In particular, it seems that the model of the work is borrowed from the German way of thinking and of organizing private law rules in a code[83]. The insertion of contract and contractual obligations in a hierarchical system of concepts, moving from the more general "juridical act" to the more specific "contract" and the "obligations" arising from it, is more similar to the analytical structure of the German BGB than to other civil law systems and the common law approach to the topic. Common law lawyers, indeed, are not familiar with the concept of a juridical act, whose inclusion in the architecture of a European 'restatement' of contract law is not felt as indispensable across the Channel[84].

The intention of the drafters is that the EU Institutions will be able to choose from the text of the DCFR the parts to be included in the (probably more focused) "political" CFR[85]. Yet,

[80] Also the Acquis Principles do not merely restate the existing EC contract law, but in a number of cases go beyond it: N. Jansen & R. Zimmermann, *Restating the Acquis comunautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law'* (2008) 71 M.L.R. 505 ff.
[81] See above, fn. 30.
[82] See above, n. I.3.
[83] Strong criticism against the structure, especially of Book II and Book III of the DCFR, can be found, e.g., in R. Schulze & T. Whilelmsson, *From the Draft Common Frame of Reference towards European Contract Law Rules* (2/2008) ERCL 154 ff. and in S. Grundmann, *The Structure of the DCFR – Which Approach for Today's Contract Law?* (3/2008) ERCL 225 ff.
[84] S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 78 ff.
[85] DCFR, Outline Edition II, pt. 39, p. 24 and pt. 74, p. 44 (Full Edition, pt. 30, p. 11 and pt. 61 and 62, p. 23).

given the logical connection between all topics regulated in this highly systematic work, it can be argued that this cherry-picking will not be an easy task[86].

2.4. *The Drafting Process and Its Method.* – The scientific results embodied in the DCFR have been achieved with a peculiar working method, which can at least partly explain some choices underlying the text and some inconsistencies existing in it. Of course, it is especially the working method of the Study Group on a European Civil Code that has impacted on the rules[87]. Over the years, this Group has been subdivided into numerous Working Teams, each having the task of elaborating model rules on the various topics going beyond the PECL scope. Each Working Team was organized under the direction of a senior academic, leading and coordinating the work of a staff of younger researchers coming from various European countries, supported by an Advisory Team. The latter was composed of experienced academics, leading experts in the specific field of research, coming from different legal systems of Europe. Each Working Team and Advisory Team had the task of elaborating a set of black-letter rules, accompanied by comments and national notes, along the lines of the PECL. A major difference was that the apparatus of national notes had to be more detailed than that of the PECL, in order to better show how the model rules are based on common solutions. The extent to which this goal has been reached, however, varies significantly from team to team. It depends on the number and expertise of younger researchers each team could involve, and on time and budget constraints. Moreover, only after the beginning of the enlargement of the European Union in 2004 were members coming from the new member countries called on to cooperate in the Working Teams, so that the input from these legal cultures has necessarily been less influential in the policy choices and in the shaping of the black-letter rules. This is especially true for those Teams which published their results first.

The choices of the Working Teams had then to be referred to and approved by a higher body of the Network, the Co-ordinating Committee, chaired by Prof. von Bar and composed by about forty members, leading lawyers from the EU member States. This Committee met twice a year and deliberated by majority vote.

It must be stressed that participation to the Co-ordinating Committee was not based on the criterion of the country of origin of the scholars, but on invitation from the project leaders. The lack of legitimacy in the choices made within this project has been underlined many times. It is indeed difficult to overcome the criticism according to which the "best solutions" this Group tried

[86] S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 83.
[87] Ch. von Bar, *Coverage and Structure of the Academic Common Frame of Reference* (3/2007) ERCL 350 ff., 353 ff.

to distil from the laws of the EU countries have been "the expression of the views of a predominated self-selecting group of (principally academic) jurists from across Europe (and, predominantly, Western Europe)"[88]. Moreover, the very possibility of identifying such "best solutions" depends on the evaluation criteria that the researchers follow. Since no precise criterion was given by the EU Institutions[89], the drafters have been free to base the whole work on their own criteria and their own cultural background. This explains why the working method of the DCFR has been classified as "methodological nationalism"[90]. As underlined in many parts of this book, the text of the DCFR reveals that this methodological approach has disregarded one of the most important lessons taught by comparative law, namely the need to consider the operative dimension of the law and the relevance of meta-legal factors in any law-making process. The Drafters of the DCFR seem to have worked on the implicit assumption that enforcement of the 'European' rules is not its concern[91].

The only instance of the involvement of meta-legal elements in the formation of the DCFR has been required by the EU Institutions which have urged the Network to involve to the largest extent possible other players in the debate. This is what was meant by reference to the "stakeholders" as voices that had to be heard in order to compare the academic choices with the social needs to which the model rules were deemed to be addressed[92]. To this purpose, the EU Commission organized some periodic workshops on selected topics, where drafting group representatives met with EU officials, members of consumer organizations, industry, and other interested parties to discuss the black letter rules and the rationale behind them. However, this effort to reduce the lack of democratic legitimacy of the DCFR has proven weak: stakeholders meetings were few and their results often unclear[93].

2.5. *Language and Style.* – Linguistic supervision on the drafting activity of each working Team has been entrusted to the Compilation and Redaction Team, under the direction of Prof.

[88] S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 44 f.; J. Smits, *The Draft-Common Frame of Reference (CFR) For a European Private Law: Fit For Its Purpose?* (15/2008) MJECL 145 ff., also available at: http://ssrn.com/abstract=1117248; M. Oderkerk, *The CFR and the Method(s) of Comparative Legal Research* (3/2008) ERCL 315 ff.

[89] See also below, n. II.6.

[90] J. Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward* (3/2008) ERCL 270 ff. See also above, n. II.3 about scope and structure of the DCFR.

[91] L. Niglia, *Taking Comparative Law Seriously: Europe's Private Law and the Poverty of the Orthodoxy* (Spring 2006) 54/2 Am. J. Comp. L. 401 ff., 418.

[92] On the involvement of the stakeholders see G. Wagner, *Die soziale Frage und der Gemeinsamen Referenzrahmen* (2007) 15 ZEuP 180 ff.

[93] H. Beale, *The European Commission's Common Frame of Reference Project: A Progress Report* (2/2006) ERCL 303 ff.; Id., *The Future of the Common Frame of Reference* (3/2007) ECLR 257 ff., 272; Lord Mance, *Is Europe Aiming to Civilise the Common Law?* (2007) EBLR 77, 93 f.

Eric Clive (University of Edinburgh). From time to time this Team suggested linguistic changes in order to gain clarity and coherence among the different books of the DCFR. Prof. Clive is also responsible for the formulation of the Definitions list requested by the EU Commission and the stakeholders, which was placed in an Annex to the Outline Edition II of the DCFR and is now in a special section preceding the model rules in the Full Edition[94].

The working language of the DCFR has been English, but the drafters have taken great care to expunge from the English wording any meaning that could be too closely connected to some national legal system. This is why, e.g. words like "rescission", "tort" and "delict" have been avoided[95]. In the same perspective, the term "contract" had to be used with a single meaning, which is defined in Art. II. – 1:101(1)[96]. Sometimes new terminology has been created in order to frame new taxonomies considered as better fitting the needs of European private law. This was the choice, e.g., of the rules on personal security. These rules divided the security agreements into two categories (dependent and independent securities), named differently from what is common in the national systems, i.e. accessory and non-accessory securities. The reason behind this choice is that the DCFR partition does not exactly coincide with the one in the main EU jurisdictions[97].

The DCFR aimed at a text that could be accessible and readable to any European lawyer[98]. In this respect, the work on language and definitions has been impressive, but is not completely flawless[99]. While there are a number of useful definitions (e.g. "withdrawal"), others very prominent for the whole work are, to some extent, inconsistent with each other, like "consumer" and "business"; other definitions are simply too broad, like "loss" and "damage", which imply relevant consequences in terms of expansion of liability[100].

The choice of using a version of the English language not too connected to current legal English might sometimes cause difficulties of understanding for common law lawyers, as in case of the expressions "creditor" and "debtor" for all kinds of obligations, not only confined to monetary obligations and loans[101]. The same is true for the concepts and linguistic expressions of "retention of ownership devices" and "acquisition finance devices", used in Book IX on Proprietary

[94] DCFR, Outline Edition II, p. 545 ff. (Full Edition, p. 65 ff.)
[95] DCFR, Outline Edition II, pt. 48, p. 29 (Full Edition, pt. 39, p. 15).
[96] According to Art. II. – 1:101(1) a contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effects. It is a bilateral or multilateral juridical act.
[97] See above, n. II.3 and Á. Carrasco, *The DCFR – Guarantee and Personal Security Contracts* (2008) ERCL 389 ff.
[98] DCFR, Outline Edition II, pt. 48, p. 30 (Full Edition, pt. 39, p. 15).
[99] The legal terminology of the DCFR is criticized for being too connected to highly abstract German legal concepts and also for a lack of consistency in their use by A. Vaquer, *Farewell to Windscheid? Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR)* (2009) ERPL 487 ff., 510-512. See also G. Dannemann, S. Ferreri and M. Graziadei, *Language and Terminology*, in C. Twigg-Flesner (ed.), The Cambridge Companion to European Union Private Law (Cambridge, CUP, 2010) 70 ff.
[100] S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 50 ff., 107 ff., 112 ff.
[101] S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 116 f. with further examples. On this point see also G. Dannemann, S. Ferreri and M. Graziadei, *Language and Terminology*, 78 f.

security in movable assets, which represent a novelty for both civil and common law terminology in this sector[102]. That these problems of terminology will impact – and possibly hinder – the translation in other national languages, and therefore impair a uniform understanding of the DCFR throughout Europe, is a real risk[103].

As far as the drafting style is concerned, it must be recalled that the acknowledged model of the black-letter rules of the DCFR are the PECL[104]. The drafting style of the PECL has been more that of a Restatement than of a Code in the continental meaning of the term. This implies a higher level of abstraction in the way of expressing legal rules. However, what we find in the model rules of the DCFR are often very detailed rules, spelled out in long sentences, which tend to abandon not only the level of abstraction of the Lando Principles, but also the synthetic style of many civil law national codifications[105]. Therefore, notwithstanding the declared purposes of the drafters to follow a different way from that of a traditional civil code, the result in terms of style of the model rules often seems to go exactly in this direction[106].

2.6. *Purposes.* – Coverage and purposes of the DCFR are closely related to one another. In the mind of its authors, the DCFR has many possible purposes. It may be a guide or model for the "political" CFR, as it was envisaged by the Commission Communications of 2003 and 2004[107]. The political CFR could choose to adopt the entire body of the DCFR, or pick up some parts only, according to the policy choices of the EU Institutions, which are still far from being defined.

However, being an autonomous body that stands on its own, the DCFR could also be used as an academic text containing the results of many years of comparative research carried out by a large group of European scholars. In this perspective the DCFR should help show similarities and differences among national laws in Europe, and – especially when equipped with comments and national notes – should show how much of national private law is based on common ground. Of

[102] See respectively Art. IX. – 1:103 and IX. – 2:101 (3).
[103] On translations difficulties in the framework of the DCFR see R. Sefton-Green, *Sense and Sensibility: The DCFR and the Preservation of Cultural and Linguistic Plurality* (3/2008) ERCL 281 ff. See also Ioriatti Ferrari, *Draft Common Frame of Reference and Terminology*, in this volume, at p. 341 ff., 346 ff.
[104] Ch. von Bar, *Coverage and Structure of the Academic Common Frame of Reference* (3/2007) ERCL 350 ff., 352 ff.
[105] E.g. see the Part on Personal Security of Book IV (Specific contracts), arts. IV.G. – 1:106 (Several security providers: internal recourse); IV.G. – 2:107 (Requirement of notification by the creditor); IV.G. – 4:103 (Creditor's pre-contractual duties).
[106] In the same vein J. Smits, *The Draft-Common Frame of Reference (CFR) For a European Private Law: Fit For Its Purpose?* (15/2008) Maastricht Journal of European and Comparative Law, 145 ff., also available at: http://ssrn.com/abstract=1117248.
[107] See above, II.3 and DCFR, Outline Edition II, pt. 6 p. 7 and pt. 59 p. 36 (Full Edition, pt. 6, p. 3 and pt. 49, p. 19).

course, the relevance of this achievement could be of utmost importance to the building of a common legal education and culture in Europe[108].

Along the line of the PECL, the "academic" DCFR has also been drafted as a set of model rules to be incorporated by the parties to a contract in their agreements, whether domestic or cross-border. In particular, this should help small and medium enterprises in doing cross-border business and increase consumers' trust in the good functioning of the internal market, when buying goods or services from a supplier situated abroad[109].

Moreover, the DCFR aspire, similarly to the PECL, to be a source of inspiration for law reform efforts in Europe and, in this way, to promote legal harmonization of European private law[110].

If we judge from the final result, i.e. the content and the structure of the DCFR, it appears that, despite any declaration to the contrary by the drafters, the main (or real) aim of the work has been the creation of a codification-like body of rules. This characteristic of the work derives from the first approach taken by the Study Group at the beginning of its (private) activity, and to this extent it is not questionable. Mentality and working habits of this "legislative" Group did not change when the EU Commission started to finance the scholarly research, nor when the Commission and the Council started expressing their preference for a more limited and specific work, primarily devoted to the review the consumer *acquis*. To be sure, this weakness in directing the research activities towards forms and contents functional to the purposes of the EU Institutions has been due to the lack of coherence by the EU Institutions on the issue of harmonization of European private law. As a consequence of this, if the EU Institutions will prefer – as it seems to be the case today – to unpack and select some relevant parts of the DCFR for its restricted "political" CFR, this will be a rather difficult task[111].

2.7. *Possible Use of the DCFR by the EU Institutions.* – The drafters of the DCFR point out many ways in which the EU Institutions could make use of the results of their efforts[112].

First of all, the EU Commission itself has declared, in the 2004 Communication "European Contract Law and the revision of the *acquis*: the way forward"[113], that through the transformation

[108] DCFR, Outline Edition II, pt. 7 p. 7 (Full Edition, pt. 7, p. 4).
[109] Ch. von Bar, *Coverage and Structure of the Academic Common Frame of Reference* (3/2007) ERCL 350. See the criticism by J. Basedow, *Kodifikationsrausch und kollidierende Konzepte – Notizen zu Marktbezug, Freiheit und System im Draft Common Frame of Reference* (4/2008) ZEuP 673 ff.
[110] DCFR, Outline Edition II, pt. 8, pp. 7-9 (Full Edition, pt. 8, p. 4).
[111] S. Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 11.
[112] DCFR, Outline Edition II, pt. 59 ff., p. 36 ff. (Full Edition, pt. 49 ff., p. 19 ff.).
[113] See above, fn. 27.

of the DCFR into the CFR, it could provide a guide for the EU law-making bodies, called a "toolbox". This "toolbox" function could help the EU legislator in reviewing the consumer *acquis* Directives. Yet, in the elaboration of the proposal for a Directive on consumer rights (COM(2008)614 final of 8.10.2008), the proposed text for the time being does not seem to refer to the DCFR at all, and on some aspects it is even in contrast with it[114]). The first moves do not seem to be very promising, unfortunately.

Moreover, it could serve as a basis for expanding the existing *acquis* and elaborating a coherent terminology in EC law, which up to now has been lacking[115]. In this perspective, the drafters underline that terminology cannot go without rules, thus stressing the link between coverage of the DCFR and (suggested) coverage of the "political" CFR. Finally, the DCFR could offer essential background information for the EU legislator. This could be made possible by the extensive national notes that are included in the final version of the rules, which are deemed to provide essential information on how some concepts are to be intended in the various member States and what is problematic for domestic laws. Of course, especially on this point the intrinsic quality and completeness of comments and national notes complementing the DCFR is crucial.

It is also worth mentioning that the DCFR has already been used in a number of cases decided by the European Court of Justice. More specifically, Advocate General Trstenjak has referred to the DCFR in several cases, using them as an aid in developing legal arguments[116].

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[114] See above, fn. 62. In a working document of the EU Council, written in June 2009 by the Committee on Civil Law Matters (Contract Law) for the COREPER (JUSTCIV 120, CONSOM 111, 15 May 2009), the puzzle remains: the Committee underlines the need to ensure consistency between the CFR and the proposed directive on consumer rights, but it considers that "the projects are separate and are intended to pursue objectives which may not always coincide" (p. 5). Moreover, it considers that it should be the CFR to follow and take into account the development of the proposed Directive, not the reverse! The Committee on Civil Law Matters has been entrusted by the Council with the task of follow regularly the work of the Commission on the CFR.

[115] One of the most famous examples is the *Simone Leitner* case (Case C.168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631), where the European Court of Justice had to decide whether damage to a consumer under the Package Travel Directive had to include or not non-economic loss, which is a heading of damage not recognized by Austrian law.

[116] *Commission v Italian Republic*, C-275/07, conclusions delivered on 11 June 2008 (doc. 62007C0275), at par. 90; judgement of the ECJ 19 March 2009 (doc. 62007JOP275); the case concerned the possibility of receiving default interest for customs debts. *Ilsinger v Dreschers*, C-180/06, conclusions delivered on 11 September 2008, at parr. 49-52; judgement of 14 May 2009; the case was about the definition of a consumer contractual action in order to establish jurisdiction. *Danske Slagterier v Germany*, C- 445/06, conclusions delivered on 4 September 2008, fn. 57; judgement of the ECJ 24 March 2009; the case concerned the determination of the limitation period for EC claims related to non-contractual liability of Member States for breach of EC law. *Pia Messner v Firma Stefan Krueger*, C-489/07, conclusions delivered on 18 February 2009 (doc. 62007C0489), at parr. 85 and 94; judgment of the ECJ 3 September 2009 (doc. 62007J0489C(01)); the case tackled the possibility for the seller to obtain compensation for the use of goods returned by a consumer on the basis if her right of withdrawal; *Eva Martìn Martin v EDP Editores*, conclusions delivered on 7 May 2009 (doc. 62008C0227), at par. 51; judgement of the ECJ of 17 December 2009 (doc. 62007j0227); the case concerned the possibility for national judges to declare of their own motion the voidness of a consumer contract due to the lack of information to the consumer of his right of cancellation. See also S. Whittaker, *A Framework of Principle for European Contract Law* (2009) 127 LQR 622-623, who lists some other cases referring to academic projects on European law: *Masdar (UK) Ltd v Commission*, T-333/03, par. 89 (the case concerned non-contractual liability of the EU institutions, and contains a reference to the rules on *negotiorum gestio* drafted by the Study Group on a European Civil Code; *Quelle AG v. Bundesverband der Verbraucherzentralenund*

Finally, when this book was finalized and ready for print, the EU Commission has published a new official document in this field: the Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law (in OJ L 105 of 27.4.2010, p. 109-111) provides for the establishment of an expert group of 20 high qualified member which should help the Commission in selecting the relevant parts from the DCFR in order to prepare a proposal for a CFR of European contract law, including consumer and business contract law; moreover, the revision of the content of the DCFR should take into consideration also other research work in the area, as well as the EU *acquis*. The wider scope of the DCFR, which goes far beyond the domain of contract law, seems to be consequently of no further interest to the EU Institutions in the near future.

2.8. *Fundamental Principles, Overriding Principles and Clashing Values.* – The uncertainty in the purposes of the CFR had an impact not only on content and structure of the DCFR, but also on the values it reflects. As previously mentioned[117], although its authors claim that the DCFR is not a Code in the continental meaning of the term[118], they have undoubtedly shaped it as a coherent body of private law. The claim for coherence of any set of private law rules necessarily implies that the normative aims of this text and their relations to another are made clear in advance, and possibly plainly declared to the addressees of the text. Without clarity on the underlying values and policy choices, the risk is that the private law regime embodied in such a text fails its mission, *i.e.* to embody and develop shared values of a community. This assumption seems to be accepted by the drafters of the DCFR, according to whom "private law is one of those fields of law which are, or at least should be, based on and guided by deep-rooted principles"[119]. However, the point concerning what are the underlying values and how they are prioritized among them was not clearly stated in the First Outline Edition, nor does the question seem to be solved in a satisfactory way by the Second Outline Edition. This despite the fact that in the second edition there is a wider analysis of the problem, resulting in a first Part of the DCFR devoted to Principles, as a consequence of the scholarly criticism and the debate on this issue. The scope and aims of the principles remain a domain lacking clear borders: the new Introduction simply declares that "it is clear that the DCFR does not perceive private law, and in particular

Verbraucherbaende, C-404/06 (a case concerning the possibility for the seller to obtain compensation for the use of goods returned by a consumer for replacement due to defects, in which Advocate General Trstenjak referred in her conclusions to the PECL: fn. 28) .

[117] See above, n. III.6.

[118] Ch. von Bar, *A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities* (May 2008) 12.1 EJCL 3.

[119] DCFR, Outline Edition II, pt. 11, p. 10 (Full Edition, pt. 11, p. 5).

contract law, as merely the balancing of private law relations between equally strong [...] persons", but leaves to the readers to find out to what extent "social justice" concerns may be achieved through the model rules[120].

The issue of the underlying principles and values has been hotly debated among scholars, especially between the First and the Second Outline Edition[121]. In this phase, the publication of the *Principes directeurs du droit européen du contrat* by the Association Henri Capitant and the Société de législation comparée[122], has influenced the debate and offered a model set of principles to be inserted in a separate, introductory part of the DCFR. However, the drafters refused to accept in full this suggestion and, taking into account the substance of the *Principes directeurs*, opted to elaborate the subject autonomously[123]. They chose to identify a small group of four "underlying principles", defined as those which are all-pervasive within the DCFR, which can be detected by looking into the model rules. Beside those principles, others have been considered as "overriding principles", i.e. principles of high political value, that are primarily relevant for an external assessment of the DCFR[124]. To the first category belong the principles of freedom, security, justice and efficiency, which are now introduced and extensively illustrated in a section preceding the model rules[125]. Under the second label come the principles of protection of human rights, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity, protection and promotion of welfare and promotion of the internal market. While illustrating the meaning of these principles, the drafters themselves stress that the two categories may overlap, since the underlying principles may also play a role as overriding principles[126]. Possibilities of conflict between the two categories of principles, as well as between principles of the same category, are envisaged by the drafters in the Introduction. This is the case, for instance, for the conflict between the principle of preservation of cultural and linguistic diversity with the principle of solidarity, protection and promotion of welfare and promotion of the internal market[127]; and it is the case for all four underlying principles, notwithstanding the effort to prioritize them by placing efficiency at a lower level in comparison to the other three principles of freedom, se-

[120] DCFR, Outline Edition II, pt. 11, p. 10 (Full Edition, pt. 11, p. 5).
[121] See H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems* (4/2008) 28 OJLS 659 ff., 669 ff.; M. Hesselink, *The values underlying the Draft Common Frame of Reference: What role for fairness and "social justice"?*, Study PE 408 312, commissioned by the Directorate-General Internal Policies, September 2008. See also O. Lando, *The Structure and the Legal Values of the Common Frame of Reference (CFR)* (3/2007) ERCL 245 ff.
[122] See above, fn. 31.
[123] Details of this process are under DCFR, Outline Edition II, pt. 13 ff., p. 11 ff. (Full Edition, pt. 13 ff., p. 6 ff.).
[124] DCFR, Outline Edition II, pt. 14, p. 13 (Full Edition, pt. 14, p. 7).
[125] See Principles, DCFR, Outline Edition II, p. 57 ff. (Full Edition, p. 37 ff.).
[126] DCFR, Outline Edition II, pt. 16 ff., p. 14 ff. (Full Edition, pt. 16 ff., p. 8 ff.).
[127] DCFR, Outline Edition II, pt. 19, p. 15 f. (Full Edition, pt. 19, p. 9).

curity and justice[128]. Moreover, the drafters recognize that "there are many examples of rules which can be explained on the basis of more than one principle", e.g. many rules designed to ensure contractual freedom can also be explained in terms of contractual justice[129]; this is why the principles can never be applied in a unilateral and mechanic way[130].

To all this another issue must be added. The text of the model rules makes extensive use of general clauses and open-ended legal concepts, such as "good faith", "fair dealing" and "reasonableness"[131]. This means that the content of these concepts referred to the underlying principles and values shall be determined by the interpreters, who have no precise guide in the performance of this task (not to mention the position of English lawyers, who are not accustomed to an extensive use of the good faith concept in commercial transactions, where they emphasize the value of legal certainty rather than that of fairness)[132].

While it is not task of this Introduction to analyze in detail the issue of the underlying values of the DCFR, this debate shows that in the context of the adjudication of disputes the architecture of the DCFR leaves the complex task of balancing those principles and values to the judges of the European countries. This is a problematic aspect, given the differences existing among the European legal systems in terms of legal cultures and routines employed by lawyers. As legal comparison has revealed[133], these differences are clear and – more important – much more difficult to overcome in the context of the law in action than at the level of black letter rules. European society, to which the DCFR is addressed, is not homogeneous, therefore the judges will probably interpret European open-ended concepts by making reference to their own national and personal prioritization of underlying principles and values. That this implies a threat to legal certainty and is likely to lead to new differences in the private law of Europe, seems to be clear.

3. The Common Frame of Reference and the EU Legal Process: Institutional Boundaries, EU Competences and Social Justice

[128] DCFR, Outline Edition II, p. 60 (Full Edition, p. 37).
[129] DCFR, Outline Edition II, p. 61 (Full Edition, p. 38).
[130] DCFR, Outline Edition II, p. 61 (Full Edition, p. 37).
[131] An accurate account on this can be found in H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems*, 674 f., with reference to the First Outline Edition.
[132] Further analysis of the issue can be found in S. Whittaker, *The 'Draft Common Frame of Reference'. An Assessment*, 38 f.
[133] See below, n. III, for the presentation of the Common Core Project.

3.1. EC/EU Competences and Legal Harmonization: Market v. Social Values. – In the European Community there is a tension between the economic and social dimensions, whose characteristics have changed over time, but which is still present today, and which also affects the current debate on the Europeanization of private law. This tension has been termed a "constitutional asymmetry"[134], whereby the consolidation and strengthening of market integration and liberalization was matched by a selective Europeanization of economic policy and social protection[135]. This gap has meant that "employment and welfare-state policies at the national level had to be designed in the shadow of "constitutionalized" European law"[136]. It grew significantly after the boost of the internal market programme following the Single European Act and the economic and monetary union of the Maastricht Treaty, because these two elements have significantly reduced the room of manoeuvre for States in order to autonomously determine and implement social goals. As a consequence, although social policies are still part of national competences, they have to be exercised in accordance with Community constraints.

The pattern of integration of private law in the European Community is mainly linked to the policy of the internal market, which is a cornerstone of the Community. This policy has been central to the EC system from the beginning in the 1950's, but over time its scope and content has changed significantly, gradually becoming an open-ended area, whose boundaries cannot be strictly defined in advance, and which has significantly altered the division of competences between the EC and member States.

Consequently, the more general issue on how shared competences should be allocated between the EC and member States is related to the issue of the existence and the scope of a competence of the EU to regulate contract law and even more private law, which is widely debated today. Moreover, another important aspect concerns the effects of this harmonized EC contract/private law on the residual regulatory competences of the States. The EC Treaty formally establishes that the Community has attributed competences, i.e. it can act only when the Treaty specifically confers to it the power to do so, which are linked to the objectives set by the Treaty (art. 5(1) TEC, now art. 5(1)(2) TEU). If this principle is taken literally, there is no specific competence to legislate generally on contract law, let alone private law. Yet, numerous legislative acts that are related to contract and private law have been enacted, based on the need to establish

[134] See F. Scharpf, *The European Social Model: Coping with the Challenges of Diversity* (2002) 40 JCMS 645-670, 647.

[135] During the negotiations leading to the Treaty of Rome, the French Prime Minister Mollet, a socialist, tried to tie industrial integration to the harmonization of social and fiscal regulation. According to Scharpf, *op. cit.*, 645-646, although the attempt failed, this would have been feasible at that time, because the national welfare systems were still rudimentary, and divergences among them still manageable. The degree of heterogeneity increased very significantly and rapidly in the 1970's, where three main models emerged: the Scandinavian, the Anglo-Saxon and the Continental, related to different social philosophies.

[136] F. Scharpf, *op. cit.*, 647.

the internal market and make it work. The argument goes that the existence of different national rules in legal areas related to the internal market (such as contract law) may hinder the workings of the internal market, and consequently legal harmonization is needed in order to overcome this obstacle. Although this choice is usually motivated as a merely technical move, in fact it "unavoidably means the shaping of a species of European contract law"[137].

This harmonization process has been based on arts. 94 and 95 TEC (now arts. 115 and 114 TFEU), concerning the internal market, whose scope is so wide as to make it virtually impossible to set definite and rigid boundaries. In fact, they have also been employed to justify the expansion to "bordering" areas, which were linked but not amenable to the internal market: this has been the case, for instance, of consumer law, where the member States have been willing to shift their regulatory competence to the EC by using the legal base related to the internal market[138]. This has determined a phenomenon of creeping erosion of national competences, which is not easily reconciled with the principle of enumerated competences[139].

To the extent that EC law re-regulates a specific legal area, a crucial issue is the quality of the rule: in fact, art. 95(3) provides for a high level of protection of health, safety, environment and consumers in the acts related to the internal market, and several other Treaty articles establish a requirement to balance internal market considerations with other relevant EC interests, such as consumer protection (art. 153 TEC), public health (art. 152 TEC), environmental protection (art. 137 TEC), social policy (art. 176 TEC), which introduce social justice concerns in the rules that pertain to the internal market and other policies.

In spite of the fact that EC legislation is selective, i.e. it only addresses specific issues, leaving the general legal framework at the national level, this affects the way in which member States regulate the areas concerned. A very broad reading of the Treaty rules related to the internal market can encroach on subject matters which are external to it, but which may interfere with it, thereby reshaping the scope of action for the States. The conflicts of competences between EC and member States have been addressed also by the European Court of Justice, as in the area of free circulation of goods, where its very broad reading of arts. 28 and 30 TEC (now arts. 35 and 36) in the 1970's and 1980's has determined a situation where theoretically any national rule affecting in any way the circulation of goods (such as e.g. rules on opening hours of shops) could

[137] S. Weatherill, *The Constitutional Competence of the EU to Deliver Social Justice* (2006) ERCL 137.
[138] S. Weatherill, *op. cit.*, 138-139.
[139] As long as the law-making procedure provides for a unanimous vote in the Council (as in the case of art. 94 TEC), this does not determine adverse reactions by the States, since they all retain a veto power. Yet, after the Single European Act there has been a shift from unanimity to a qualified majority vote in the Council (art. 95 TEC), and this may determine reactions by those States that have been outvoted.

be considered as infringing EC law. In the 1990's, with the leading decision of *Keck*[140], the ECJ has tried to limit this encroachment to rules that are directly related to the free circulation of goods and the internal market and have a discriminatory nature. Although the scope of the ratio of this case is not fully clear (the decision is formulated in relation to national rules concerning the way in which goods are marketed, and it is not clear how far this extends to other kinds of rules), it means that States can argue that national rules related to social needs can be justified even though they may affect the way in which the internal market works. The main problem in this area is that the definition of the boundaries between what member States can legitimately do and what is prohibited because it contrasts with EC rules is defined by the EC institutions themselves, not by the member States, and there may well be very significant divergences. In this way, EC constraints may inhibit the evolution of national law related to social justice, since it may clash with EC law, and this causes what is termed a "regulatory gap"[141].

More recently, in the famous Tobacco advertising case of 2000[142] the European Court of Justice held that legal diversity *per se* does not justify harmonization by EC institutions, unless it is sufficiently proven that different national legal rules create an obstacle to the working of the internal market, and that the harmonized rules are in fact suitable to cure the problem. Although the boundaries of this ruling are not completely settled, it can be safely said that it means that EC institutions do not possess a general law-making power related to the internal market, but must specifically show the obstacles to it that the EC rules intend to remove. When applied to the contract/private law context, this reasoning seems to imply that the EC institutions cannot harmonize the whole of contract/private law, but rather must limit their intervention to selective issues in which it is demonstrated that regulatory differences adversely affect the internal market[143]. This seems also to be in line with the principle of subsidiarity, and clearly affects the wider question of EC competence to address general issues of social justice through contract/private law.

The existence of shared competences of the EC and member States in the area of contract/private law implies the existence of a multi-level system, where the two levels must cooperate in order to reach a satisfactory regulatory framework. One way in which this is done is through the use of the mechanism of minimum harmonization: EC directives provide for a minimum level of harmonization, which can be lawfully increased by member States, also for reasons

[140] *Keck and Mithouard*, C-267, 268/91 [1993] ECR I-6097.
[141] S. Weatherill, *op. cit.*, 151.
[142] *Germany v. Parliament and Council*, C-376-98 [2000] ECR I-8419. The Court annulled Dir. 98/43 on the advertising of tobacco products, considering that in fact its real aim was related to health concerns, rather than harmonising the market for advertising of tobacco products. Since the EC lacks harmonizing powers in the area of public health (art. 152 TEC), the directive was consequently invalid.
[143] M. Hesselink, *The Values Underlying the Draft Common Frame of Reference*, cit., 15: "It is undisputed that the European Union at present lacks the constitutional competence for enacting a European Civil Code that replaces the national private laws of the Member States".

related to social justice considerations. This is what has happened in the area of consumer protection, but it must be emphasized that at the moment the Commission has shifted its strategy and decided that in order not to hamper the working of the internal market, maximum harmonization is required. Again, this is motivated purely on the basis of technical considerations (the need to provide for proper harmonization and to avoid fragmentation), but in fact it has an important "constitutional" effect, since internal market considerations become paramount and impede the pursuit of other legitimate and relevant interests[144].

It is therefore not surprising that the increasing level of integration of economic aspects of the EC has raised a debate concerning the need to balance it with corresponding social regulation. Yet, this is politically and technically even more difficult than in the founding phase of the Community, and in spite of the discussion and the numerous Treaty amendments it has never happened. Rather, weaker mechanisms were developed, which produced at best mixed results: after the Maastricht Treaty the coordination of national economic policies is based on broad economic guidelines and recommendations of the Council (arts 98-104 TEC), whose legal character is very weak (as is demonstrated by the complexity and scant usability of the sanctions). Later, in the Lisbon summit the European Council defined a new method, the open method of coordination (OMC), which had to be employed in the fields of social protection, education and training; it implied that policies remained in the hands of the States, but efforts were concentrated on agreeing voluntarily on common objectives and indicators, which had to be evaluated according to peer review and lacked formal sanctions[145]. The results of these new methods are mixed and have not been fully assessed: they have surely fostered mutual learning and sharing of information, but because of their "soft" character they do not work when significant divergences emerge, and in any case they cannot affect the "hard" EC *acquis*. As long as economic and social

[144] S. Weatherill, *op. cit.*, 154, according to which the shift to maximum harmonization "radically transform the pre-existing political bargain". According to him "It is deeply questionable whether the Commission's general policy preference in favour of maximum harmonisation is well suited to a Union of 25 diverse Member State. (...) There is a strong case to be made for regarding maximum harmonization as applicable only in particular sectors and only where its use has been carefully justified in the prevailing sector- specific conditions. But these are high stakes. A maximum model would radically shift the pattern of European contract law away from a co-operative model towards a more hierarchical pattern" (p. 156). See also V. Mak, *Review of the Consumer Acquis: Towards Maximum Harmonization?* (1/2009) ERPL 55 ff.
See also H.-W. Micklitz, *From Social Justice to Access Justice*, European University Institute Working Papers, 2008, 38: "Under minimum harmonization, the European Commission has to argue before the European Court of Justice that particular national rules that go beyond the minimum are not necessary to achieve an adequate level or protection, that they create technical barriers to trade and that they are therefore disproportionate. Full harmonization puts Member States under pressure to demonstrate why the rules the European Commission proposes are not sufficient to protect consumers".
[145] See D.M. Trubek and L. Trubek, *Hard Law and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordinatrion* (2005) 11 ELJ 343.

concerns are not set on equal footing and therefore adequately balanced, the gap is bound to remain and possibly even increase[146].

Recently, the debate on the failed European Constitution has again brought to the general attention the need to address the political and social implications of European integration. Although much of the content of the European Constitution is now in force, after the positive conclusion of the long and difficult ratification process of the Lisbon Treaty (which entered into force in December 2009), the current situation is far from clear, and so is the direction that the process should take. Although it is evident that member States are no longer capable of guaranteeing social justice individually and separately, due also to a wider phenomenon of globalization, at the same time there is no agreement that this gap should be filled by the EC, which is criticized for being too market-oriented and for the lack of an adequate level of legitimacy. This paradox is evident, but recipes for overcoming it unfortunately seem to be lacking these days.

The meaning of the expression "social justice" is not undisputed (not only in the area of private law), and the only common element seems to be related to the idea of redistribution of wealth in favour of weak social groups, which has become common in Europe with the rise of the welfare state. Social justice has acquired different meanings in different epochs and nations, being linked to a variety of cultural, social and economic factors[147]. It is today the subject of a critical assessment[148], which has emphasized the difficult relationship between the various national

[146] F. Scharpf, *op. cit*., 662-663, proposes to back the use of the open method of coordination with framework directives, which would allow sufficient scope for national diversity, at the same guaranteeing binding results for the States.
As a possible alternative method to increase the level of integration in social policies he also proposes to use closer co-operation, i.e. the pursuit of further integration by only a part of the member States (art. 44 TEU). Yet, the conditions and limits for using closer co-operation are fairly strict, and the mechanism has so far never been actually employed (660).

[147] For an analysis of the meaning of social justice in France, Germany and England, as well as generally in Europe, see H.-W. Micklitz, *From Social Justice to Access Justice: The European Challenge*, cit. According to Micklitz, the conception of social justice is linked to three factors: the function of law, the relationship between market and society; the social expectations and the relationship between the State and individuals (p. 27). In the same direction see L. Nogler and U. Reifner, *Social Contracts in the Light of the Draft Common Frame of Reference for a future EU Contract Law*, in this volume, at p. 363 ff.; L. Nogler and U. Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, in Jubilee ThomasWilhelmsson, (2009) Vol. 3/4 Juridiska Föreningen i Finland 437–455.

[148] See M. Hesselink, *The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and "Social Justice"*, study produced for the European Parliament, Committees on Legal Affairs, and on Internal Market and Consumer Protection, September 2008, PE 408 312. The aim of the study is to evaluate whether the DCFR is based on a conception of contract law as a tool for regulating private relations among parties having equal bargaining power, or whether it balances it with the need to protect weak parties. According to Hesselink, a European notion of social justice in the DCFR should be based on regulatory legitimacy, a sufficient level of protection of weaker parties, a proper balance between liberalism and socialism, sufficient room for judicial intervention through general clauses and general standards, and balance among the underlying values (p. 21). In his view, although the DCFR "has all the characteristics of a typical European compromise (…) Overall, from the point of view of social justice, the DCFR is fairly balanced. Nevertheless, there is certainly room for improvement"(p. 70); "It strikes a balance between autonomy and solidarity that is quite similar to the ones drawn in the modern private laws (...) of the Member States" (p. 71). Yet, "it is now time for the citizen's voice. Only a meaningful input from the European and national Parliaments can provide the final CFR with the regulatory legitimacy that it needs" (p. 70).

conceptions of social justice (ranging from socialist to liberal conceptions) and the one which characterizes the European Community, strongly influenced by a neo-liberal conception of "economic constitution", i.e. a legal order based on individual rights related to a free market, which challenges the national models[149].

Coexistence of a European model of social justice with different national models seems to be possible only if the minimum harmonization mechanism is kept, in contrast with the most recent trends in EC law and particularly with the position of the EU Commission. Moreover, member States should act in accordance with the principle of subsidiarity interpreted in a new way, implying, rather than the protection of national competences, a responsibility for the member States to support the Community in order to develop adequate rules in order to achieve joint objectives of social justice[150].

The need to revive the political dimension of this debate has been emphasized both by scholars[151] and the European Parliament, the EC institution having democratic legitimacy. Among academics, some have argued in favour of a clear recognition of the political dimension of the issue of Europeananization of private law, and are critical of what is termed the "scholarly industry", in which a new influential class of academic experts provides useful intellectual services to the Community technocrats[152]. In this way, European scholars acquire influence and visibility at the international level, while European institutions enhance the value of their activity by the improvement of its legal quality. Yet, this interference of scientific and political aspects is often not openly acknowledged, and may lead to a distortion of the results, which are couched in neutral terms, while in fact they are functional to the interests that are more strongly represented at the Community level. In this view, the DCFR is "a formalist, technocratic, and exegetic enterprise launched by the Commission in order to limit the social function of contract law spurring from different legal traditions"[153]. The scholarly and technocratic elements of the Europeanization of private law have a different nature, because the impact of the first is only related to its

[149] See M. Hesselink, *The Politics of a European Civil Code* (2004) 10 ELJ 675 ff.; Study Group, *Social Justice in European Contract Law: A Manifesto* (2004) 10 ELJ 653.
[150] H.-W. Micklitz, *From Social Justice to Access Justice*, cit., 5, 43, who analyzes the issue of social justice comparing three fields of private law which are usually considered separately, particularly at the EC level, where only the first is covered by a specific EC competence: consumer law, labour law and tenant law. See also L. Nogler, U. Reifner, *Der menschliche Makel – Principles of European Contract Law zwischen Merkantil- und Dienstleistungsgesellschaft*, in M. Le Friant, K. Kekezuka, L. Nogler (eds), Festschrift fuer Ulrich Zachert (Baden-Baden, Nomos, 2009).
[151] M. Hesselink, *The Values Underlying the Draft Common Frame of Reference*, cit., 22-24, according to whom the risk of accepting the DCFR as a merely technical and neutral document "could have been avoided by the political European institutions, notably the European Parliament, by addressing the main political questions before putting the drafting in the hands of the experts. Thus, the actual drafting would have become more technical and the CFR process more political. Now they should live up to their responsibility and critically examine the proposed text in all its details – a formidable task" (p. 24).
[152] U. Mattei and F. Nicola, *A "Social" Dimension in European Private Law? The Call for Setting A Progressive Agenda* (2006) 41 New England L. Rev. 1-65, 25-27.
[153] U. Mattei, F. Nicola, *op. cit.*, 16.

quality and prestige, while the second is linked to the exercise of power. Yet, they have in common a strong tendency to avoid open political debate, hiding behind scientific or technical legitimacy. This tendency is particularly strong at the EC level, where the different institutional framework and law-making process emphasize the technocratic character of its decisions, particularly those of the Commission. On the other hand, the European Parliament has strongly voiced the need to be involved in the discussion on the DCFR leading to a possible adoption of the CFR. In this perspective, the more general issue of the democratic deficit of the EU is clearly relevant.

3.2. The DCFR as a Toolbox or a Code – "Constitutional" Implications. – Looking at its structure, the DCFR very much resembles a Code, with its systematic and co-ordinated structure[154], rather than a toolbox. Deciding whether this is the most suitable form depends on its future use: if the aim is to produce a coherent European private law that coexists or supersedes national law, then the code form seems to be the right one. On the contrary, if its use is that of a "toolbox", where EC institutions and national actors can find principles, concepts and rules to be employed in specific contexts, then the form of a code does not seem the best, since its parts are all interconnected, and it is difficult to separate discrete portions of it[155]. Moreover, from a substantial point of view the DCFR has been criticized as suffering from "methodological nationalism"[156], i.e. it uses the same regulatory technique that is employed in the national legal systems. While this choice has very strong historical and structural roots within the national settings, it does not necessarily correspond to the needs of the European integration process: "what is best at the national level may not be optimal at the European one"[157]. The features of the new multi-level system created by the EU, where the interaction between the supranational and national level creates a complex web of multiple relations and pressures, require a comprehensive effort in order to reconceptualise legal categories, also in the area of private law[158]. What is needed is not merely

[154] See above, n. II.6.
[155] See above, n. II.6.
[156] J.M. Smits, *The Draft Common Frame of Reference, Methodological Nationalism and the Way Forward*, Tilburg Institute of Comparative and Transnational Law Working Paper (TICOM), no. 2008/12 (http://www.ssrn.com/link/Tilburg-TICOM.html). See also above, n. II.4.
[157] J.M. Smits, *op. cit.*, 2.
[158] See Ch. Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline* (2004) 14 Duke J. Comp. Int. L. 149-160. S. Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 4-5, notes that the also the exclusion from the scope of the DCFR of legal relations related to public law is problematic, since it does not define the notion of "public law" for this purpose, while this category is fuzzy in the European setting: all national system use the public/private law divide as a fundamental partition of law, but they differ significantly in the way in which they define these boundaries; on the other hand, EC law does not refer directly to this distinction, and many rules of the EC *acquis* contain both public and private law aspects. See also S. Whittaker, *A Framework of Principle for European Contract Law* (2009) 127 LQR 622 ff.; G. Bellantuono, *The Limits of Contract Law in the Regulatory State* (2/2010) ERCL, forthcoming.

an extension, however carefully based on a comparative effort, of what exists in the national legal systems, but rather a bolder effort in order to develop a body of law that reflects the needs and characteristics of this new legal setting. Unfortunately, in the huge work performed by the research network this aspect has been largely neglected, probably because the perspectives concerning the possible use of the DCFR were so vague and fuzzy, ranging from an optional code to the "toolbox" option. In its turn, this lack of a clear vision of the objectives to be achieved through the CFR are the result of a political dilemma: it is not clear how far the European Community has competence to regulate contract/private law comprehensively, and in any case it is not clear whether this is desirable and functional, and what is the right "recipe" in terms of structure and content in order to achieve this aim. Therefore, this looks like a "chicken and egg" dilemma: it is difficult to find a suitable content, if it is not known what the use of the rules will be, but at the same time it is difficult to know if it is possible to harmonize wide areas of law unless the content of this work is determined. The dilemma remains, and the very significant degree of indeterminacy of the scope and uses of the DCFR seems to be one of the major weaknesses of this enterprise: looking at it today, it seems that it would have been a wiser choice to start directly with a toolbox option, leaving the more ambitious perspective of an optional code for the future, after a sufficient time for testing the body of rules[159]. Even if this option would have run counter to a significant sector of legal doctrine, which favours a sweeping codification effort at the European level, it would have made the elaboration of the research network much more focused, and probably would have led to very different results. Since this narrowing of the focus was not chosen, it would at least have been necessary to discuss extensively and openly the impact of the different options on the structure and content of the rules, but unfortunately this has not been done[160].

If one looks at the scope of the DCFR, it is immediately clear that it is very extensive, covering most areas of private patrimonial law[161]. This may be considered as a wise choice if final

[159] A different view is that of M. Hesselink, *The Values Underlying the Draft Common Frame of Reference*, cit., p. 16, who considers that "The great advantage of the European Commission's project of adopting a common frame of reference as a non-binding soft law instrument is that – unhindered by competence anxiety – it can bring back to the foreground those non-market functional aspects of private law". Yet, at some point the soft-law nature will have to be confronted with the need to make "hard" regulatory choices, and the issue of competence and policy choices will have to be tackled.

[160] According to J.M. Smits, *op. cit.*, 6, "the presentation of legal texts should depend largely on their function. A national civil code needs to be presented in a different way than a set of rules whose aim is to help improve the existing *acquis*, or to inspire legislators and courts across Europe or to play a role in legal science and teaching" (p. 9). For Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 4, "Given the absence of democratic legitimacy for the views advanced by the authors of the DCFR (…) these views must stand or fall by their inherent quality and the convincing nature of the arguments used in their support. References for this purpose in the draft Comments to the DCFR to the effect that the views reached by the text are "fair", "sensible", "appropriate" or justified by reference to good faith and fair dealing do not in my view advance sufficient justification for this purpose".

[161] See above, n. II.3.

aim is a codification (whether optional or not), but is seems less convincing if, as it seems now to be the case, the primary use of the CFR will be in order to revise the existing *acquis communautaire*, and possibly be used in new acts in specific fields of EC competence[162]. If the second option is chosen, one may wonder whether this is not like using a sledge-hammer to crack a nut: the effort is far too large for the target. If, on the other hand, revision of the *acquis* is merely a starting point, but the final destination is a code, it would be much better openly to acknowledge it, because the two enterprises have a completely different nature, and require different instruments and techniques. The blurring of the distinction between selective and comprehensive harmonization helps neither legal/technical choices nor political ones. This may lead to the unwanted and very unsatisfactory result that the DCFR is useful neither as a "toolbox", nor as an optional code[163].

A possible combination of these two different options would be to work on a narrower and more focused "toolbox", specifically linked to the revision of the *acquis*, which would be linked to a wider effort to elaborate a general body of principles and rules (possibly providing alternative options to be selected) that should be used first of all to build a truly European legal science through teaching and research, a fundamental element which is still largely missing today, and for which the DCFR does not seem completely suitable, since it is a mixture of very detailed rules and open-ended criteria, while leaving the definition and mutual relationship of general principles that are at the root of the body of rules largely incomplete[164]. Only after the completion of this work of building solid foundations of legal reasoning and techniques would it be possible to discuss the feasibility of a code, which would then be based not merely on a comparative synthesis of national solutions, but rather on a bolder choice of the best solutions, elaborated on the basis of a comparative analysis[165].

The idea of a Code is not merely related to technical issues, i.e. the scope and systematic character of a body of rules, but has also a significant symbolic value: national codes not only

[162] In fact, the somehow awkward relationship between the parts related to the EC *acquis* and those based on the materials of the PECL and the European Civil code is evident in the structure and content of the DCFR: rules on specific contracts, such e.g. those on contracts for the supply of goods and services, are scattered in different parts of the DCFR (Book II and IV); rules contained in the EC *acquis*, particularly in the area of consumer protection, have been taken and extended to wider areas (e.g. pre-contractual duties of information), a choice that has been criticized by some scholars as not being sufficiently motivated and possibly harmful. See S. Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 3.

[163] S. Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 11-12.

[164] See also M. Hesselink, *The Values underlying the Draft Common Frame of Reference*, cit., 67-69, who thinks that the list of values in the Introduction of the DCFR (which has nevertheless been amended in the second version of the DCFR of February 2009) is incomplete and should be supplemented. Moreover, according to him the balancing between fundamental values, such as party autonomy and solidarity, is not sufficiently spelled out. Finally, he notes that while there is a clear link between the list of values contained in the DCFR and that of the Nice Charter on Fundamental Rights (although they are not identical), the Charter is not even mentioned in the DCFR.

[165] J.M. Smits, *op. cit*., 9-10.

comprise the most significant rules in a specific field, but also represent the synthesis of a specific instance of national culture. Therefore, the enactment of a code is not merely a technical choice, but also a political and cultural one. Conversely, the "loss" of a national code due to the transfer of competence to the EC transnational level would be not only technically but also politically controversial.

Moreover, the question of the form of a Code should also be connected to another important issue that is currently at the centre of the European integration process, i.e. that of the need and feasibility of a Constitution. Yet, in spite of the clear connection between these two elements, they are seldom discussed together[166]. It must be recognized that the failure of the European Constitution of 2004 has struck a hard blow on the whole European integration process, and this is obviously affecting also the development of European private law, which is nowadays not high on the agenda[167]. This factor has possibly influenced the shift in the Commission's position, which, after having taken into consideration the possibility of enacting a code (the "optional instrument"), has moved to the more limited idea of a Common Frame of Reference as a toolbox. The Lisbon Treaty has now entered into force, but the prospect of a constitutionalization of the Treaties still seems unclear. Although it is impossible at this stage to foresee future developments, it seems likely that this will reinforce the option of a "toolbox" for European private law, a choice which seems to be politically less controversial[168].

In spite of all these considerations, the magnitude of the work done by the network of scholars involved in the drafting of the DCFR must be acknowledged: they have done an immense amount of highly skilled work of research and drafting, overcoming a number of major difficulties (linguistic[169], methodological, but also practical, if one only thinks about the sheer

[166] H.-W. Micklitz, *From Social Justice to Access Justic*e, cit., 32.

[167] "If the voters of Europe did not want a constitution it is hardly the moment to force a civil code, even just a contract code on them. The political moment, the political context is not right; however, as with the constitution, the practical arguments in favour of greater harmonisation will remain": M. Hesselink, *The Values Underlying the Draft Common Frame of Reference*, cit., 9.

[168] In February 2009 the competence to deal with the CFR process within the Commission has been moved from the DG on consumer affairs (DG SANCO) to DG "Freedom, security and justice"; this transfer has not only slowed down the process, but has probably determined a shift of focus, because the CFR is now inserted in a much larger framework concerning judicial co-operation in civil and commercial matters. In the Commission Communication concerning the programme for the area of freedom, security and justice (10 June 2009, COM (2009) 262 fin.), the common frame of reference (strangely referred to in the document as "common reference framework for contract law", p. 31) is listed in annex as a priority action in order to support economic activity, together with the improvement of enforcement of judicial decisions, drafting of standard contracts and further harmonisation of some areas, such as insurance and company law. Yet, in the text of the Communication the Commission does not refer to the CFR as a toolbox, but rather as "an optional, specifically European system of rules open to companies (a "twenty-eight" system)" (p. 13), which seems to be in contrast the emphasis given in most recent documents to the CFR as a toolbox.

[169] According to S. Whittaker, *The "Draft Common Frame of Reference"- An Assessment*, cit., 8-10, the drafting in English of the DCFR rules is excellent, with a "wide consistency of the language and terms", and in general the choice of a neutral and descriptive language, not tied to any specific national legal system, is generally successful, although some definitions are missing or confusing.

number of scholars involved in the project). This impressive effort has generated a large network of scholars (although its number is marginal if compared to the numbers of national scholars and practitioners) sharing a working method, which will clearly influence future developments of European law, no matter what the end result of the DCFR will be. In fact, today the perspectives of the CFR are fuzzy: the Commission seems to have retreated from its previous bold plans, the European Parliament has abandoned its strongly active position, and the EU and European Council also seem to favour a pragmatic and moderate approach to the creation and use of a CFR. In spite of the survival of the European integration effort after the ratification of the Lisbon Treaty, it seems that currently the political momentum towards integration has faded, in private law even more than in other areas. It is extremely difficult to foresee whether this situation will change in the future, but at the moment the CFR process is close to a standstill. On the contrary, the situation from a scholarly point of view is very different: the DCFR has steered a heated debate, and it is at the centre of a large number of projects concerning the analysis, the critical evaluation and the teaching of European contract/private law. No matter what will be the political fate of the DCFR, it will definitely change the landscape of legal research in the coming decades[170]. In some respect, this is a kind of "back to the future" experience: similarly to the epoch of the PECL in the 1980's, today legal scholarship seems to be the most engaged part of the enterprise on integration of European private law, with EU and national institutions playing a background role. Yet, the context has changed significantly: the EU institutions have taken actively part in the activities, they have sponsored research, and they will be further confronted with the results achieved by scholars. Moreover, the visibility of this European scholarship has vastly increased, moving from an élite of internationally trained and active lawyers to national circles. If the work surrounding the discussion on European private law will manage to enter the European law schools and the working environment of legal practitioners, it will radically alter the features of the integration process. The DCFR project, no matter what its advantages and disadvantages, is clearly a major step in this process.

4. The Common Core of European Private Law and the Case-Based Assessment of the Draft Common Frame of Reference

[170] See E. Hondius, *The Draft Common Frame of Reference: Building Block or Stumbling Block for a European Civil Code?* (2009/17) ERPL 483.

4.1. *Project's Aims.* – The project "The Common Core of European Private Law"[171] has been launched in 1995 under the direction of Prof. M. Bussani (Trento) and U. Mattei (Torino/Hastings); today, it brings together nearly two hundred scholars coming from all the EU member States, Eastern European and Mediterranean countries, and from the US and Canada. It was initially based at the University of Trento (Italy), and since 2007 its seat is at the University College of Torino (Italy), where annual general meetings are held. This enterprise seeks to unearth the "common core" of European private law, *i.e.* what is already common among the different legal systems of Europe, subdividing the research area in the general categories of contracts, torts and property.

The major research aims are well expressed in a metaphor by the project leaders[172]. They believe that such a "common core" must be revealed in order to draw at least the main lines of a reliable geographical map of the law of Europe. What the use of this map will be is of no concern to the cartographers who are drafting it. However, if reliable, it may become indispensable for the drafting of European legislation. This may be particularly so in the process that leads incrementally towards the harmonization of European private law through the elaboration of a European Common Frame of Reference, whatever form will be adopted in the future.

According to the metaphor, for the transnational lawyer the present European situation is equal to that of a traveller compelled to use a number of different local maps, each one containing misleading information. The goal of the research is to correct this misleading information. However, this shall not be realized by forcing actual diversity reality of the law within one single map in order to attain uniformity. In other words, the project does not seek to draft a "city plan" for something that will develop in the future and that it wishes to shape.

The Common Core aims at analyzing the present complex situation in a reliable way. While the scholars participating in the research believe that cultural diversity of the law is an asset, they do not wish to take a preservationist approach, nor do they wish to push in the direction of uniformity. This is probably the most important cultural difference between the Common Core project and other important enterprises (such as the Unidroit Principles, the Lando Commission, the Study Group on a European Civil Code, the *Académie des Privatistes Européens*), which may be seen as engaging in "city planning", rather than "cartographic drafting"[173].

[171] See http://www.iuctorino.it; http://www.jus.unitn.it/dsg/common–core/home.html.
[172] M. Bussani & U. Mattei, *The Common Core Approach to the European Private Law* 3(3) (1997/98) Col. JEL 339 ff.
[173] See above, n. I.2.

4.2. *Method*. – In order to engage in such a reliable "drafting", the project makes use of the tools of comparative law. The Common Core research method builds on the experience of the so-called factual approach, developed by R.B. Schlesinger in the '50s and '60s for the study of the "common core" in the formation of contracts[174], and on the analysis of legal formants, developed by R. Sacco[175]. The former is a method that allows a dialogue between scholars coming from different cultural backgrounds, using as *tertium comparationis* a series of facts constituting hypothetical cases. In this way the legal reasoning is organized as a dialogue among different scholars on cases, the outcome of which needs to be analyzed by each scholar according to his/her own law. The analysis of legal formants is based on the assumption that a list of all the reasons given for decisions arrived at by the courts does not represent the entire relevant body of rules. Neither do statutes give us a complete picture of the law – and the same is true of scholarly analysis by academics of legal rules. In order to know what the law is, it is necessary to analyze the complex relationship between the so called "legal formants" of a system, i.e. all those elements that contribute to the solution of a legal problem, which relate to statutes, general concepts, principles, definitions, reasons for decisions, holdings, and non legal (e.g. political, economic, religious, etc.). These formative elements are usually not coherently linked in a specific legal system, even though domestic lawyers generally assume such coherence.

All this, however, must be taken into account in order to understand the law of a particular jurisdiction, and may have unexpected consequences. For example, provisions in statutes or Codes of one jurisdiction may be identical with provisions in the statutes or Codes of other jurisdictions but may produce different results when applied in practice to identical factual situations. The reverse may also be true: statutory provisions or general principles of two jurisdictions may differ, though when applied in practice they may produce the same results.

Adequate knowledge of the legal formants and how they relate to each other helps in determining the factors that affect legal solutions and indicate the role played by accepted interpretative practices based on academic literature, legal debates stimulated by court decisions, etc., in moulding actual outcomes.

In this way it is possible to produce a comparative analysis which measures the degree of convergence or divergence among different legal systems, thereby eliminating false analogies or differences produced by mere formal descriptions and juxtapositions deriving from analysis of the individual system made by every (national) scholar.

[174] R.B. Schlesinger & P. Bonassies (gen. eds), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Dobbs Ferry (N.Y.), Oceana; London, Stevens, 1968) 2 voll.
[175] R. Sacco, *Legal Formants* (1991) Am. J. Comp. L. 1 ff. (I); 344 ff. (II).

In order to meet this goal, questionnaires concerning specific problems in the three main areas of private law (e.g. pure economic losses, environmental damages, good faith in contract law, security rights, transfer of immovables, trust, remedies in competition law, and so on) are drafted and distributed among the participants, who must answer them for each country and explain statutory law, case law, the influence of legal scholarship and every other relevant element (formants).

4.3. *Results and Long-Term Goals.* – The results achieved to date are published (except for some books published by Staempfli, Berne) by Cambridge University Press, after extensive international and anonymous review process, in a specific autonomous series named "The Common Core Project of European Private Law", under the direction of Professors M. Bussani and U. Mattei.

At present, the following volumes have been published: R. Zimmermann and S. Whittaker (eds), *Good Faith in European Contract Law*, Cambridge University Press, 2000; J. Gordley (ed), *The Enforceability of Promises in European Contract Law*, Cambridge University Press, 2001; M. Bussani and V.V. Palmer (eds), *Pure Economic Loss in Europe*, Cambridge University Press, 2003; E.-M. Kieninger (ed), *Security Rights in Movable Property in European Private Law*, Cambridge University Press, 2004; F. Werro and V.V. Palmer (eds), *The Boundaries of Strict Liability in European Tort Law*, Carolina Academic Press – Staempfli – Bruylant, 2004; R. Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge University Press, 2005; M. Graziadei, U. Mattei and L. Smith (eds), *Commercial Trusts in European Private Law*, Cambridge University Press, 2005; B. Pozzo (ed), *Property on Environment. Old and New Remedies to Protect Natural Resources in the European Context*, Staempfli-Carolina Academic Press, 2007; T. Möllers and A. Heinemann (eds), *The Enforcement of Competition Law in Europe*, Cambridge University Press, 2007; M. Hinterreger (ed), *Environmental Liability and Ecological Damage in European Law*, Cambridge University Press, 2008; J. Cartwright and M. Hesselink (eds), *Pre-contractual Liability in European Private Law*, Cambridge University Press, 2009. A forthcoming volume is G. Brüggemeier, A. Colombi Ciacchi and P. O'Callaghan (eds), *Personality Rights in European Tort Law*, Cambridge University Press, 2010[176].

[176] The website http://www.cambridge.org/series/sSeries.asp?code=CCEP) is devoted by Cambridge University Press to the series of publications led by Proff. Mauro Bussani and Ugo Mattei.

Several other volumes are in the pipeline: S. Banakas and A. Mullis (eds), *Personal Injury Compensation in European Law*; C. Godt, G. van Overwalle, L. Guibault and D. Beyleveld (eds), *Boundaries to Information Property in European Law*; C. van der Merwe, R. Caterina and A. Verbeke (eds), *Time-Limited Interests in Land in European Law*; C. van der Merwe, F. Fiorentini and G. Watt (eds), *Security Rights in Immovable Property in European Law*; E. Hondius and H.C. Grigoleit (eds), *Unexpected Circumstances in European Law*; D. Panforti, A. Miranda, O. Roy and C. Dadomo (eds), *Duties of Care and Duties of Cash in European Family Law*; N. Cohen, R. Stevens and G. Dannemann (eds), *Restitution in Contractual Context in European Law*; P. Pichonnaz (ed), *Set-Off in European Law*; P. Giliker and B. Gsell (eds), *Remedies in Contract Law in Europe*; E. Cooke and L. Martinez (eds), *Transfer of Immoveable Property in European Law*[177].

While drafting a "map" of European law is the direct concern of the Common Core Project, in the long run this task is part of the building of a common European legal culture[178]. The set of data the project has produced and will produce in the future, shall generate a wide debate having an explicatory and functional scope.

The programme, therefore, aims at enriching the jurists' cultural background, in order to strengthen the instruments at the disposal of European legal community and especially of legal scholarship, whose activity is – and it will increasingly be – called to support the member States and the European Institutions in the development of the European integration process.

As a matter of fact, "top–down" harmonization always implies the production of rules that are new for everyone, or at least for a part of the actors of the legal systems involved. The enforcement of such rules requires a class of interpreters who are familiar with their *ratio*. The unavoidable lack of this knowledge in the short run and furthermore the path-dependency related to deep–rooted traditions involving different concepts, different notions, and their mutual relations, could lead to the defeat of any (attempted) uniformation. Therefore, an extremely important ele-

[177] Other related publications include: L. Antoniolli, F. Fiorentini and J. Gordley, *A Case-Based Assessment of the Draft Common Frame of Reference* (2/2010) 58 Am. J. Comp. L. 343-358; M. Infantino, M. Bussani and F. Werro, *The Common Core Sound. Short Notes on Themes, Harmonies and Disharmonies of European Tort Law* (2009) 20 King's Law Journal 239 ff., available at SSRN: http://ssrn.com/abstract=1452658; M. Bussani & U. Mattei, *Opening Up European Law, The Common Core Project* (Bern, Staempfli, 2007); M. Bussani & F. Fiorentini, *I contratti di finanziamento e le garanzie del credito nella prospettiva europea/Financial Contracts and Secured Transactions in the European Perspective* (Triest, Quaderni del Dipartimento di Scienze Giuridiche, 2003); M. Bussani & U. Mattei (eds), *The Common Core of European Contract Law. Essays on the Project* (The Hague, London, New York, Kluwer Law International, 2002 (repr. 2003)); U. Mattei & A. Pradi (eds), *Rudolf B. Schlesinger: Memories* (Trento, Quaderni del Dipartimento di Scienze Giuridiche, 2000); M. Bussani & U. Mattei, *Making European Law. Essays on the Common Core Project* (Trento, Quaderni del Dipartimento di Scienze Giuridiche, 2000), a volume collecting essays devoted to the project of leading comparativists: R. Sacco (Torino), U. Drobnig (Hamburg), M.A. Eisenberg (Berkeley), J.R. Gordley (Berkeley), A. Hartkamp (Amsterdam), E. Hondius (Utrecht), C. Joerges (Florence), H. Koetz (Hamburg), M. Shapiro (Berkeley) .

[178] See above, n. I.2.

ment for legal integration is the development of a common legal culture. The Common Core Projects believes that the most important instrument for this task is the foundation of a common methodological education and working method, based on the awareness of what is common and what is different in the legal experience of each European system and with the legal formants approach to the law. As the materials of this book show, according to this approach not only abstract legal elements must be taken into account in the legal discourse, but also meta-legal factors, i.e. the "real world" in which legal rules have to be enforced, because differences in these factors may produce different outcomes even in contexts with a homogeneous legal culture.

4.4. *Case-Based Assessment of the DCFR. Aims and Object.* – On the basis of the characteristics of the research methods and goals of the Common Core project, in 2005 it has been called to participate in the CoPECL Network of Excellence, among the so-called "Supportive Groups". As mentioned above[179], these groups aim at supplementing the principles, definitions and model rules of the DCFR with impact assessments of various kinds. Within the CoPECL programme, the Common Core Group has been entrusted the task of carrying out a case-based assessment, focusing on the applicability and practicability of the results elaborated by the Principle Drafting Groups. The results of the analysis by these groups will become part of the CoPECL.

To carry out this work, the Plenary Session closing the XIII General Meeting of "The Common Core of European Private Law" has decided in July 2008 to establish a "Common Core Evaluating Committee", under the direction of the authors of this Introduction, who have been appointed as editors for the assessment. The Committee gathers a number of young and well-established scholars coming from Eastern and Western countries of the European Union. It has worked in order to select participants coming from countries which best represent similarities and differences existing among the European legal experiences and to enrich the assessment with the contribution of scholars coming from the new EU countries, since their input to the building of a European legal culture is an extremely valuable asset[180]. The Committee's assessment is structured in two levels. The first is the factual analysis by the contributors, each focused on a specific topic of the DCFR; the second is the comparative comment by the editors, in the concluding part of the report. The contributors have been asked to organize a case-based assessment on some of the core topics of the DCFR, as it was published in the First Outline Edition of 2008. The Second Outline Edition has appeared in February 2009, when the work of the Common Core Evaluating

[179] See above, n. I.3.
[180] See the essays published in M. Bussani & U. Mattei, *Opening Up European Law, The Common Core Project*, (Bern, Staempfli, 2007).

Committee was already in an advanced stage. Of course, the novelties contained in this new edition have also been taken into consideration by the authors of the assessment. However, due to time constraints relating to our obligation to deliver the evaluation to the EU Commission, it has not been possible to include in our evaluation the final results of the CoPECL Network appeared in the Full Edition of the DCFR of October 2009. This means that comments and national notes accompanying the text of the model rules only in the Full Edition were not at our contributors' disposal at the time of their assessment, and this is reflected in the papers published in the present volume. The selection of the topics to be assessed has taken into account the need to cover significant areas of private patrimonial law dealt with by the DCFR. Therefore, some aspects of the general parts of Books II and III have been chosen, as well as some parts of Book IV on specific contracts, Book VI on non-contractual liability arising to damage caused to another, Book VII on unjustified enrichment and Book VIII on acquisition and loss of ownership of goods. These are among the areas where differences and similarities among the various legal systems in Europe can best be appreciated.

The contributors have framed three hypothetical cases concerning the subject matter under analysis. They have been asked to carry out essentially a two-level analysis of such factual situations, one concerning their national law (or more national legal systems, in some cases), the other the DCFR-rules. Similarities and differences in the outcome of the hypotheticals had to be stressed, together with difficulties – if any – in the possible application of the "Principles of European Law", the general aim of the work being to test how the DCFR could work at the operative level, *i.e.* when applied in the different legal systems.

Starting from the factual analysis by the national contributors, the editors of the project have tried and summarize the comparative results of the research. In particular, the expected outcome of this analysis is to discover whether significant similarities between the DCFR and national laws can be detected, which could constitute a solid ground for successful harmonization, or rather relevant differences emerge, which could lead to fragmentation rather than harmonization.

4.5. *Method, Limits and Value of the Factual Assessment.* – In order to meet the European Commission's requirements, the contributors have been asked to use the methods of legal analysis developed by the Common Core project. Therefore, the answers to the cases had to underline, as far as possible, the different legal formants, i.e. all the elements which form and impact the law

as it is applied in each legal system[181]. According to the Common Core method, these legal formants are usually subdivided into three categories: (i) operative formants (outcome of the case); (ii) descriptive formants (rules applied to the case, i.e. legislation, doctrines, case law, etc.); (iii) meta-legal formants (non-legal factors and elements which might impact on the outcome of the case).

Under "operative formants" the national reporters had to describe the basic rules applicable to the factual situation in their jurisdiction and indicate the answers to the questions by applying these rules. Reporters were also asked to state whether the reasoning and result reached are clear and undisputed, or on the contrary unclear and problematic.

The level of the so-called "descriptive formants" has a twofold goal. The first aim is to indicate the reasons which lawyers use in describing the 'operative rules' and the extent to which the various solutions are consistent either with specific and general legislative provisions, or with traditional or emerging general principles. The reporters were therefore asked to investigate whether the way in which the hypothetical case has been solved by case law in their legal system corresponds to the solution given by the other legal formants. They must indicate whether the legal formants are coherent. Sources of disagreement may be minority doctrines (including dissenting opinions in leading cases and criticisms raised in academic literature), or the emergence of new principles which generate solutions differing from the traditional ones. The reporters had also to indicate whether the solution is considered to be a question of fact or a question of law; this factor may determine the degree to which the solution can be enforced by supreme courts against lower courts, as well as the impact of judicial precedents. The second aim is to investigate whether the solution depends solely on the rules of private law and/or also on rules and institutions outside private law, such as procedural rules (including rules of evidence) and administrative or constitutional provisions.

Finally, the level of "meta-legal formants" requires the reporter to provide any other information considered relevant and which affects the operative and descriptive levels, such as policy considerations, economic factors, social elements and values, as well as the structure of the legal process (organization of courts, administrative structure and practice, etc.), when this is important for the solution of the issue under analysis. Contributors were asked to apply as far as possible this subdivision in the development of their analysis.

Due to these characteristics of the analysis, a number of limits exist and must be clearly disclosed in this Introduction. First, the factual method presupposes that only selected problems are dealt with in the contributions, and only the law of some selected countries is compared with

[181] See above, n. IV.2.

the DCFR-rules. In the Common Core project national reporters are asked to answer the factual questionnaires only according to their law, which is the best known legal system for every lawyer. Generalization of the results and comparison is a task for the editors. This scheme has been followed also in this work, although some authors have broadened the scope of their papers, analyzing also legal systems different from their own. In such cases, the comparative materials resulting from the research have been considerably enriched, but this was not possible for all reports. All this produces a certain – unavoidable – fragmentation of the analysis.

A second limit depends on the fact, as already mentioned, that the DFCR was available only in the black letter rules version when the work was undertaken. Therefore, reporters could generally not work on the apparatus of comments and national notes, which are most relevant to understanding how the rules should be interpreted, especially in relation with existing national laws (and which are now available after the publication of the full edition in October 2009).

Finally, although the Common Core method has proved to be very successful in discovering similarities and differences among different legal systems, it must be acknowledged that this success presupposes an analysis that is founded and depending on the living dimension of the law. Without the law-in-action dimension, the results of such analysis can be at best only tentative. In carrying out the factual assessment of the DCFR the common core method was applied to model rules that still lack any practical dimension, their very fate being still unclear. Therefore, comparison with national laws is asymmetric and necessarily limited.

Despite these intrinsic limits, all participants to the Common Core Evaluating Committee have been working scrupulously and have done their best to carry out this demanding and new kind of factual assessment. Moreover, we believe that, beside the issue of the degree of usefulness of this assessment in improving or modifying future developments of the DCFR rules, a very important and tangible value of this exercise lies in the fact that a number of scholars of different age and experience, representing different legal cultures of Europe, have worked on a joint legal analysis, developing a common working method, and taking part in the scholarly enterprise that is leading to the formation of a new European legal culture. This proves that the Common Core approach, by training scholars from different cultural backgrounds to study how cases are solved in various European systems, is a significant step in building such a new European scholarship[182].

[182] On this point see also L. Antoniolli, F. Fiorentini and J. Gordley, *A Case-Based Assessment of the Draft Common Frame of Reference* (2/2010) 58 Am. J. Comp. L. 343-358.

4.6. Critical Essays. – Beside the reports of the Evaluating Group the work is enriched by three critical essays written by prominent European scholars focusing on some crucial aspects of the DCFR, which complement and enlighten the factual assessment: Christoph Schmid (University of Bremen) has focused on the relationship in European private law between the CFR process, EU consumer contract law and the case law of the ECJ; Luca Nogler (University of Trento) and Udo Reifner (University of Hamburg) have analysed the DCFR in the light of the need of a European law on social contracts; Elena Ioriatti Ferrari (University of Trento) has evaluated the linguistic and terminological characteristics of the DCFR. All these contributions underline the existence of problematic features in the DCFR, while all sharing the belief in the need of developing European private law.

Schmid highlights the fragmentary character of European private law as related to EC private law, emphasizing the dominance of elements related to economic efficiency, instead of justice, due to the link with the fundamental aims of the internal market. According to Schmid, European private law has "three lives" related to the CFR process that is currently under way, to EU consumer contract law and the ECJ elaboration of rules in the domain of private law through its case-law. These "lives" are interconnected, yet they have very distinctive and different features. In particular, the elaboration of the DCFR is criticized for being too close to a continental Civil code, in spite of the formal claim of being suitable also as a "toolbox"; yet, the adoption of a Code at the European level seems very unlikely today for political reasons. From a strictly technical legal perspective the DCFR can be criticized also for a number of flaws (such as lack of coordination with the EC *Acquis* part and the excessive use of general clauses), yet to Schimd these technical problems are not decisive, since they could be remedied at a later stage. The most crucial problem of the CFR process is the lack of a clear legal status, a problem that was controversial since the beginning and has not been solved. This is also mirrored in the method and procedure adopted, which resembles the open method of governance employed in other areas of EC law (such as social policy), but involving an insufficient number and variety of actors. Enhancement of the scientific quality and political legitimacy could be achieved, according to Schmid, by the establishment of a European Law Institute. EU consumer contract law is clearly connected to the CFR process from a substantive point of view, yet in procedural terms it is following an almost completely autonomous path: after 2005 the Commission set the revision of the consumer contract law *acquis* as a priority, but this process has been detached from the discussion of the CFR, as the 2008 proposal for a consumer rights directive clearly shows. Moreover, the gradual shift of emphasis from minimum to maximum harmonisation in the area of consumer protection is altering the previously existing balance between EU and national law, emphasizing the value of

uniformity over the need to guarantee adequate consumer protection in different social and economic contexts. Finally, also the case law of the European Court of Justice is an important component of European private law, in spite of the fact that its intervention in the traditional domains of private law is a fairly recent phenomenon. Yet, the constant emphasis of the ECJ on *effet util* and its functional reading of EC individual rights in order to maximize effectiveness of EC law does not always match the need to respect the social values embedded in national laws, particularly in the field of contract law. As a consequence, at the moment it does not seem that ECJ case law can be an adequate bridge between European and national law from the point of view of mirroring existing fundamental values. The conclusion of the analysis is that "the European system of multi-level governance is complemented by an internal fragmentation of European private law, which amounts to a sort of "multi-compartment governance"[183]. The evaluation of the situation is therefore negative: "a European regime which is not able to safeguard its internal coherence and orientation towards justice as the key objective of private law does not enjoy the legitimacy to set aside and disintegrate national private laws, which still constitute more or less well functioning systems upholding justice among citizens. Instead, European private law should resort to classic justice-oriented legal instruments which do not suffer from market integration biases"[184].

Elena Ioriatti Ferrari has analysed the terminological aspects of the DCFR, setting it in the EU legal context, which has specific features due to the fact that EU law is a multilingual and multijurisdictional entity. It is characterized by specific methods of drafting, which often imply neologisms, either in the form of new terms, or pre-existing terms adapted to the EU legal context. The gradual extension of EC/EU competencies, which have been enlarged from very technical areas (e.g. agriculture) to areas with complex legal elements, reaching in the last decades also private law, has raised new difficulties, because it still lacks "its own system of conceptual references or (…) an internal and external organised system of concepts and categories"[185]. The launching of the CFR project by the Commission is related to the growing awareness of EU institutions of the need to guarantee legal consistency and linguistic/semantic coherence, both horizontally (i.e. among various EC acts[186]) and vertically (i.e. between EC and national transposing laws), to be able to achieve the harmonisation goals that were set, particularly within the internal market setting. In sum, the CFR should bring about a common European terminology, to be em-

[183] Ch. Schmid, *The 'Three Lives' of European Private Law*, in this volume, at p. 325 ff., 340.
[184] Ch. Schmid, *The 'Three Lives' of European Private Law*, in this volume, at p. 325 ff., 340.
[185] E. Ioriatti Ferrari, *Draft Common Frame of Reference and Terminology*, in this volume, at p. 341 ff., 343.
[186] Horizontal consistency among EC acts is often achieved through the use of the so-called linguistic precedent, according to which an expression employed in EC law is used also in other documents in order to guarantee linguistic consistency, which sometimes does not coincide with conceptual consistency. In this way sometimes linguistic expressions are employed in context where they are formally identical, but in fact refer to very different legal meanings, a phenomenon termed "nomadic meaning": Ioriatti Ferrari, *Draft Common Frame of Reference and Terminology*, in this volume, at p. 348.

ployed not only for the revision of the existing *acquis*, but also for new EU acts and possibly in the future for an optional instrument, as well as being a guideline for national courts and legislators for the application and implementation of EC law, and for private parties when dealing with EC/EU rights. The drafters of the DCFR have devoted great effort to developing a correct and coherent terminology, using neologisms where required in order to have neutral terms independent of national legal systems, particularly from English law, since English has been the drafting language (e.g. the term "non-contractual liability" instead of "tort")[187]. Moreover, definitions form a substantial and fundamental part of the DCFR, although there is some confusion due to the fact that some definitions are contained in the main part on model rules, while the majority are contained in a glossary annexed to the rules, and their relation is not fully clear. This comprehensive set of definitions could be very helpful for EU law, where legal terms are often not defined, leaving the definition to the case law of the Court of Justice.

Yet, according to Ioriatti the usefulness of the CFR process is diminished because of the lack of a clear choice between the CFR as a tool-box or an optional instrument (i.e. a comprehensive code-like model), which marked the CFR process from the very beginning. This has influenced the structure and drafting of the DCFR also from a terminological point of view. If the CFR is going to be a soft law instrument, with no direct normative function (which is the case for the toolbox option), then the wide and descriptive language is justified. Yet, the use of a clearly continental code-like structure, and more specifically the influence of the German model, has had an impact on terminology as well (as the wide use of the term "juridical act" as an overarching legal category), and refers to a more normative structure. This terminology clearly goes beyond existing EC law, and it has to be tested how much it is connected and compatible. In the end "the hybrid nature of the instrument, which is placed half-way between terminological support and para-legislative instrument" makes it harder to evaluate the usefulness of the instrument.

Luca Nogler and Udo Reifner have focused on the analysis of the DCFR in relation to social contracts. They are critical of the DCFR in this respect, because they consider that it threatens and undermines the foundations of European social contract law as developed in national laws (although with significant differences among them). They consider that social justice is an important criterion for the drafting of a European civil code (which they think is the real model of the DCFR), and this requires the insertion of suitable rules on social contracts, i.e. "long-term

[187] Another important issue concerns the possibility of translating the CFR in all EU official languages, a work that is extremely difficult not only for the sheer number of languages, but also because the need to keep the original meaning of the concepts drafted in English requires a substantial body of information and legal skills. In short, it would require a common European legal culture, which at present is only embryonic.

contracts pertaining to the way human life is spent"[188], such as labour[189], credit services[190] and housing contracts. Yet, this body of rules cannot be merely added to the existing DCFR, because they are modelled on totally different values and principles: "this draft (...) presently is not much more than a European sales law based on a special and questionable form of informational consumer protection, where the market is supposed to provide all solutions for everything that social problems can cause"[191]. On the contrary, rules on social contracts should focus on the life-time of contracts instead of their conclusion, on means for adaptation instead of withdrawal and for protection of weak parties against market mechanisms. Social contracts are characterised by a long-lasting relation of power, and due to this they are subject to rules limiting market mechanisms in all national systems (e.g. minimum wage legislation, rules on services of general economic interest, etc.). This kind of regulation limits party autonomy through a variety of rules crossing the borders between private and public law, and is based on a specific hierarchy of values, which is not mirrored in the four main group of principles mentioned in the DCFR (i.e. freedom, security, justice and efficiency). Nogler and Reifner think that, in spite of a dogmatic structure influenced by the German code, the DCFR is modelled in terms of policy choices on the common law (and this is reinforced by the use of English as the drafting language), with a strong emphasis on party autonomy, information and efficiency, and they consider it to be unsuitable to build a body of European social contract law based on shared national values and principles[192]: "A European contract law which does not even mention price regulation, protection against acceleration of debts or unilateral early termination of rent, labour and credit contracts disregards the importance public interest has gained in modern contract law and reflects the status quo more than 100 years ago. It will not be able to convince people that unification is a valuable goal".

They also point to the problems that stem from the insufficiency of the EU competence to regulate civil law comprehensively. As long as the DCFR is considered as an academic text, this does not create serious problems, but they will become crucial as soon as the DCFR will be trans-

[188] L. Nogler and U. Reifner, *Social Contracts in the Light of the Draft Common Frame of Reference for a Future EU Contract Law*, in this volume, at p. 363 ff., 366.
[189] Interestingly, while the DCFR explicitly excludes employment relationships from its scope of application, EC law contains a very significant body of rules covering labour law, both legislation and case law, an important gap between the DCFR and the EC *acquis*. See also S. Whittaker, *A Framework of Principle for European Contract Law*, (2009) 127 LQR 622 ff.
[190] While the DCFR contains some rules related to the EC *acquis* in the field of consumer credit, it employs protective mechanisms that are only focused on information imbalance, but not on social imbalance. Moreover, consumer loans and loans for immovables are excluded as well.
[191] L. Nogler and U. Reifner, *Social Contracts in the Light of the Draft Common Frame of Reference for a Future EU Contract Law*, in this volume, at p. 404.
[192] They consider that even the notion of good faith and fair dealing in the DCFR is influenced by this liberal conception, emphasizing the procedural over the substantial aspects of the principle. Another relevant element is the extensive use of the right of withdrawal as a protective mechanism for the weak party.

formed or transfused in legal texts, be they in an encompassing codification or a series of more limited and specific acts.

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Case-Based Assessments

Unfair Terms

DCFR, Book II: Contracts and other juridical acts; Chapter 9: Contents and effects of contracts; Section 4: Unfair terms

by

Chris Willett

Summary: 1. General Introduction. – 2. Negotiated, Non Negotiated Terms and Standard Terms. Case 1. – 3. Coverage by Reference to Substantive Effects of Terms (A). Case 2. – 4. Coverage by Reference to Substantive Effects of Terms (B). Case 3. – 5. Concluding Comments.

1. General Introduction

This chapter considers various important issues as to the regulation of contract terms for fairness. There are many such important issues, so obviously a degree of selection has been necessary. The first issue is as to whether or not controls do and should apply to individually negotiated terms. This has theoretical significance as an indication of the attitude of a control system to the relationship between freedom to bargain and protection of procedural and substantive interests. It may, as we shall see, also have practical significance. The second issue is as to whether or not controls do and should apply to the amount charged for goods and services. This raises a different issue about the relationship between freedom and fairness. Here, the fundamental issue is the extent to which the relationship between freedom and fairness is and should be affected by the subject matter of the relevant obligation (and the questions about consent, reasonable expectations, competition and social justice that seem to lurk beneath the surface here). The third issue is as to the approach to price variation terms; what this says about notions of consent, expectation and fairness; and what broader patterns this reflects.

The analysis essentially compares the approaches taken to these issues under the Draft Common Frame of Reference (DCFR) and in the UK. This comparison is also set in the context

of the EU Directive on Unfair Terms in Consumer Contracts Directive (UTD);[1] the proposal for a Consumer Rights Directive (CRD);[2] and, to a limited extent, examples and influences from other national regimes.

In keeping with the methodology of the common core work, it considers each of the three issues, first of all, by reference to a Case Study illustrating the precise technical nature of the relevant rules and how they would be applied to a given set of facts; and, secondly, by reference to a broader analysis of the theoretical and policy issues that arise.

It will become evident that the section on individually negotiated terms is longer than the other sections; and, also, that the Case Study on individually negotiated terms actually comprises three sub-categories. This is because it appeared to be the only way to draw out the various complex issues and comparisons that arise in this area.

2. Negotiated, Non Negotiated Terms and Standard Terms. Case 1

(i) Introduction

This section deals with the issue as to whether terms have or have not been negotiated and whether they are 'standard'. Under the DCFR, these issues are of relevance in relation to various rules. First of all, there are the rules on 'conflicting standard terms' in Article II. 4:209. Essentially, the rule here is that the existence of conflicting terms does not prevent the formation of a contract; the standard terms forming part of the contract to the extent that they are common in substance. Then, there are the rules in Article II. 9:103 on when terms are actually counted as part of the contract (as a matter of basic inclusion or incorporation). Here, terms supplied by one party that have not been individually negotiated can be invoked against the other only if this other party was aware of them, or if the supplier of the terms took reasonable steps to draw them to his attention before or at the time of conclusion of the contract.[3] Finally, the rules on unfair terms (Articles II. 9:401-9:406) are dependent (in some cases) on whether terms are 'individually negotiated' and (in other cases) on whether terms are 'standard'.

The focus here is on the unfair terms context and how the DCFR rules compare with UK rules in particular. Obviously, choices about whether or not to require fairness in relation to all terms (or only in the case of those that are standard or have not been negotiated) are significant

[1] 93/13/EEC, OJ L 095, 21.4.1993, p. 29 – 34.
[2] Proposal for a Directive on Consumer Rights, 8.10.2008, COM (2008) 614 final.
[3] It should be noted here that the *acquis* principles appear to be more protective of the consumer than the DCFR, as the *acquis* rule is that the consumer must have had a real opportunity to become acquainted with the terms before conclusion of the contract (ACQP, Art. 6:201).

choices. Certainly, at a theoretical level, such choices reveal something about the philosophy of the control system in question; in particular whether the primary issue is protection or whether it is the freedom to negotiate. There are also questions as to the practical significance of the rules, e.g. as to whether, in B2C contracts, there is ever likely, in practice, to be individual negotiation.

(ii) Case 1

Unfairness of terms limiting or excluding liability – Defective goods – Defective services – B2C and B2B contracts

A sells cars, spare parts and accessories; as well as carrying out repair services. A has sold a defective car to private consumer X; and a defective spare tyre to business customer Y. However, A tells both X and Y that he is not liable because of a term in the contract of sale that:
'A accepts no liability for the quality of vehicles, parts and accessories'. [Exclusion Clause 1].

A has also carried out repairs on a car belonging to a private consumer W and a van belonging to business customer Z. The work has been carried out negligently (various necessary repairs to W's car have been missed and damage has been caused to the engine in Z's van by careless installation of parts). However, A denies liability, pointing to a clause providing that:
'A will use best endeavours to carry out repair work effectively, but accepts no liability in cases of dissatisfaction'
[Exclusion Clause 2].

Finally, A has contracted to deliver spare parts to private consumer C and business customer D by certain dates. In both cases, delivery is late by many weeks. Again, he seeks to avoid liability, pointing to a clause providing that:
'A will always seek to meet delivery deadlines; but cannot accept responsibility for delays'.
[Exclusion Clause 3].

(iii) Legal Rules

Excluding or limiting liability for defective cars and parts

In the UK we find that terms excluding or restricting liability for quality defects in the cars and the tyres are controlled whether the terms are negotiated or not. Basically, exclusion or restriction of the implied terms as to description, quality and fitness for purpose of goods is wholly ineffective in B2C contracts and subject to a test of reasonableness in B2B contracts; and in both cases it is irrelevant whether the term in question is negotiated or not.[4] So A will find that 'Exclusion Clause 1' is subject to these controls if it is in his standard terms; if he simply proposed it for the particular contracts with X and Y and refused to negotiate over it; or if he negotiated with them from a 'blank sheet of paper' to a position where Exclusion Clause 1 was the result; or if he engaged in some blend of the above approaches. This was the position under the UK law prior to the UTD and remains so. Initially, after the UTD was introduced, this UK position[5] could only be justified on the basis of the minimum clause in the UTD. This is because the UTD, itself, only applies the unfairness test to non-negotiated terms.[6] Now, however, the UK approach (of controlling both non-negotiated *and* negotiated terms excluding or restricting liability for description, quality or fitness problems) reflects the *mandatory* position for B2C contracts at EC level as a result of the Directive on Consumer Sales and Associated Guarantees[7] (The Sales Directive); which sets a conformity standard for goods,[8] provides for remedies for breach of this standard[9] and makes exclusion ineffective,[10] it not being relevant whether the

[4] Unfair Contract Terms Act (UCTA) 1977, ss. 6 (2) and (3); although the Law Commission has recommended that in B2B contracts, the controls should be restricted to non negotiated terms (Law Commission, Unfair Terms in Contracts, 2005, 4.29 and see further below). On rationales for making such terms wholly ineffective in B2C contracts see C. Willett, *Fairness in Consumer Contracts* (Aldershot, Ashgate, 2007) 4.2.7.1 and 4.2.7.3.
The criteria for determining whether the buyer is acting as a consumer or not are contained in UCTA, s. 12; and see the decisions *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 All ER 847 and *Feldaroll Foundry plc v Hernes Leasing (London) Ltd* [2004] EWCA Civ 747, 101(24) LSG 32 on this issue.
In B2B contracts the reasonableness test is laid down in s. 11 of UCTA. Relevant cases applying this test include *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803; *Smith v Eric S Bush* [1989] 2 All ER 514; *RW Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602; *Monarch Airlines Ltd v London Luton Airport Ltd* [1997] CLC 698; *Watford Electronics Ltd v Sanderson CFL Ltd* [2002] 2 All ER (Comm) 984; *Britvic Soft Drinks Messer UK Ltd* [2002] 2 Lloyd's Rep 368; *SAM Business Systems v Hedley & Co* [2003] 1 All ER (Comm) 46 5; and *Sheperd Homes Ltd v Encia Remediation Ltd* [2007] B.L.R. 13.
For academic discussion of the reasonableness test see E. MacDonald, *Contents*, in M. Furmston (ed.), Butterworths Law of Contract (London, Lexis Nexis, 2003) 630-636; A.G. Guest, *Unfair Terms in Consumer Contracts*, in H. Beale (ed) Chitty on Contracts (London, Sweet and Maxwell, 2008) 14-084-14-099; and E. MacDonald, *Exclusion Clauses and Unfair Terms* (Haywards Heath, Tottel, 2006) 161-186.
[5] I.e. continuing to keep in place the controls in ss. 6 (2) and (3) of UCTA.
[6] Art. 3(1). Note that the UK Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999, which implement the UTD are, like the UTD, restricted to individually negotiated terms (reg. 5 (1)). The test of unfairness in these Regulations (from the UTD, art 3 (1)) therefore applies to non- individually negotiated terms excluding or restricting liability for negligence. However, as we have seen, such terms, as well as those that are non- standard, negotiated, terms, are also controlled under the pre-existing UK UCTA.
[7] 99/44/EC, OJ L 171, 7.7.1999, p. 12-16.
[8] Article 2.
[9] Article 3.

exclusion is in a negotiated or non negotiated term.[11] This would be continued in the proposed Consumer Rights Directive;[12] and the same position is taken in the DCFR for B2C contracts, which lays down a conformity standard[13] and prevents derogation from this.[14]

For B2B contracts the position is different at the European level. Of course, there is no *mandatory* conformity standard for such contracts at European level; but the DCFR general conformity requirement[15] that applies to B2C contracts also applies to B2B contracts. However, when it comes to exclusion or restriction clauses, there is no provision comparable to that for consumer contracts, i.e. there is no provision that deals with derogation from this conformity standard or the remedies for its breach. This means that control of terms having such an effect is left to the general test of unfairness in Art. II. 9:405. However, this only applies to terms 'forming part of standard terms supplied by one party'. In other words in contracts to supply to businesses, any exclusion or restriction by A of his liability for defective cars or parts (including, of course, Exclusion Clause 1 above as used against business customer Y) will only be subject to the DCFR test of unfairness if it is contained in his (A's) standard terms. 'Standard terms' are defined as:

'terms which have been formulated in advance for several transactions involving different parties, and which have not been individually negotiated by the parties'.[16]

In sum, then, as far as his contract with his consumer customer (X) is concerned, A is in the same position under UK law and the DCFR (and the Sales Directive and the proposed CRD); i.e. that the above exclusion clause will be ineffective however it came about (negotiated or not) and whatever form it is in (standard or not). However, while UK law also controls (by a reasonableness test) this exclusion clause when used in the contract with business customer Y however it came about and whatever its form; under DCFR rules, A would be able to avoid review of this exemption clause if it was not in his standard terms and he had simply negotiated it with Y. Indeed, even if he did not negotiate it, but simply brought it to the table and refused to change it, then he seems to be clear of review as long as the term is not standardised.

Of course, a question that arises is as to when, exactly, a term is 'standard'. The above definition refers to having been 'formulated in advance for several transactions'. First of all, it would seem

[10] Article 7(1).
[11] However, as we shall see shortly, the DCFR position (and the proposed maximum protection position under the proposed Consumer Rights Directive) on terms in consumer contracts in general is more complicated with regard to the issues of negotiation and so forth.
[12] Above, fn. 2, art. 43.
[13] Art. IV. A. 2:301.
[14] Art. IV. A. 2:309.
[15] See Art. IV. A. 2:301.
[16] DCFR, Annex 1.

that such a term will usually be one that we would also have to conclude has not been individually negotiated. If a term is formulated in advance for several transactions, and it does not undergo any change before the contract in question, then usually it must follow that it was not individually negotiated. The term may, of course, have been negotiated between trade bodies, but this is still not 'individual' negotiation. Of course, there might be some cases in which the terms are actually the result of a prior individual negotiation between a trader and 'several' other traders, one of these being the other party in question in the case at hand (e.g. A has previously negotiated Exemption Clause 1 above with customer Y-and others-for use in all their future contracts, of which the contract described is one). In such a case, it may well be that the term is not caught by the DCFR unfairness test for B2B contracts; because, although it has been 'formulated in advance for several transactions', it has, at least in one sense, been individually negotiated between A and customer Y.

There is a final question as to the meaning of the 'formulated in advance' element of the test and its relationship with the negotiated terms element. Above we mentioned the possibility of A having brought Exemption Clause 1 to the table and having refused to change it; and said that, as long as the term is not a 'standard' one, then it seems to escape review, even although it has not been negotiated. However, the point is that if A has actually done this several times with what is substantially the same term, then there must come a point when the term is indeed treated as 'standard'.[17]

Excluding or limiting liability for negligent repairs

Turning to exclusion or restriction of liability for negligently carried out repairs, the UK position, again, is that control is not dependent on whether terms are negotiated/non negotiated or standard/non standard. Exclusion or restriction of liability for negligent performance of a service causing death or injury is wholly ineffective.[18] Exclusion or restriction of liability for negligent performance of a service causing other loss is subject to a test of reasonableness.[19] In both cases, this applies whatever the negotiated/non negotiated or standard/non standard nature of the term in

[17] See also, on the confusion caused by the definition, H. Eidenmuller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmerman, *The Common Frame of Reference for European Private Law-Policy Choices and Codification Problems* (4/2008) 28 OJLS 659, at 702.

[18] UCTA, s. 2 (1). On rationales for making such terms wholly ineffective in B2C contracts see C. Willett, above, fn. 4, at 4.2.7.1 and 4.2.7.2.

[19] UCTA, s. 2 (2). See, again, the cases and academic sources cited at supra, note 4 on the reasonableness test. In particular, see the *Smith v Bush* case as it is a House of Lords case and involved exclusion of liability for negligence where the customer was a private consumer (most of the other cases cited at note 4 are B2B cases, because, in relation to exclusion or restriction of liability for defective goods, the reasonableness test is only applicable to B2B contracts). Also on the application of the reasonableness test to B2C contracts see C. Willett, above, fn. 4, at 4.6.

question. Further, these controls apply whether the contract is B2C or B2B. So, under UK law, A's attempt (Exclusion Clause 2) to avoid liability for losses caused by failing to notice the repairs needed on W's car and for the damage caused to the engine on Z's van, will be subject to the reasonableness test. This, as in the case of Exemption Clause 1, will be the case whatever form he has used (i.e. whether the term is standard/non-standard, negotiated/non-negotiated or whatever).

At European level, the situation in B2C contracts is that terms (like Exclusion Clause 2) excluding or restricting liability for negligent performance of a service causing any form of loss are subject to the unfairness test in the UTD. However, this (as with all terms under the UTD) is only where the term is one that has not been individually negotiated;[20] this depending, primarily, on whether the consumer was 'able to influence the substance of the term'.[21] Under the DCFR, there are two alternative approaches, because it was not possible for the Study Group and the Acquis Group to reach an agreement.[22] The version that is more protective of consumers (and more restrictive of trader freedom) provides that terms (and this would cover those excluding or restricting liability for negligence) are subject to the test of unfairness if they have been supplied by the trader.[23] The slightly less protective version provides that terms are only subject to the test of unfairness where they have not only been supplied by the trader; but where they have also not been individually negotiated[24] (this, like the UTD, depending, primarily, on whether the consumer was able to influence, in this case, the 'content' of the term[25]). So, it appears to be contemplated that a term (such as Exclusion Clause 2) might be supplied by the trader (such as A) and then be the subject of some negotiation. Under the first approach such a term will be covered by the test of unfairness. However, under the second approach, if the negotiation is sufficient to satisfy the definition provided, the finally agreed term will not be subject to the test of unfairness.

[20] Art. 3(2), which says that: 'A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract'. Note that the UK UTCCR, implementing the UTD copy out this same approach (reg. 5) , but, as we saw above, there is the separate, pre-existing UK control in the UCTA, which pays no heed to the negotiated/non-negotiated/standard/non standard issue.

[21] UTD, Art. 3 (2).

[22] For a discussion see M. Loos, *Review of the European Consumer Acquis* (Munich, Sellier, 2008) 41 and F. Zoll, *Unfair Terms in the Acquis Principles and Draft Common Frame of Reference: A Study of the Differences between the Two Closest Members of One Family* (2008) Juridica International 69, at section 7.

[23] II. 9:403 (version with brackets).

[24] II. 9:403 (version without brackets).

[25] See the Annex, which says that: 'A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms. '

At present the UK is able to maintain the more protective approach described above (covering terms excluding or limiting liability for negligence whether, negotiated or not or standard or not) on the basis that the UTD is a minimum Directive. The proposed Consumer Rights Directive does not actually refer to 'individual negotiation'. Rather, it says that the unfairness test only applies to terms 'drafted in advance by the trader or a third party, which the consumer agreed to without the possibility of influencing their content'.[26] Under such a regime, Exemption Clause 2 would be free from control if it did not fall within these criteria. In fact this CRD formulation seems to be even more favourable to A than the second DCFR version and the UTD approach. In the second DCFR approach and under the UTD, whether a term has been 'drafted in advance' seems to be nothing more than something that provides evidence that there has been no consumer influence over the term (and, therefore, no negotiation).[27] However, under the CRD the unfairness test would only apply to 'terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content'.[28] This could mean that, rather than simply being a factor indicating non negotiation, being 'drafted in advance' is essential, in itself, if the terms are to be covered by the test of unfairness. If this is the case, Exemption Clause 2 could possibly avoid the test of unfairness if it had been proposed to the customers (W and Z) on the spot prior to the contract (even if he refused to negotiate over it). (Of course, if he has done this before, the more likely it is to be arguable that he has, effectively, 'drafted' such a term in advance.)[29]

What is far from clear is whether the UK would actually be required to move to the CRD approach as a result of the maximum nature of the CRD. It seems to be arguable that terms that have not been drafted in advance and that the consumer has actually influenced might be outside the scope of the CRD altogether. If this is the case then the UK would be entitled to continue to regulate such terms.

In B2B contracts at European level, the approach is the same as in the case of terms excluding or limiting liability for poor quality goods (as it is with all terms), i.e. that a term (such as Exemption Clause 2) is only subject to control if it forms part of standard terms supplied by A and has not been individually negotiated.[30] So, if the DCFR approach was to become applicable in the UK, it would mean that A could avoid the fairness controls by avoiding using standard terms or making sure there has been a sufficient degree of negotiation. (We would then, of course,

[26] Article 30(1).
[27] See the UTD text at above, fn. 20; and the DCFR text, above fn. 25.
[28] Art. 30(1).
[29] For a discussion of the CRD rules on this issue see J. Stuyck, *Unfair Terms*, in G. Howells and H. Schulte-Nolke, Modernising and Harmonising Consumer Contract Law (Munich, Sellier, 2009) 115, at 129-130.
[30] Art. II. 9:405/Annex.

return to the various points made above as to the precise meaning of 'standard terms', when there has been negotiation and what the relationship is between these concepts.)

Excluding or limiting liability for failure to meet deadlines

As for Exclusion Clause 3, the position of A (under UK law) in relation to private consumer C is as described above in relation to excluding or restricting liability for negligence. By this I mean that it is subject to control (a test of reasonableness under UCTA[31]) notwithstanding questions as to negotiation/non-negotiation or its standardised/non-standardised nature. Of course, again, this is in contrast to the current rule in the UTD, which would only catch a term if it is not individually negotiated.[32] It is also in contrast with the DFCR, which, as we have seen, has two alternative versions, one making the issue solely a matter of whether the business supplied the term; the other also freeing the term from control as long as it was not actually negotiated with the consumer.

The proposed CRD would change the position in a specific type of case of late delivery. Under the CRD, if the parties do not agree otherwise, goods should be delivered within 30 days of the conclusion of the contract; and, if this deadline is not met, a refund should be provided within 7 days of the 30 day deadline.[33] Contracting out of this is not permitted;[34] so, if, because no specific deadline is agreed, the 30 day rule applies, a seller could not exclude or restrict the 7 day refund rule or exclude or restrict liability for damages. The ban on contracting seems to apply whether or not the term in question is negotiated/non-negotiated or standard/non-standard. This would actually be a more protective rule for consumers than under the current UK rules or under the DCFR. First, it would be an absolute ban on a term seeking to contract out of the 30 day/7 day refund rules; while the UK approach is to use a broad test of reasonableness (see above) and the DCFR approach is a broad test of unfairness. Second, the DCFR test only applies where (depending on which version is applied) the business has supplied the term or the term has actually been negotiated; while, as we have just noted, the CRD would seem to ban such a term however it comes about.

[31] This is done under UCTA, s. 3, which applies the reasonableness test to exclusion/restriction of any liability for breach of contract where the other party is a consumer. This catches the types of breach of contract that are not covered by the sections dealing with particular liabilities, i.e. those, discussed above, covering liability for defective goods and for negligence (ss. 2 and 6). On application of the reasonableness test see the cases and academic discussions mentioned at above, fns. 4 and 19.

[32] Again, of course, the UK also applies the UTD controls in the case of terms that have not been individually negotiated (UTCCR, reg. 5 (1)), which would include non-individually negotiated terms excluding or restricting liability for late delivery.

[33] Art. 22.

[34] Art. 43.

Outside the CRD 30 day rule (i.e. where-as in A's contract with consumer C- there is an agreement on a delivery time), exclusion or restriction of liability for late delivery would (under the CRD regime) fall to be assessed under the general unfairness test in the CRD. This, as we saw above, only catches terms that have been drafted in advance and the consumer has had no possibility to influence. So, outside the 30 day rule, the maximum nature of the CRD would mean that the UK could no longer subject to a reasonableness test a term excluding or restricting liability for late delivery unless this term was drafted in advance and was one that the consumer had not had the possibility to influence (assuming that cases outside the 30 day rule are actually regarded as being within the scope of the Directive, something which is not clear and assuming also that control of individually negotiated terms is within the scope of the proposed Directive, something else, which as mentioned above, is not clear).

The position in B2B contracts under the DCFR is as it is for all terms in B2B contracts, i.e. as described above. So if the DCFR approach was applicable in the UK, it would mean that A would avoid the fairness controls over Exclusion Clause 3 if it was not one of his standard terms or if he had made sure that there was a sufficient degree of negotiation over it before the contract was finalised. (Again, we would, of course, return to the points made above as to the precise meaning of 'standard terms', when there has been negotiation and what the relationship is between these concepts.)

In the case of B2B contracts, we find that UK law is closest to the DCFR in relation to control of Exclusion Clause 3. Above we saw that in B2B contracts, exclusion or restriction of liability for defective goods or negligent repair is controlled notwithstanding questions as to negotiation/non-negotiation or whether terms are or are not standard. (The position on such terms is actually provided for in sections of the legislation dealing specifically with exclusion/restriction of liability for these particular types of breach of contract[35]). However, where (as with Exclusion Clause 3) exclusion or restriction of liability for late delivery is concerned, we find that the position for businesses such as A is different. Here, the relevant provision is a more general one that refers to terms excluding or restricting liability for 'breach of contract'.[36] This covers excluding or restricting liability for late delivery as done by Exclusion Clause 3. Such terms are subject to the test of reasonableness.[37] Vitally, however, this is only where the term is one of the 'written standard terms of business' of the party using it;[38] so, here, A can use such a term without any control as long as it is not one of his written standard terms.

[35] I.e. ss. 2 and 6; see above generally and fn. 19.
[36] UCTA, s. 3(2) (a).
[37] UCTA, s. 3(2).
[38] UCTA, s. 3(1).

So, the approach is close to that under the DCFR for B2B contracts. Of course, under this UK approach, it is enough to trigger the controls that there are 'standard terms'. There is no separate reference (as in the DCFR) to the need for the term to one that has not been individually negotiated. It is true that in most cases if the terms are standard, then they have probably not been individually negotiated. It is also true that the more negotiation there has been over the terms the less likely the courts are to treat them as 'standard' (even although they may have begun as standard terms). Equally, of course, terms that may have started as standard terms, which have been the subject of limited meaningful influence by the other party are unlikely to escape the 'standard terms' tag.[39] So, all in all, the concepts of standard and non-negotiated terms interlink and overlap very closely; so that the UK and DCFR approaches are very close. Nevertheless, it was suggested above that there might be cases (and this could include Exclusion Clause 3) in which a term has been negotiated by A with several other business customers that regularly buy from him. Having been negotiated, it is put in A's standard terms. Such a term may not be caught by the DCFR unfairness test for B2B contracts, because, although it is standard, it has, at least in one sense, been individually negotiated between A and the customer in question. However, it might possibly (at least sometimes) be caught by the UK approach, which catches a term so long as it is a standard one.

(iv) Commentary

What we find, from the above case studies, is that, on the whole, there is a distinction (between the UK and the DCFR) in relation to the philosophy of control in the context of the issue as to standard/non-negotiated/negotiated terms (at least where terms excluding or restricting liability are concerned[40]). In the UK, where B2C contracts are concerned, there is what might be described as a 'right to protection' approach. Consumers are to be protected against exclusions/restrictions whatever the type of liability at stake. Freedom of contract (in the sense of

[39] See *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115; *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *St Albans City and District Council ICL* [1996] 4 All ER 48; and *Watford Electronics Lts v Sanderson CFL Ltd* [2002] 2 All ER (Comm) 984.

[40] In the case of terms imposing unfair obligations or liabilities on consumers, the controls come from the UTCCR and (following the UTD) these controls (the same ones that apply to exemption clauses under UTCCR) only apply to non-negotiated terms (reg. 5 (1)); although the Law Commissions have recommended that they be extended to negotiated terms (Law Commission, *Unfair Terms in Contracts*, 2005, 3.55). This is on the grounds that consumers will rarely understand the issues sufficiently to make negotiation meaningful and that coverage of negotiated terms would be consistent with the approach to exemption clauses already taken under UCTA (3.51). See the view of Zoll, above, fn. 22, at section 7, to the effect that the' inability to meaningfully influence' rationale shows the UK approach to be one more based on the procedural concerns than the French approach-on which see below-which he characterises as more substantive, i.e. that there should be protection from unfair terms because it is fair in substance per se.

freedom to negotiate and be free from interference with the result) is sidelined. Even if the terms are not standard and were negotiated with the consumer, it is recognised that the trader may still be in a stronger bargaining position in terms of market power and in terms of bargaining experience and expertise and understanding of the significance of the rights that are at stake in the bargaining process. It is also recognised that the substance of the terms then agreed could, therefore, still end up being unfair in substance for the typical private consumer (who may find losses more difficult to absorb than businesses).[41]

Where B2B contracts are concerned in the UK, there seems to a 'right to protection' approach where exclusion of liability for negligence and defective goods is concerned. These are regulated even if they have been negotiated or are non standard terms.[42] Here we perhaps need to look for the rationale in the nature of these particular types of liability (given that the UK controls are restricted to standard terms in other cases[43] in B2B contracts). It might be said that the coverage of terms excluding or restricting liability for negligence (even where they are non standard or they are negotiated) is based partly on a policy against fault (i.e. that businesses should not lightly be able to escape liability where they are actually negligent).[44] The other dimension, of course, is the outright ban where liability for death or injury is concerned. Here we might say that the right to protection of physical integrity is so fundamental, that it should not be subject to freedom of contract even where there has been negotiation.

The 'European' approach for B2C[45] and B2B is tied to the more freedom oriented notion that control is only necessary where, due to the transactions costs savings from using standard terms, there has not been a negotiating input from the party affected by the term; essentially where the degree of 'real consent' is very limited, particularly because of the use of standard terms.[46] This, of course, ignores disparities of bargaining power that may exist, especially where

[41] For a discussion of issues surrounding individual negotiation see C. Willett, above, fn. 4, at 5.2.

[42] However, the Law Commission has actually recommended that exclusion or restriction of liability for defective goods should only be controlled where the term was negotiated (on the basis, inter alia, that negotiated terms will usually be fair and that the scope for challenge allows delaying tactics to be employed by buyers) (see Law Commission, *Unfair Terms in Contracts*, 2005, 4.25-4.29).

[43] I.e. where general breach of contract (including late delivery) is concerned (see the above discussion of Exclusion Clause 3).

[44] The Law Commission has also said that control of negotiated terms excluding liability for negligence is important because negligence covers not only negligent breaches of contract; but also negligence in tort and delict (see Law Commission, *Unfair Terms in Contracts*, 2005, 4.36-4.40).

[45] This is apart, of course, from the approach to exclusion of liability for non conformity of goods, which is presumably viewed as unacceptable in all circumstances because of the idea that the right to goods that meet the basic conformity standard is so fundamental. It is also apart from the approach that would be taken under the proposed CRD to some delivery cases. There we saw that when the 30 day rule would apply exclusion or restriction of liability would be prevented however the term came about.

[46] This is closest to the German approach that influenced the UTD, although the German approach was focussed even more narrowly on standard terms. What was at stake in negotiation of the UTD was whether this approach (which applied to B2B and B2C) was to be preferred to the French approach (which was focussed on protection of consumers, irrespective of negotiation). On these issues see, Willett, above, fn. 4, at 5.2.1; P. Nebbia, *Unfair*

the party affected is a consumer or a small business. It also ignores the substantive losses that might be suffered by the party whose right to claim is excluded or restricted; and the fact that, where consumers or small businesses are concerned, these losses may be harder to absorb.[47] The UK, as we saw above, follows this type of approach where B2B contracts are concerned and the breach is one other than in relation to defective goods or negligent performance.

Of course, we also saw above that the UK approach to the latter sort of terms may be marginally more protective, in covering any standard term, even where there may have been some negotiation. However, the difference here seems to be minimal.

We also saw that one version of the DCFR approach as applied to B2C contracts seems to restrict freedom of negotiation/contract a little more, by allowing for control in any case where the term has been supplied by the trader; even although such a term might possibly still have been the subject of a degree of negotiation. Perhaps this covers cases where the consumer has had some influence over the finally agreed content of the term; this is an influence that would be sufficient to reach the conclusion that term has been individually negotiated (for the purposes of the other version of the test[48]); but because (an initial draft of) the term was supplied by the business, it is controlled. Such an approach might, in practice, severely limit the potential for businesses to achieve the term they wish (and, thereby, protect consumers in most cases). This is because it seems unlikely that businesses would often find it cost effective to genuinely negotiate 'from scratch'. Of course, even on the version that disallows control of negotiated terms, the question is what is meant by the consumer being able to 'influence' the term. If this is interpreted strictly to require that the consumer makes real gains in substance relative to where the negotiations started, then it might be that very few terms would ever actually escape control by this route.[49] (The same point could be made about the individual negotiation criteria in B2B contracts.)

The final point is one about the practical implications of excluding individually negotiated terms from control. It might well be said that, whatever the theory, most problematic terms (especially in B2C contracts) will end up being controlled; simply, because, most of them *are* standard, non-negotiated terms and because most businesses will not then go to the trouble of trying to achieve enough revision of them to change their status to avoid control. This is almost certainly true in many, if not most, cases. However, there is some evidence in B2C contracts that

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Contract Terms in European Law (Oxford, Hart, 2007) 34-40 (also dealing with the Italian approach); and F. Zoll, above, fn. 22, at section 2.

[47] See C. Willett, above, fn. 4, at 5.2.2.

[48] The core element of the test is whether the consumer has been able to influence the content of the term (Annex).

[49] See C. Willett, above, fn. 4, at 5.2.2.

some traders are seeking to use 'sham negotiations'; which might not pass the legal test, but could well be enough to persuade the unwary consumer that he has lost any legal protection.[50]

3. Coverage by Reference To Substantive Effects of Terms (A). Case 2

(i) Introduction

The next two case studies deal with how the substantive effects of terms determine whether they are tested for unfairness. Specifically, there is the issue as to the amount charged for goods or services (Case 2); and the issue as to terms allowing price variations (Case 3).

(ii) Case 2

Unfairness of terms establishing price higher than market price – B2C and B2B contracts

A rents a van to business customer B and a car to consumer customer C. In both cases the rental charges are significantly higher than what is normal in the market sector in question (the normal price for the van per week is £150, while B is charged £250 and the normal charge for a car per week is £100, while C is charged £200).

(iii) Legal Rules

As to the basic rental price of the vehicles, the position is the same under the DCFR for B2B and B2C contracts; and this same position is reflected in UK legislation (although there may be some scope for a different approach under equitable rules in some cases).

Under the DCFR the rule (for B2B and B2C contracts) is that:

'For contract terms which are drafted in plain and intelligible language, the unfairness test

[50] European Commission Report on the Unfair Contract Terms Directive (2000) (COM) 2248 final at p. 14; and see discussion in C. Willett, above, fn. 4, at 5.2.3.

extends neither to the definition of the main subject matter of the contract, *nor to the adequacy of the price paid*'.[51]

Essentially, the reference to not being able to test the 'adequacy' of the price means not being able to argue that it is too high. This more or less reflects the position in the UTD,[52] which would continue under the proposed new CRD.[53] The UK currently copies out this approach in implementation of the UTD, so the domestic position under the UTCCR is the same.[54]

In other words, under the DCFR, A's rental charges are free from control in his contracts with both B and C, as long as they are expressed in plain and intelligible language. In B2C contracts, they are free from control under the UTCCR in the UK under the same conditions. If they are not in plain and intelligible language, they do, of course, become subject to the relevant test of unfairness (whether the B2B test in the DCFR, the B2C test in the DCFR or the UK UTCCR test).

As far as B2B contracts are concerned in the UK, there is no general statutory control over terms imposing obligations on the customer. The UCTA that we have been discussing above (although applicable to B2C *and* B2B contracts) only applies to clauses by which one exempts one's liability.[55] It does not cover terms involving the imposition of unfair obligations or liabilities on others. The UTCCR *do* control obligation and liability imposing terms.[56] We have seen that, in the case of price terms, this is subject to the exclusion mentioned. However, as the UTCCR do not apply to B2B contracts, there is not even the idea that price terms are controlled if they are not in plain and intelligible language. One possible general control over A's very high rental charges would be under the equitable rules on 'unconscionable bargains'. However, the requirement here is for rather extreme procedural and substantive unfairness.[57] Indeed, it may well be similar to the sort of thing that could be covered by Article II. 7:207 of the DCFR on 'unfair exploitation'. The extent to which provisions of this nature could control unfair prices is really a matter that is beyond the scope of the current discussion.

[51] Art. II. 9:406(2).
[52] Art. 4 (2).
[53] Art. 32(3); although, as we shall see below, the proposed formulation may give a narrower substantive definition of price and also lays down more transparency conditions that must be satisfied for the exclusion to apply.
[54] Reg. 6(2).
[55] See UCTA, ss. 2-7 and 13.
[56] Reflecting the UTD, the test of unfairness is subject to all except expressly excluded terms (such as individually negotiated terms, core price and main subject matter terms and terms reflecting mandatory statutory and regulatory provisions (see regs. 4-6).
[57] See C. Willett, above, fn. 4, at 8.1.2.

(iv) Commentary

As far as regulation of the basic price is concerned, the UK approach to B2B contracts stands at the most freedom-oriented end of the spectrum. There is no statutory control over the substantive level of the price; and there is not even a control that is triggered in cases where there is procedural unfairness in the sense that the price is not plain and intelligible. Apart from the equitable rules on 'unconscionable bargains' mentioned above, we might, of course, mention basic common law rules on incorporation of terms. So, there does, of course, need to be incorporation of price terms, like any other term. However, the only requirement here is that there has been 'reasonable notice' of terms.[58] In general, this means no more than a chain of reference to the existence of the term in question.[59] It does not mean that the term must be in plain and intelligible language. Having said this, if a term is particularly onerous or unusual', it does need to be drawn to the attention of the other party in order to be incorporated;[60] and this might imply a need for plain and intelligible language.

The UK and the DCFR take essentially the same approach to price terms in B2C contracts. This is an approach that does indeed prioritise freedom of contract; but, nevertheless insists upon transparency (in the form of plain and intelligible language) as a pre-condition for being permitted freedom from a review that could consider the substantive fairness of the price. So, there is a form of procedural fairness in the shape of the plain and intelligible language rule; a requirement that a 'pure' freedom-oriented regime might not even have-as it does place limits on the means of presentation of terms and on the requirement for the other party to exercise a high degree of self reliance in trying to understand them. This extreme position is not taken. Price terms must pass a basic clarity threshold. Nevertheless, as long as this threshold is crossed, there is freedom of contract.

The exclusion of the core obligations (including those on price, but also those defining the main subject matter) from the tests of unfairness is resonant of civilian tradition, which seems to have traditionally distinguished between ancillary terms and core terms.[61] The distinction

[58] *Parker v SE Ry Co.* 2 CPD 416.
[59] See Willett, above, fn. 4, at 8.1.4.
[60] See *Interfoto Picture Library Ltd v Stiletto Visual Programmes* [1989] QB 433.
[61] A. De Moor, *Common and Civil Law Conceptions of Contract and a European Law of Contract: the Case of the Directive on Unfair Terms in Consumer Contracts* (3/1995) ERPL 257, at 268-8; and if the core elements of the parties' obligations are viewed as representing the main element of the consideration provided by the parties to each other, then the exclusion of these elements from review also fits with the common law notion of not being concerned with the adequacy of the consideration. The exclusion of core terms from the UTD (article 4 (2)) was as a result of pressure from the German government and appears to be based on the provision to this effect in article 8 of the German Standard Contracts Act of 1976; see H.-W. Micklitz, *The Politics of Judicial Co-operation in the EU* (Cambridge, CUP, 2005) 360.

appears to have been based upon the idea that there is rarely true consent to the ancillary terms; while there *is* true consent to the core terms.[62] Certainly, customers are much more likely to focus on the core performance promise of the trader and their own core price obligations than they are to focus on terms dealing with ancillary matters.[63] So, from one point of view, there is a stronger argument for adhering to a freedom-oriented approach in relation core terms, including core price terms. Of course, this is only the case where there is a good enough level of transparency, so that the consent is more likely to be genuinely 'informed consent'.

The issue may, indeed, go beyond the fact that there is a purer form of consent to these terms. Because customers focus on these issues, it may also be that the deal (on main subject matter and price) is more likely to be disciplined by market forces.[64] This, in turn, may mean that some of the other unfairness problems are reduced. First of all, there may be more choice on offer in the market in relation to these issues, as traders compete for business by reference to what they offer on these issues. This, in turn, may mean that the terms dealing with these issues are more substantively favourable to customers than is the case where ancillary terms are concerned. If there is no competition over the ancillary terms, traders can use them to load risks onto customers, while the competition in relation to the issues dealt with by core terms may prevent this happening.[65]

Having said all of this, there is no doubt that exclusion of these terms from the test of fairness means that there cannot be said to be the facility to ensure overall substantive fairness or to use contract law as a means of redistribution of wealth. Traders can, for example, increase prices in order to compensate for having to meet fairness standards in relation to ancillary terms. In addition, from one point of view, the result may be that customers are, on the whole, worse off. This is because the risk of being adversely affected by ancillary terms is only a fairly small one that will materialise in a few isolated cases in which there is a dispute of some kind; while higher prices will affect customers in every case. Another potential problem with excluding core terms from the test of fairness is that, in practice, the argument may be routinely raised by traders that terms fall into this category, even when they do not; but that lack of consumer knowledge means that they readily accept this argument and do not take the issue further.

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[62] *Ibid.*

[63] See Willett, above, fn. 4, at 4.4 and 5.8 for further development of this discussion.

[64] See Willett, *ibid.*, at 2.3.2.1 and see H. Beale, *The Directive on Unfair Terms in Consumer Contracts*, in J. Beatson and D. Friedmann, Good Faith and Fault in Contract Law (Oxford, Clarendon Press, 1997) 232 at 233; V.P. Goldberg, *Institutional Change and the Quasi-Invisible Hand* (1974) 17 J Law & Econ 461 at 483 ff.; and C. Willett, *Good Faith in Consumer Contracts: Rule, Policy and Principle*, in A. Forte, Good Faith in Contract and Property Law (Oxford, Hart, 1999) 181 at 185.

[65] V.P. Goldberg, *ibid.* and H. Beale, *ibid.*

Of course, some countries have taken advantage of the minimum clause in the UTD and do apply a test of fairness to price terms. This is the case where the Nordic countries are concerned; and the test seems, broadly, to be based on the idea that the price should at least be in line with the norm in the sector in question.[66]

As far as the UK is concerned, the Law Commissions are against removal of the exclusion of price (and other core) terms. In relation to the exclusion of price terms the view of the Law Commissions is that most consumers are reasonably alert to price, and that, given variation in market prices, even where markets are competitive (based on factors that might not be obvious to consumers) there could be large numbers of challenges. In addition the Law Commissions make the argument that there would be a lot of scope for argument, e.g. on issues such as the costs faced by traders and whether the market is competitive. The conclusion is that these factors would create too much uncertainty.[67]

Another dimension now, of course, is that the proposed CRD would be a maximum directive. So, the control of core price terms in B2C contracts at national level would not be allowed if such terms are regarded as being within the scope of the Directive; as such terms are excluded from control under the CRD.[68] From the point of view of fairness and consumer protection (not to mention respect for national choices as to social justice), this would clearly be very problematic.

There is, however, some scope to reduce the effects of the exclusion and so maximise the range of price related terms that escape control (and the CRD may do this). First of all, we can stipulate for a broader form of transparency as a pre-condition to price terms being free of control. At present, as we have seen, the requirement (in the UTD and the DCFR) is 'plain and intelligible language'. However, the CRD actually refers also to whether there has been a real opportunity to become acquainted with the term;[69] and to other, non-core, charges being expressly consented to[70]-possibly, inter alia, so as to sharpen the focus of the consumer on what the main price actually is. An improved level of transparency improves the chances of more genuine consent and of substantive control through competition; as well as broadening the range of terms that will be caught by the unfairness test (because it seems inevitable that some traders will not go to the effort of ensuring the requisite degree of transparency). In order to obtain such benefits in *B2B*

[66] See T. Wilhelmsson, *Social Contract Law and European Integration* (Aldershot, Ashgate, 1995) 199.
[67] Law Commission Consultation Paper on Unfair Terms, 2002, 3.27-3.34.
[68] Art. 32(3).
[69] Art. 31(2). This is referred to in the Preamble to the UTD (recital 20), but it is not obvious that it intended to refer to the applicability of the price term exclusion; and it is certainly not referred to in art. 4(2) which is the provision excluding price from review.
[70] Art. 31(3).

contracts, the DCFR provision would need to be amended so as to reflect the approach in the draft CRD.

The second point is that a narrow approach to defining what (*in substance*) counts as a core price term would obviously limit the circumstances in which customers could be treated unfairly. The UK courts have spoken, generally, of taking a 'restrictive' approach to what counts as a core term for the purposes of the legislation implementing the UTD.[71] The idea has been to focus on whether the term really represents what is payable in the due performance of the contract, in particular not including something that might be payable on default;[72] even where what is payable may still, technically, be a primary payment obligation and not, technically, represent compensation for breach.[73]

This might be tied to a concept of 'real' consent, defined by reference to reasonable expectations and competition (building on the points about consent and competition made earlier). Whatever awareness there might be of charges arising in default situations, these are not charges consumers typically expect to pay in the normal course of things. In the normal course of things, consumers expect to pay what is due in the course of routine performance.[74] This is a quite reasonable expectation, given the general problem of 'bounded rationality' allied with the fact that consumers are usually not 'repeat players' when it comes to experiencing default situations. Given these expectations, it is likely that the attention of consumers will be on the payments to be made in due performance of the contract. This, therefore, is where the richest form of consent is to be found and where the potential for competitive discipline is most realistic. By the same token, the limited consumer focus on default situations (even if the obligation is, technically, a primary one) means that consumers are likely to give a 'thinner' form of consent to terms dealing with such cases (and, consequently, less impact on competition). Indeed, the UK view may also be that some subsidiary or incidental primary obligations are not caught by the exclusion even where they do not arise in circumstances of default. In *First National Bank v Director General of Fair Trading*, it was said that 'incidental' and subsidiary' terms are not covered by the price

[71] *First National Bank v Director General of Fair Trading* [2001] 3 WLR 1297, Lord Steyn, at 1312.
[72] *First National Bank v Director General of Fair Trading*, *ibid.*
[73] In the First National Bank case the term imposed a continuing obligation to pay interest on sums ordered by the court to be paid by consumers defaulting on loans. The obligation to continue to pay interest in this way is arguably still a primary payment obligation, notwithstanding that the gist of the complaint is as to it continuing to be due at a time when the consumer is in default and a judgement has been issued. This notwithstanding it was held not to be an excluded price term. Equally, in *Abbey National plc and Others v Office of Fair Trading* [2009] EWCA Civ. 116, terms providing for various bank charges, arising in situations such as where consumers have exceeded an agreed overdraft limit, were treated as primary payment obligations. Nevertheless, they were held not to be excluded price terms. The argument was that this exclusion was only intended to cover payments that consumers would reasonably expect to make in the due performance of the contract (and that consumers would not view bank charges in this way). On the initial High Court decision in the *Abbey National* case see E. MacDonald, *Bank charges and the Core Exemption* (6/2008) 71 Modern Law Review 987.
[74] See C. Willett, above, fn. 4, at 5.8.3.

exclusion.[75] The case did, of course, concern a sum payable in circumstances of default, albeit under a primary obligation;[76] so that it might be that it is only such terms that were being contemplated as 'incidental' or 'subsidiary'. However, it seems possible that these words were also intended to extend to subsidiary primary price obligations that do not even arise in circumstances of default; but which are simply secondary to the main price charged.[77] Here, the consumer probably does reasonably expect to pay the sum in the due performance of the contract. Nevertheless, limited consumer information processing abilities may still mean that there is limited focus on such charges and, therefore, not particularly rich consent to them (and, further, limited knock-on competitive effects).

This sort of approach (if it is correct for the UTD) seems also to be legitimate for the DCFR in its application to both B2C and B2B contracts (as the language used there is virtually the same[78]). However, it would arguably be better if this sort of approach was spelt out (as has been suggested by the English and Scottish Law Commissions in relation to their review of the UK legislation implementing the UTD[79]).

In fact, the proposed CRD seems to unpack the issue in a way that emphasises a narrow approach. The DCFR refers simply to the 'adequacy of the price to be paid'; while the UTD (and UK UTCCR) refer to the adequacy of the price 'as against the goods or services supplied in exchange'. By contrast, the CRD refers to the 'adequacy of the remuneration foreseen for the trader's *main contractual obligation*' [italics added].[80] This seems to emphasise that we are referring not just to payments in general for anything the trader does; but payments for the main, core thing the trader does; or, put in UK terms, what the consumer would reasonably expect to pay in the course of due performance of the main (not the subsidiary) obligations, and certainly not what

[75] Above, fn. 71, Lord Bingham, *ibid.*, at 1304.
[76] Above, fn. 73.
[77] There may also be support for this approach by the Office of Fair Trading (the main UK regulatory body enforcing the unfair terms laws). The OFT view is that a term is only an excluded price term if it is 'central to how consumers perceived the bargain' (OFT Unfair Terms Bulletin, No 2, para. 2.25). It is arguable that secondary charges that do not represent the main price (even if they are routinely payable) are not necessarily central to how consumers would perceive a contract.
[78] Of course, what business customers reasonably expect to pay in the due performance of a contract, and more generally, what they give a rich degree of consent to, must be seen in the light of the fact that businesses are often part of a 'contracting community' that is much more experienced (than consumers) in how contracts play out in practice; see J. Wightman, *Beyond Custom: Contracts, Contexts and the Recognition of Implicit Understandings*, in D. Campbell, H. Collins and J. Wightman (eds), *Implicit Dimensions of Contract* (Oxford, Hart, 2003).
[79] Law Commissions, *Unfair Terms in Contracts*, 2005, para. 3.65; where it is proposed that the adequacy of the price should only be excluded from review where it is: (1) payable in circumstances substantially the same as the consumer reasonably expected ; (2) calculated in substantially the same way as the consumer reasonably expected; (3) not payable under a default or subsidiary term of the contract; (4) where it is transparent. The reference (in the third of these conditions) to 'default *or* subsidiary' terms may suggest an approach in line with that suggested above in the text (and see supra, notes 75-77); i.e. that the Law Commissions wish to leave open the possibility that subsidiary obligations may sometimes be subject to review even where they do not arise in circumstances of default.
[80] Art. 32(3).

would be paid in the case of default. The DCFR might usefully be amended to say the same sort of thing.

4. Coverage by Reference To Substantive Effects of Terms (B). Case 3

(i) Case 3

Unfairness of unilateral price variation terms – B2C and B2B contracts

A sells a car to consumer customer P and business customer Q. The agreed price is £20,000. On delivery, he asks each of them for an extra payment of £1,000, relying on a term providing that: 'A is entitled to increase the agreed price where this is necessary to cover increases in transportation and other costs'.

(ii) Legal Rules

As far as price variation is concerned, if A uses such a term it will be controlled under the DCFR unfairness test in both his contracts with P and Q. We know this because both relevant unfairness tests refer to the unfairness of a 'term'.[81] A 'term' can be derived from the 'express agreement' of the parties;[82] so, prima facie, price variation provisions are covered. Further, they are not covered by the exclusion of price terms discussed above; as the issue there is that there cannot be a review as to the basic adequacy of the price, i.e. whether it is too high. This is different from the question as to whether it is fair to increase it from whatever level has been agreed. It is made even more clear that such terms are covered in B2C contracts by the list of terms that are 'presumed to be unfair' in such contracts.[83] One of these is a term that:

'provides that the price of goods or other assets is to be determined at the time of delivery or supply, or allows a business to increase the price without giving the consumer the right to

[81] See Art. II. 9:403 and II. 9:405.
[82] Art. II. 9:101.
[83] Art. II. 9:410.

withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described'.[84]

Explicit mention of such terms follows the approach already taken in the UTD for B2C contracts;[85] and the position implemented by the UK in the UTCCR for such contracts.[86] However, these provisions do not actually contain the *presumption* of unfairness that is contained in the DCFR. Under the UTD (and, reflecting it, the UK UTCCR) the list containing the price variation term is simply an 'indicative' list of terms that 'may be regarded as unfair'.[87] A presumption of unfairness in relation to price variation terms *is*, however, provided for in the proposed CRD.[88]

To summarise then, in A's contract with consumer customer P, the UTD, UTCCR, DCFR and proposed CRD regimes would allow his price variation term to be challenged for unfairness. Under the UTD and UTCCR regimes, the full burden of establishing unfairness is on P (although the presence of such a term on the indicative list will undoubtedly be of help to P).

However, under the DCFR and CRD, if the term satisfies the criteria in relation to such a term on the 'presumed unfair' list, then it is presumed to be unfair and A has the burden of showing that it is not unfair. Nevertheless, it would still appear that the initial burden is on P to establish that the term does, indeed, satisfy the criteria in question (as there is no 'presumption' to this effect). So, under the DCFR and CRD regimes the basic question would be whether P can show that the increased price allowed for is too high by comparison with the price agreed at the time of conclusion of the contract. Then P must show that A has not provided for his customers to be entitled to withdraw from the contract in such circumstances. Once this is established the burden seems to shift to A to establish that, these points notwithstanding, the term is not unfair.

In A's contract with business customer Q, applying the DCFR regime, the term is subject to the general test of unfairness; but it is neither indicatively unfair, nor presumed to be unfair (no such list exists for B2B contracts). So, the full burden of establishing unfairness is on Q. In addition, the above criteria as to the extent of the increase and whether there is a right to withdraw do not actually apply (there being no list describing the term and the relevant criteria); although such

[84] Para. 1 (k).
[85] UTD Annex, para. 1 (l).
[86] UTCCR, Schedule 2, para. 1 (l).
[87] UTD, art. 3 (3) and UTCCR, reg. 5(5).
[88] Art. 35 and Annex III, para. 1 (g); and we shall see below that the level of protection offered under the proposed Directive may actually be higher than that offered by the DCFR.

criteria might sensibly be taken into account in applying the general test of unfairness to B2B contracts such as that between A and Q.

We then turn to the position in B2B contracts under the UK regime. The simple answer is that the term is not controlled under current UK law. As we saw above, there is no general statutory control over terms imposing obligations on business customers. The UCTA (although applicable to B2C *and* B2B contracts) only applies to clauses by which one exempts one's liability. It does not cover terms involving the imposition of unfair obligations or liabilities on others; so it does not cover a term such as a price variation clause. The UTCCR *do* control obligation and liability imposing terms, such as price variation clauses; but only in B2C contracts. In short, under current UK law, Q is bound to the price increase.

(iii) Commentary

Let us begin with B2C contracts. We have seen that there is control of such terms in B2C contracts in the DCFR and (following the UTD) in UK law. This is not inconsistent with the exclusion from review of the basic amount of the price. The consistency can be found in the notion of reasonable expectations. Whether the basic amount of the price *should* be reviewable on social justice or other fairness grounds, we have seen that it can be rationalised that the main price is at least something that the consumer reasonably expects to pay. However, the point is that this is usually *all* that he reasonably expects to pay. He will be unlikely to focus on subsidiary terms allowing for price increases; so there is a clear case, on reasonable expectations grounds, for control of such terms.[89]

We also saw that the approach of the DCFR (for B2C contracts) (and the CRD) is to move to a presumption that certain price variation terms are unfair. Essentially, under the DCFR, this is where the increased price allowed for is too high by comparison with the price agreed at the time of conclusion of the contract; and there is no ensuing right for the consumer to cancel. It may, in fact, be that the proposed CRD offers a slightly more protective approach. There the presumption of unfairness arises simply where there is provision for an increase per se and there is no right to terminate.[90] In other words, there is no need for the consumer to establish that the price allowed for is too high by comparison with the price agreed at the time of conclusion of the contract. Provision for *any* increase (without a right to terminate) is enough to raise the presumption of unfair-

[89] There is also a' thinner' form of consent to such terms.
[90] Annex 3, para. 1 (g).

ness. Of course, it is true that the trader may find it easier to establish that there is no unfairness where the provision for increase does not allow the price to go up by more than a small amount. Nevertheless, the balance does seem to be shifted somewhat in favour of the consumer and against increases per se.

We also saw that in B2B contracts, under the DCFR, price variation terms are subject to the test of unfairness. They are not listed explicitly as terms that are presumed to be unfair; but then neither are any terms in B2B contracts. They are not explicitly excluded (certainly not being covered by the core price exclusion, which relates to the basic amount of the price, not the question of variation). Further, their coverage by the unfairness test is, as with B2C contracts, justified on the basis that the business affected by them may well not have reasonably expected that such an increase would take place. Nevertheless, the presumption of unfairness does not apply in B2B contracts. In addition, of course, it may well be that some businesses *will* reasonably expect the other to have stipulated for a price increase; and, such a term may be more likely to be fair in B2B contracts in general, e.g. on the basis of the stronger bargaining power of the business subject to the term (compared with the average consumer) or its greater ability (by comparison with consumers) to absorb the increase. However, this can be taken into account in application of the unfairness test itself. Indeed, the B2B test requires that the term be:

'of such a nature that its use *grossly deviates from good commercial practice*, contrary to good faith and fair dealing'.[91]

The focus on 'good commercial practice' allows the assessment as to what the business reasonably expected to be judged by reference to the normal standards of the market. This is more likely to be a legitimate measure in B2B contracts, where businesses are likely to have more experience as to what typically happens.[92] (The test for consumers is whether the term 'significantly disadvantages the consumer, contrary to good faith and fair dealing';[93] so that the measure of reasonable expectations, and fairness more generally, is *not* the market norm.) We also saw, however, that price variation clauses are not controlled under current UK law in B2B contracts. This seems to fail to recognise the potential reasonable expectation justification for control outlined above. In addition, it seems to be inconsistent with the UK approach to exemption clauses. Some such clauses are controlled in UK law in B2B contracts, specifically on

[91] Art. II. 9:405.
[92] This may be because some businesses will be members of a contracting community in which price increases are regularly experienced (supra, note 78). Of course, this is not to say that there are not businesses that do not have this experience; so the test may place too much focus on the business practice measure.
[93] Art. II. 9:403.

the basis that they allow for a contractual performance that is substantially different from that reasonably expected by the other party.[94] So, there has been a failure to follow through the reasonable expectation logic to obligation imposing terms.[95] Of course, the issue goes beyond reasonable expectations. In B2B contracts, terms imposing obligations and liabilities may be unfair in other ways, e.g. by allowing one business to terminate for non serious breaches[96] or allowing a business to require full pre-payment for work, thereby removing any possibility of the other business withholding payment when there are defects in the work. Such terms can be tested for unfairness under the DCFR unfairness test applicable to B2B contracts; but they are not currently covered in the UK; where the 'unfairness focus' has traditionally been on clauses excluding or restricting liability. The same was true in relation to B2C contracts in the UK (UCTA only covering exemption clauses) until broader coverage was required by the UTD (and implemented by the UTCCR); so that terms imposing unfair obligations and liabilities on the consumer are (as they are in the DCFR) covered in UK B2C contracts.

Yet, as we have seen, problems of terms compromising reasonable expectations and causing unfairness more generally can also arise in B2B contracts. Limited understanding of terms, limited bargaining power and substantive vulnerability to the effects of terms can affect business contractors. This is recognised by the Law Commissions in the UK, at least in relation to small businesses; and it has been recommended that a 'fair and reasonable' test should be applicable to standard terms that impose obligations and liabilities on the other party (i.e. extending beyond the UCTA approach of only controlling terms excluding or restricting liability) (but not extending to the core price).[97] This would bring the UK regime into line with the DCFR approach in relation to the terms covered in B2B contracts (at least in the sense that there would be a general fairness control, albeit that the particular fairness concepts are at least worded differently).

5. Concluding Comments

In relation to unfairness issues, we see various similarities and distinctions between the DCFR and the UK. The former is tied to a 'freedom to negotiate' notion that excludes from control negotiated terms; although there are exceptions. The latter takes a more protectionist app-

[94] UCTA, s. 3 (2) (b) (i).
[95] The same was true in relation to B2C contracts in the UK (UCTA only covering exemption clauses) until broader coverage was required by the UTD (and implemented by the UTCCR).
[96] See Law Commissions, *Unfair Terms in Contracts*, 2005, 5.8.
[97] See Law Commissions, *ibid.*, chapter 5.

roach to this issue in general, particularly in B2C contracts; but may be edging towards the DCFR approach in B2B contracts. At a more technical level, there are a variety of questions and some confusion as to where the precise lines are drawn (and how much consistency there is) in and between UK, DCFR and CRD approaches to the issue.

There is a fairly consistent approach to price terms under the various regimes; whereby, in broad terms, such terms are not fully controlled, social justice goals giving way to more limited, 'semi-protective' notions of informed consent and reasonable expectations. There are, at least, signs (in the CRD and the UK approaches) of attempts to maximise these 'semi-protective' elements of the regime.

The UK and DCFR approaches to price variation clauses in B2C contracts are similar and the future approach (caused by the CRD and reflected in the DCFR) is to presume unfairness in such cases. UK law lags behind the DCFR in B2B contracts; in failing yet to recognise that the reasonable expectation and other unfairness problems (applicable where exemption clauses are concerned) can also apply to terms such as price variation clauses as well as other terms by which a business imposes unfair obligations or liabilities on another business. However, the Law Commission recommendations would recognise this, at least where small businesses are concerned.

Change of Circumstances

DCFR, Book III: Obligations and corresponding rights; Chapter 1, Art. 1:110: Variation or termination by court on a change of circumstances

by

Valentina Bineva

Summary: 1. Introduction. – 2. Three Cases. – Case 1. – Case 2. – Case 3. – 3. Concluding Remarks.

1. Introduction

In legal practice, it can happen that after the conclusion of a contract, but before its performance, a change beyond the parties' control occurs in the circumstances under which the contract was concluded. Such change can occur in an ordinary manner and be foreseeable, but it can also be unexpected and unforeseen by the parties at the time when they conclude the contract. Sometimes, it only marginally affects the equilibrium of the contract and performance of obligations resulting from it. At other times, however, such a change can make performance of contractual obligations more onerous or even impossible. Legal theory differentiates between the two situations, sometimes defining the first one as a "hardship" (*Störung der Geschäftsgrundlage*), and the latter as "*force majeure*"[1]. Common law appears to address all these problems under the doctrine of frustration[2].

National legal systems tackle this issue in different ways. Some are very reluctant to allow variations in contractual relationships due to fundamental changes in circumstances, others

[1] H. Rösler, *Hardship in German Codified Private Law – In comparative perspective to English, French and International Contract Law* (3/2007) ERPL 485.
[2] A.G. Guest (ed.) *Anson's Law of Contract*, 26th edn (Oxford, Clarendon Press, 1984) 443-449.

provide for both termination and variation of obligations, while still others provide for termination but not any variation[3].

The contribution aims at analyzing the solutions for the above mentioned legal problems in the Draft Common Frame of Reference (DCFR) in comparison with the relevant rules of Bulgarian law.

2. Three Cases

Case 1[4]

Hardship

Amigos Trade Ltd. agreed to sell Bio Nutrition Ltd. a quantity of groundnuts to be shipped from Sudan to Hamburg in November or December. The price of the groundnuts CIF Hamburg was calculated on the basis of shipment via the Suez Canal. On November 2, the Canal was closed and remained closed for the next five months. The contract contained no term contemplating the possible closure of the Canal. Although it was still possible to ship the nuts to Hamburg around the Cape of Good Hope, that would have made the shipment much more expensive. Amigos Trade Ltd. refused to perform its contractual obligation because of the changed circumstances.

Variation: How would the case be resolved if the goods were perishable or a definite date had been fixed for delivery?

Draft Common Frame of Reference

(i) Notwithstanding the fact that it has become more burdensome for the debtor, the seller Amigos Trade Ltd., the contractual obligation for shipment of goods CIF Hamburg still must be performed (III. – 1:110 (1) DCFR). Since the contract is binding for the parties (II. – 1:103 (1) DCFR), obligations resulting from it can only be modified or terminated by an agreement between the parties or as provided by law (II. – 1:103 (3) DCFR).

[3] Rösler, *op. cit.*, 507.
[4] *Source:* Guest (ed.), *op. cit.*, 448.

However, if the change of circumstances is regarded as exceptional, and as a result of it, the contractual obligation has become so onerous that it will be manifestly unjust to keep the debtor bound by it, the debtor is entitled to pursue variation or termination of the obligation. In such case the seller Amigos Trade Ltd. is obliged to attempt to negotiate with the buyer Bio Nutrition Ltd., reasonably and in good faith, a reasonable and equitable adjustment of the obligation (III. – 1:110 (3) (d) DCFR). Only if such negotiation fails is the seller entitled to file a claim in court for either variation of his obligations to make them reasonable and equitable in the new circumstances; or for the termination of the obligations altogether (III. – 1:110 (2) DCFR).

In a case where the goods that are the subject-matter of the contract between Amigos Trade Ltd. and Bio Nutrition Ltd. are perishable or a definite date for delivery has been fixed, the seller's non-performance due to closure of the Suez Canal can be excused under a provision of art. III. – 3:104 DCFR (excuse due to an impediment). Since this would then be a case of excused non-performance, the seller would not have to pay damages (III. – 3:101 (2) DCFR) and the buyer would not be allowed to demand specific performance (III. – 3:101 (2) DCFR).

(ii) A contract for sale of goods was concluded between Amigos Trade Ltd. and Bio Nutrition Ltd. (IV. A. – 1:202 DCFR). Under this contract, the seller Amigos Trade Ltd. has the obligation for carriage of the goods CIF Hamburg via the Suez Canal. In accordance with this clause the seller is obliged to: load the goods on board; conclude a contract for carriage to Hamburg, and pay the freight, as well as all other costs; bear all risks of loss of or damage to the goods until they have passed the ship's rail at the named port of shipment in Sudan; and obtain transferable marine insurance[5].

After conclusion of the sales contract, a significant change of the relevant circumstances occurred – i.e., unexpected and long-term closure of the Suez Canal. This potential change of circumstances was not addressed by the parties in the contract. Nevertheless, the seller's contractual obligation for carriage of goods can still be performed using a longer and more expensive route. As a result of this change of circumstances, the costs for carriage of goods to Hamburg will increase significantly. Since these costs are supposed to be paid by the seller, it can be concluded that for the latter the contractual obligation to provide a carriage of goods would become more onerous.

Provided that the seller and the buyer cannot reach an agreement for a reasonable and equitable adjustment of the obligations (III. – 1:110 (3) (d) DCFR), the seller is entitled to file a claim in court for variation or termination of his obligation. In order to obtain such a modification

[5] INCOTERMS 2000 available at http://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS2000_e.pdf (last visited 20.01.2008).

or termination, the seller must prove that the closure of the Suez Canal represents an exceptional change of circumstances. Furthermore, the seller bears the burden of proof that this change has caused such an increase in the cost of performing his obligation for the carriage of goods CIF Hamburg that it will be manifestly unjust to ask for performance of this obligation (III. – 1:110 (2) DCFR). If all these requirements are met, the seller's claim of the seller for variation or termination of his contractual obligation will be upheld. The court will decide at what date and on what terms the obligation will be terminated (III. – 1:110 (2) (b) DCFR).

When the goods are perishable or a definite date for delivery has been fixed, the closure of the Suez Canal can be considered as an impediment to performance beyond the seller's control that could not have been taken into account at the time of conclusion of the sale contract. The seller must notify the buyer about the impediment and its effect on his ability to perform his obligation (III. – 3:104 (5) DCFR). The notification must be made within a reasonable time after the seller knows or could reasonably be expected to have known of this new circumstance. If carriage of goods around the Cape of Good Hope will extend the delivery date beyond the date of expiration of the goods, or if the carriage is completed later than the agreed date of performance, the buyer may treat the delay fundamental non-performance and terminate the contractual obligation (III. – 3:104 (3) in connection with III. – 3:502 DCFR). It is not clear, however, whether or not the termination will have retrospective or prospective effects. According to art. III. – 3:104 (3), in connection with Chapter 3, Section 5, Sub-section 4 (Restitution), and in particular with art. III. – 3:510 (1) DCFR, restitution of any benefit received under performance will follow termination of the legal relationship. Therefore, it seems probable that the termination will have retrospective effects.

Bulgarian law

(i) The seller is not entitled to refuse performance of his obligation. According to art. 288 of the Commercial Law (CL), in connection with art. 20a (1) of the Law on Obligations and Contracts (LOC), the sale contract has binding effects for the parties and the contractual relationship can only be varied, terminated, or avoided by a further agreement between them or as provided by law[6]. One of these provisions is art. 307 of CL[7], according to which the debtor (the

[6] Решение от 21.06.2000г. по МАД № 122/1999г. на АС при БТТП [Judgement of 21.06.2000 of IAC № 122/1999 of AC of BCCI]; Решение от 30.07.2000г. по МАД № 3/2000г. на АС при БТТП [Judgement of 30.07.2000 of IAC № 3/2000 of AC of BCCI]; Решение от 16.12.2004г. по ВАД № 75/2004 г. на АС при БТТП [Judgement of 16.12.2004 of DAC № 75/2004 of AC of BCCI]; Решение от 01.10.2002г. на АС при Българската стопанска камара по арб. д. № 2/2002г. [Judgement of 01.10.2002 of arbitration case № 2/2002 of AC of BIA].

seller, in the case concerned) is entitled to file a claim in court for either variation or termination of his obligation under the contract due to new circumstances that occurred after the conclusion of contract that the parties could not have foreseen at the time of conclusion and which make the performance of the contractual obligations inconsistent with fairness and good faith.

If the subject-matter of the sales contract is perishable goods and the period of time necessary for the carriage of these goods around the Cape of Good Hope will extend the delivery date beyond the expiration date of the goods and there are no other ways for the seller Amigos Trade Ltd. to carry the goods CIF Hamburg on time, a court may find that an impediment to the performance of the seller's obligation has occurred, *i.e. force majeure*, according to art. 306 (3) of CL. The seller must notify the buyer about this new circumstance and about its effect on the performance of the contractual obligations. In this case, either party can terminate the contractual relationship (art. 306 (4) of CL), and termination will have a prospective effect[8]. The same outcome would result if a definite date for the delivery of goods had been fixed.

(ii) A commercial contract has been concluded for sale of goods between the seller Amigos Trade Ltd. and the buyer Bio Nutrition Ltd (art. 318 – art. 341 of CL).

The seller and the buyer have agreed delivery of goods to a place (Hamburg) that is not the place of performance (a port in Sudan). Therefore, the provision of art. 330 of the Commercial Law regarding the allocation of costs for a so- called "distance sale"[9] applies to the contract. With respect to costs for the carriage of goods, the parties have used the term CIF of the INCOTERMS. This means that the seller is responsible for paying costs, insurance and freight necessary for the carriage of goods to Hamburg *via* the Suez Canal[10].

After the conclusion of the sales contract but before performance, circumstances have changed under which the contract was concluded, *i.e.* the Suez Canal has been closed. The seller and the buyer did not take this possibility into account at the time of conclusion of contract. Despite this change, there are no impediments to performance of the contractual obligations, as the goods can still be carried to Hamburg around the Cape of Good Hope. However, carriage via this longer route will increase the seller's costs; hence, this will make the seller's obligation more burdensome. The seller can file a claim in court for either a variation or the termination of his obligation (art. 307 of CL). He bears the burden of proving that, due to this change of

[7] Тълкувателно решение № 2 от 01.12.1997г. на ОСГК на ВКС [Interpretative judgement № 2/1997 of General Assembly of Civil College of SCC of RB]; М. Бобатинов, *Искове за допълване, изменение и прекратяване на търговските договори* (2003) 8 Пазар и право, с. 35 [M. Bobatinov, *Claims for supplement, amendment and termination of commercial contracts* (2003) 8 Market and Law 30-35].

[8] О. Герджиков, *Търговски сделки. Книга по част III от Търговския закон* (София, ИК "Труд и право", 1997), с. 34 [O. Gerdzhikov, *Commercial judicial acts. Part III of the Commercial Law* (Sofia, "Trud i pravo", 1997) 34].

[9] Герджиков [Gerdzhikov], *op. cit.*, 74-75.

[10] INCOTERMS 2000 available at http://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS2000_e.pdf (last visited 20.01.2008).

circumstances, requiring performance of his contractual obligation would be contrary to fairness and good faith. Requiring performance is considered unfair when a change of circumstances produces a significant asymmetry in the reciprocal obligations between parties and the contractual obligation has become onerous for the debtor, i.e. the seller Amigos Trade Ltd. in this case[11]. Performance is considered in contrast to the good faith requirement when it is contrary to fair-dealing and honesty[12]. In this case, to be entitled to variation or termination of his obligation under the sales contract, the seller must prove that, due to the increased costs for the carriage of goods CIF Hamburg around the Cape of Good Hope, performance of his obligation would be contrary to fairness and good faith. According to Bulgarian case law, in order to ask a court for variation or termination of contractual obligations, it will be sufficient for the debtor to prove that due to an unexpected change of the circumstances under which the contract was concluded, the performance of his contractual obligation will be unfair and will have an unjustified social effect[13]. Some Bulgarian legal scholars go further and suggest that only changes of circumstances that will make performance of contractual obligations result in insolvency of the debtor should be considered relevant[14].

Provided that either the subject-matter of the sales contract is perishable goods or a definite date for the delivery of goods has been fixed, and there is no other way for the seller to carry the goods CIF Hamburg on time, a court may hold that an impediment to the performance of seller's obligation has occurred. This impediment may then be treated as *force majeure* (art. 306 (3) of CL) – an exceptional, unforeseen or unavoidable circumstance beyond the control of the debtor which occurred after the conclusion of contract and has resulted in impossibility for performance of its obligations. The seller Amigos Trade Ltd. bears the burden of proof that the non-performance is due to *force majeure*[15].

Comments

This case is a classic example of a change in the circumstances under which a contract was concluded after which performance of the contractual obligation is still possible but has

[11] Герджиков [Gerdzhikov], *op. cit.*, 36.
[12] А. Калайджиев, *Облигационно право – обща част* (София, Издателство "Сиби", 2001), с. 281 [A. Kalaydzhiev, *Law of Obligations* (Sofia, SIBI, 2001), 281].
[13] Решение от 03.07.2008г. по ВАД № 196/2007г. [Judgement of 03.07.2008 of DAC № 196/2007 of AC of BCCI]; Решение № 255 от 24.04.2002г. по гр. д. № 1079/2001г., V г.о. на ВКС [Judgement № 255/2002 of civil case № 1079/2001 of V Civil Division of SCC of RB]; Решение № 115 от 08.05.2008г. по т. д. № 774/2007г., II о., ТК на ВКС [Judgement № 115 / 2008 of commercial case № 774/2007 of Commercial College of SCC of RB].
[14] Калайджиев [Kalaydzhiev], *op. cit.*, 281.
[15] Решение от 16.06.2004г. по ВАД № 16/2004г. на АС при БТТП [Judgement of 16.06.2004 of DAC № 16/2004 of AC of BCCI].

nonetheless become more onerous for the debtor. The seller can still perform his obligation to carry the goods CIF Hamburg, but the amount of the costs for his performance will be significantly higher than originally expected.

The core legal issue in this case is whether, notwithstanding the changed circumstances, the debtor is still obliged to perform the obligation or instead has the right to refuse performance.

Both the DCFR and Bulgarian law have specific provisions for this case, *i.e.* art. III. – 1:110 (Variation or termination by court on a change of circumstances) DCFR and art. 307 of CL. The analysis of these provisions reveals some similarities as well as some differences in both the requirements for their applicability and the available remedies.

First, under the provisions of both the DCFR and national law the debtor is not entitled to refuse performance of his obligation and to vary or terminate it unilaterally. The contract is binding on the parties and all rights and obligations resulting from it can only be modified or terminated by a further agreement between the debtor and creditor or as provided by law.

Furthermore, both sets of rules entitle the debtor to file a claim in court for either variation or termination of his obligations if some specific requirements are satisfied. Moreover, under the provisions of both the DCFR and national law the debtor bears the burden of proving that the requirements are met.

Legal analysis reveals some differences between the requirements under the provision of the DCFR and national law.

First, under the DCFR after the change of circumstances the debtor must first try to negotiate a variation of his obligations with the creditor (III. – 1:110 (3) (d) DCFR). Under national law, it is not explicitly required that the debtor attempt to negotiate with the creditor. Nevertheless, under the general requirement of performance of the obligations in good faith (art. 63 of LOC) it can be assumed that the debtor must try to reach agreement with the creditor as a first step.

Second, there are some differences between the requirements that have to be satisfied to justify the claim for variation or termination of the contract under the two systems (III. – 1:110 (2) (3) DCFR; art. 307 of CL). Applying art. III. – 1:110 (2) (3) DCFR is complicated by the need to interpret the undefined terms “exceptional change of circumstances” and “manifestly unjust”. However, the comments and notes of the forthcoming full edition of the DCFR will probably elucidate the exact content of these terms.

Third, the power of courts as well as the legal effects of their judgements are regulated in the DCFR in a way that differs slightly from the way they are regulated under national law. For instance, under the provision of the DCFR, the court has wider discretion to adjudicate at what

date and on what terms the obligations will be terminated (III. – 1:110 (2) (b) DCFR). Under national law, the power of court is limited by the claim, i.e. if a claim has been brought for only partial termination of certain obligations, the court will not be entitled to terminate the whole relationship.

Furthermore, under national law the judicial decision will have prospective effect[16]. Under the provision of the DCFR it is not clear what legal effects the court decision will have – retrospective or prospective.

Finally, the particular provision of national law (art. 307 of CL) is only applicable to contractual obligations[17]. On the contrary, art. III. – 1:110 DCFR concerns both contractual obligations and obligations arising from a unilateral juridical act.

This hypothetical case is based on a real case that arose in England. However, in that case the House of Lords rejected the existence of a frustration of the contract, since the carriage around the Cape of Good Hope was not regarded as fundamentally different[18].

When the subject-matter of the sales contract is perishable goods or if the date of performance has been fixed, the DCFR and Bulgarian law produce very similar outcomes, although with some slight differences. Both sets of rules treat such a change as an impediment to performance beyond the debtor's control, but they employ different terminology: Under the DCFR, this is an "impediment beyond the debtor's control" (III. – 3:104 (1) (2) DCFR), while under national law, this is a case of *force majeure* (art. 306 of CL).

Notwithstanding these terminological differences, the outcomes these provisions produce remain very similar. In both cases, the debtor must notify the creditor of the new circumstance and its effect on performance of the obligations. Provided this new circumstance is only temporary, such notification temporarily excuses the non-performance under both the DCFR and national law. If the changed circumstance continues for a period beyond which the creditor loses his interest in performance, available remedies are slightly different under the two sets of rules. Under Bulgarian law, each party can terminate the contractual relationship in such a case (art. 306 (4) of CL) and termination will have prospective effect. According to the provision of the DCFR, a delay in performance can under specific conditions be regarded as fundamental non-performance and the creditor can terminate the contract (III. – 3:104 (3) DCFR). It is then not clear whether such termination will have retrospective or prospective effect. According to art. III.

[16] On the contrary, for example under German law termination has retrospective effect (§ 313 (2) in connection with § 346 BGB), unless it is a continuing obligation, in which case termination has prospective effect: Rösler, *op. cit.*, 490.

[17] The same scope of application applies to the provision about the fundamental change of circumstances under German law – § 313 BGB: Rösler, *op. cit.*, 490.

[18] *Tsakiroglou & Co Ltd* v. *Noblee Thorl GmbH* [1962] quoted after Guest (ed.), *op. cit.*, 448.

– 3:104 (3), in connection with Chapter 3, Section 5, Sub-section 4 (Restitution), and particularly with art. III. – 3:510 (1) DCFR, termination of the legal relationship creates an obligation to provide restitution of any benefit received. It therefore seems that termination will have retrospective effect. However, the interpretation of art. III. – 3:104 (3) DCFR may cause difficulties when applying this provision.

Since this will be a case of excused non-performance, the debtor will not have to pay damages, and the creditor will not be able to claim specific performance (see III. – 3:101 (2) DCFR; art. 306 of CL). Under Bulgarian law, however, the debtor will have to pay damages if when *force majeure* occurred his performance had already been delayed (art. 306 (1) 1 sentence of CL) or if he failed to notify the creditor the existence of the *force majeure*.

Case 2[19]:

Force majeure

Alfred had an orchard and grew a very rare kind of apples. Boris, Cyril, and Daniel each offered to buy a different amount of apples from him.
Alfred sold Boris 50 kg of apples and Boris paid Alfred in full. They agreed that Boris would return five days later to pick the apples he had bought.
Cyril bought 40 kg of apples from Alfred, paid in full, picked 40 kg of apples from the orchard and took them home.
Daniel bought 60 kg of apples from Alfred, picked 60 kg of apples from the orchard, put them in boxes and left the boxes at the edge of the orchard. Alfred and Daniel agreed that Daniel would return at the end of the week to pay what he owed and retrieve the apples.
The next evening there was a storm. As a result, all of Alfred's remaining apples were shaken from the trees, and almost all the crops got lost or damaged. The strong wind uprooted a few apple trees and all the apples in the boxes Daniel had left were scattered.
When they found out about the storm, Boris and Daniel called Alfred and informed him that they were terminating their contractual relationships with him. Furthermore, Boris also demanded that Alfred return the money Boris had paid.

[19] *Source:* П. Попов *Облигационно право – казуси* (София, Университетско издателство "Св. Климент Охридски", 1991), с. 32 [P. Popov, *Law of Obligations - Cases* (Sofia, Univ. Edit. "St. Kliment Ohridski", 1991) 32].

Draft Common Frame of Reference

(i) According to art. III. – 3:104 (1) DCFR, a permanent impediment to performance of the seller's obligation to deliver the subject-matter of a sales contract has occurred; therefore, the seller Alfred's obligation to deliver the goods is extinguished (III. – 3:104 (4) DCFR). The buyer Boris's reciprocal obligation is extinguished as well (III. – 3:104 (4) DCFR). As the buyer has already paid the price to the seller, the latter must return it (III. – 3:104 (4) in accordance with art. III. – 3:510(2) DCFR).

Furthermore, since the loss and damage caused by the storm occurred after title to the apples and along with it the risk of loss or damage had transferred (IV. A. – 5:102 (1) DCFR), the buyer Daniel will still have to perform his obligation to pay the price of the apples he bought (IV. A. – 5:101 DCFR) and is not entitled to refuse payment.

(ii) Between Alfred and Boris, Alfred and Cyril, and Alfred and Daniel, binding legal relationships exist on the ground of the contracts for the sale of goods, concluded in accordance with art. IV. A. – 1:202 DCFR. The subject-matter of these contracts is definite quantities of individually non-identified goods – a rare kind of apples grown in Alfred's orchard in this particular season.

First, between Alfred and Boris a contract for the sale of goods has been concluded, under which Alfred is the seller and Boris the buyer (IV. A. – 1:202 DCFR). At the time of the event that damaged the goods (the storm) the subject-matter of the contract was not individually identified (the fruits had not been picked from the trees) and the contract was not performed to completion, since the obligation to deliver the goods had not yet been performed (IV. A. – 2:101 (b) DCFR; IV. A. – 3:101 (b) DCFR). At that moment, only the buyer had completed performance. According to art. IV. A. – 5:102 (2) DCFR, the risk of loss or damage of goods caused by the storm had not yet passed to the buyer Boris, since the goods had been individually identified neither in the contract between Alfred and Boris, nor by marking them, nor by shipping them, nor otherwise. The risk remained with the seller Alfred. That is why the buyer Boris has been discharged from his obligation to pay the price – *per argumentum a contrario* art. IV. A. – 5:101 DCFR.

The unexpected event (the storm) has caused loss and damage to the whole apple crop in the seller's orchard. Since the apples were of a very rare variety, it can be assumed that it will be very difficult for the seller Alfred to find and deliver to the buyer Boris the same quantity of the same type of apples. Therefore, the seller Alfred's obligation to deliver the goods is extinguished

(III. – 3:104 (4) DCFR); the obligation of the buyer has been correspondingly extinguished as well (III. – 3:104 (4) DCFR).

Second, under the sales contract between Alfred and Cyril, Alfred is the seller and Cyril is the buyer (IV. A. – 1:202 DCFR). The contract for the sale of goods between Alfred and Cyril has been performed to completion. Since Cyril picked up and took possession of the goods, the seller performed his obligation to deliver goods to the buyer (IV. A. – 2:101 (b) DCFR). The buyer Cyril, meanwhile, has also completely performed his obligations under the contract: He has paid the total amount due (IV. A. – 3:101 (a) DCFR) and has taken possession of the goods (IV. A. – 3:101 (b) DCFR). At the moment when the buyer Cyril took possession of the goods, the risk of loss or damage passed from the seller Alfred to him (IV. A. – 5:102 (2) DCFR). Since the event that caused loss and damage of the goods (the storm) happened after complete performance of the contractual obligations, the new circumstance is irrelevant to the contract between Alfred and Cyril. At that moment, neither the seller had outstanding obligations under the contract – these had been extinguished by full performance (III. – 2:114 DCFR).

Lastly, between Alfred and Daniel there is a binding legal relationship in which Alfred is the seller and Daniel is the buyer (IV. A. – 1:202 DCFR). At the time of the conclusion of the sales contract, the goods that were the subject-matter of the sales contract had not been individually identified. But when the buyer Daniel picked the apples from the trees, put them in boxes and left the boxes at the edge of the orchard, the risk of loss or damage of goods passed from the seller Alfred to the buyer Daniel (IV. A. – 5:102 (2) DCFR).

Bulgarian law

(i) The loss and damage of the fruits, caused by subsequent unexpected and unavoidable circumstances, resulted in it being impossible for the seller Alfred to perform his obligations. The contractual relationship will therefore be terminated with retrospective effect (art. 89 of LOC), and the seller Alfred must return the amount paid to the buyer Boris.

The risk of loss or damage caused by the storm is born by the buyer Daniel. He is not entitled to terminate his obligations under the sales contract because there has not been any non-performance by the seller. The buyer Daniel must still perform his obligation to pay the price of the goods to the seller Alfred.

(ii) Between Alfred and Boris a contract has been concluded for the sale of goods (art. 183 – art. 213 of LOC). The subject-matter of this contract is a specified amount of goods that were not individually identified at the time of contracting – 50 kg of a rare variety of apples grown in

the seller's orchard in that season. Since the goods were not identified by the time the contract was concluded, ownership of the goods would have transferred (and the risk of loss or damage would have passed) from the seller to the buyer at the moment when the goods were identified (art. 24 and art. 186a of LOC). The parties had agreed that this would have been done later – five days after the conclusion of the sales contract. Until then, the seller Alfred remains the owner of the goods, and he bears the risk of loss or damage of them. The buyer Boris has performed his obligation by paying in full.

The storm, which arose before complete performance of the obligations under the sales contract between Alfred and Boris, made it impossible for the seller to perform his obligations. Since the apples are of a very rare kind it can be assumed that it will be very difficult for the seller to find other goods of the same quality and characteristics[20]. According to art. 89 of LOC, in such a case the contractual relationship shall be terminated with retrospective effect. Each party must then return any benefit received from the performance of the other party (art. 55 of LOC)[21].

As for the contract for sale of goods concluded between Alfred and Cyril, the obligations which arose under it have been completely performed. The buyer Cyril paid in full, picked the apples, and took possession of them. At that moment, ownership of the goods transferred from the seller to the buyer along with any risk of loss or damage (art. 24 and art. 186a of LOC)[22]. Therefore, the seller Alfred has completely performed his obligation of transferring the ownership and delivery of the goods. From that moment on, the buyer Cyril bears the risk of any loss or damage of the goods that occurred afterwards, including loss or damage as a result of the storm. This new circumstance is therefore irrelevant for the sale contract between Alfred and Cyril.

Lastly, between the seller Alfred and the buyer Daniel a contract for the sale of goods has been concluded – 60 kg of the apples grown in the seller's orchard. By picking the apples and putting them in boxes at the edge of the orchard, the goods which are the subject-matter of the contract have been individually identified, and the buyer Daniel has taken possession of them. The buyer Daniel has not yet performed his obligation to pay the price of the goods. According to art. 24 (2) of LOC, at the moment the apples were identified the ownership transferred from the seller to the buyer,[23] and therefore the risk of loss or damage passed from the seller Alfred to the

[20] Решение от 30.04.2003г. по ВАД № 141/2002г. на АС при БТТП [Judgement of 30.04.2003 of DAC № 141/2002 of AC of BCCI].
[21] Калайджиев [Kalaydzhiev], *op. cit.*, 285.
[22] А. Кожухаров, *Облигационно право. Общо учение за облигационното отношение. Книга Първа*, (София, Издателство "Софи-Р", 1992), с. 126 [A. Kozhuharov, *Law of Obligations. General Theory of Obligation Relationship.* Book One (Sofia, SOFI-R, 1992) 126].
[23] Кожухаров (1992) [Kozhuharov (1992)], *op. cit.*, 126; Калайджиев [Kalaydzhiev], *op. cit.*, 285. At the opposite opinion – П. Венедиков, *Договор за гледане и издръжка* (София, Издателство "Сиби", 1994), с. 33 [P. Venedikov, *Contract for Care and Financial Support* (Sofia, SIBI, 1994) 33].

buyer Daniel (art. 186a of LOC)[24]. When the storm occurred, the seller Alfred had already completely performed his obligations; hence, the risk of damage caused by the storm rests with the buyer Daniel. Because there will be no non-performance of the seller's obligations, the buyer Daniel will not be entitled to terminate his obligations under the sales contract. Moreover, the buyer will have to perform his obligation to pay the price of the goods to the seller Alfred[25].

Comments

This case concerns a change of relevant circumstances that has occurred after the conclusion of contract and has made performance of contractual obligations impossible. This change is unexpected and unavoidable for the parties to the contract.

One of the important features of the case is that it concerns three legal relationships, each one resulting from a specific contract for sale of goods. The goods which are the subject-matter of these contracts were not individually identified at the time the contracts were concluded. Furthermore, the fruits were limited in number (the crop of a definite orchard grown in a definite season). For this reason, it can be assumed that it will be very difficult for the seller to find and deliver to the buyers other goods of the same quality and characteristics. Therefore, when after the conclusion of the contracts the loss and damage of the whole crop of apples has been caused by unexpected and unavoidable new circumstances, performance of seller's obligation to transfer ownership and deliver such goods has become impossible.

Another important feature of the case is that at the moment of the change of relevant circumstances each one of the three legal relationships was at a different stage of performance.

Under the first contract (between Alfred and Boris), at the moment of the change the risk had not yet transferred and the seller's obligations of transferring ownership and delivery had not been performed. On the contrary, the buyer's obligation to pay had been performed.

Under the second contract (between Alfred and Cyril), at the moment of the change the risk had already passed and the seller's obligations of transferring ownership and delivery had already been performed; as had the buyer's obligation to pay the price and take possession of the goods.

Finally, under the third contract (between Alfred and Daniel) at the moment of the change the risk had already passed and the seller's obligations of transferring ownership and delivery had been performed; the buyer's obligation to pay the price had not yet been performed.

[24] Калайджиев [Kalaydzhiev], *op. cit.*, 285.
[25] Кожухаров (1992) [Kozhuharov (1992)], *op. cit.*, 227.

The core issue of this case concerns how the subsequent change of circumstances affects each of the three contractual relationships.

First, application of the two sets of rules – the DCFR (III. – 3:104 (4); IV. A. – 5:101) and Bulgarian law (art. 89, 1st sentence and art. 55 of LOC), on the first contractual relationship (between Alfred and Boris) produces similar outcomes: The contract is terminated and the seller must return the price to the buyer. Under the provisions of the DCFR, since the loss and damage of the whole apple crop is treated as an impediment beyond the debtor's control (III. – 3:104(1) DCFR), the obligations of both the seller of transferring ownership and delivery of goods, and the buyer in paying the price, have been extinguished (III. – 3:104 (4) DCFR). When defining whether the extinguishing of obligations has retrospective or prospective effect, difficulties have been experienced when applying the above-mentioned provisions of the DCFR. Furthermore, it is not clear what are the differences, if any, between the terms "termination" (Book III, Chapter III, Section 5 DCFR) and "extinguishing" of the obligation (III. – 3:104 (4) DCFR).

Second, the application of the provisions of the DCFR and Bulgarian law on the second legal relationship (between Alfred and Cyril) has similar outcomes. Since the unexpected and unavoidable circumstances (which caused loss and damage to the goods) happened after the complete performance of contractual obligations, they are not treated as relevant for this contract. At that moment, neither the seller's nor the buyer's contractual obligations still exist. They have been extinguished by full performance.

Finally, the solutions of the case regarding the third sale contracts (between Alfred and Daniel) are similar according to the DCFR and national law. The buyer bears the risk of loss or damage to the subject-matter of the contract and he may not refuse to perform his obligation to pay the price.

Case 3[26]:

Change of circumstances in aleatory contract

Advanced in age with no close relatives and a limited income, Anna concluded a contract with her neighbour Benjamin under which Anna transferred ownership of her house to Benjamin (with reservation of a right for Anna to reside there for the remainder of her life)., In return, Benjamin agreed to provide care and financial support for Anna during her lifetime.

[26] *Source:* Попов [Popov], *op. cit.*, 111.

One year later, the house was struck by lightning and burnt down. Although it was insured against fire, the compensation paid to Benjamin by the insurance company was only one-third of the total amount of the expenses required for full restoration of the house. Furthermore, since Anna had suffered severe injuries from the fire and the state of her health had declined, the monthly expenses for her medical care had increased. Having considered the significant amount of economic loss suffered due to the demolition of the house, as well as the increased expenses necessary for financial support of Anna, Benjamin decided to terminate his contractual relationship with her. Benjamin brought a claim before a court for termination of the contractual relationship because of an exceptional change of circumstances.

Variation: How would the case be resolved if Benjamin died or if, as a result of an accident, he became disabled and therefore unable to provide care and financial support for Anna?

Draft Common Frame of Reference

(i) Notwithstanding the subsequent change of circumstances, Benjamin is still obliged to perform his obligation (III. – 1:110 (1) DCFR). Only if the change is exceptional and performance becomes manifestly unjust will Benjamin be entitled to file a claim in court for variation or termination of his obligation (III. – 1:110 (2) DCFR). In such a case, the debtor must first try to negotiate an adjustment of the obligation with the creditor (III. – 1:110 (3) (d) DCFR). There are several other preliminary requirements for claiming variation or termination of the obligations (III. – 1:110 (3) (a) (b) (c) DCFR). If not all of them are met, the claim of Benjamin for variation or termination of his contractual obligation will be rejected.

If the debtor dies before the creditor Anna, or if, as a result of an accident, he becomes disabled and is no longer able to perform his obligations, the legal effect of these new circumstances on the contractual relationship will vary depending on the terms of the contract. If personal performance of Benjamin's obligations is not required, then his obligations can be performed by any third person who has a legitimate interest in performance (III. – 2:107 (1) (b) DCFR). If the personal performance of Benjamin's obligations is required under the contract, the death or permanent disability of the debtor will be considered as a permanent impediment to performance (III. – 3:104 (4) DCFR). Benjamin's obligation will consequently be extinguished (III. – 3:104 (4) DCFR). Since this will be a case of excused non-performance, the debtor (or his estate) will not have to pay damages (III. – 3:101 (2) DCFR) and the creditor Anna will not be entitled to specific performance (III. – 3:101 (2) DCFR).

(ii) A binding legal relationship based on the contract exists between Anna and Benjamin. Under this contract, Anna must transfer ownership of immovable property (a house) to Benjamin, and Benjamin must provide Anna care and financial support during her lifetime. The DCFR does not contain special rules for such a contract. The contract appears to have been validly concluded according to the principle of party autonomy (II. – 1:102 DCFR). The general rules of Book I, II, and III of DCFR are applicable to the rights and obligations of the parties. The contract has binding effect for Anna and Benjamin, so the rights and obligations resulting from it can only be terminated and modified by a further agreement between the parties or as provided by law (II. – 1:103 (1)(3) DCFR).

After the conclusion of the contract a change of relevant circumstances occurred – the subject-matter of Anna's obligation was devoured in a fire caused by an unexpected event – a bolt of lightning. As a result of the same fire, Anna's health deteriorated, so the costs of performing Benjamin's obligation (i.e., providing care for her) increased.

This change seems to be irrelevant with regard to Anna's obligation since at that moment her obligation appeared to be performed completely. However, it is impossible to provide a complete analysis of this issue, since the DCFR does not contain provisions regarding the transfer of ownership of immovable property (I. – 1:101 (2) (f) DCFR; IV. A. - 1:101 (3)).

On the contrary, the change of circumstances is relevant for Benjamin's obligations, since at the moment when the change occurred his obligations were only partly performed. As a result of the change, the performance of Benjamin's obligations is still possible, but has become more onerous for him due to the increased costs. Notwithstanding this change, Benjamin is still obliged to perform his obligations (III. – 1:110 DCFR). Only if the change is exceptional and performance becomes manifestly unjust will Benjamin be entitled to file a claim in court for variation or termination of his obligations (III. – 1:110 (2) DCFR). In such a case, the debtor must first try to negotiate an adjustment of the contractual terms regarding his obligations with the creditor Anna (III. – 1:110 (3) (d) DCFR). There are other requirements as well: (a) the change of circumstances must have arisen after the time when the obligation was incurred; (b) the debtor must not, at that time, have taken into account, and could not reasonably be expected to have taken into account, the potential change of circumstances or its magnitude; (c) the debtor must not have assumed, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances (III. – 1:110 (3) (a) (b) (c) DCFR). Not all of these cumulative requirements are satisfied in this particular case. For example, it will be difficult for the debtor to prove that he did not assume the risk of this change. It is true that when concluding the contract the parties (Anna and Benjamin) most likely did not take into account the possibility of a fire. Nevertheless, by

agreeing to provide lifetime care and financial support for Anna, Benjamin must have anticipated the probable future deterioration of her health and the resulting increase in costs for providing her care and services. Since not all prerequisites under III. – 1:110 (3) DCFR are met, the claim of the debtor for variation or termination of his contractual obligation will be rejected.

If the debtor Benjamin dies before the creditor Anna, or as a result of an accident he becomes disabled and thus no longer able to provide care and financial support for her**,** the legal effect of these new circumstances on the contractual relationship between them will depend on the type of the contract. If under the contract personal performance of the obligation by Benjamin is not required, then his obligation can be performed by any third person who has a legitimate interest in performance, and the creditor Anna will not be allowed to refuse such performance (III. – 2:107 (1) (b) DCFR). If personal performance is required under the contract, then the death or permanent disability of the debtor will be treated as a permanent impediment to performance (III. – 3:104 (4) DCFR). The debtor Benjamin (or his heirs) will have to notify the creditor Anna of this impediment (III. – 3:104 (5) DCFR). In such a case, Benjamin's obligation will be extinguished (III. – 3:104 (4) DCFR). Each party will have to return the benefits received from any performance (III. – 3:104 (4) DCFR). The debtor or his heirs will have to transfer ownership of the immovable property back to the creditor Anna (III. – 3:510 (3) DCFR), as well as all natural or legal benefits received from it (III. – 3:510 (5) DCFR). If the debtor Benjamin has improved the property, however, he or his heirs will have the right to payment for the fair value of improvements under art. III. – 3:513 (2) DCFR. The creditor Anna also must compensate Benjamin (or his heirs) for any care and financial support already received. Since performance of the obligation for financial support consisted of a payment of money, the creditor will have to return the amount received (III. – 3:510 (2) DCFR). However, as the received care does not appear to constitute a transferable benefit, the creditor will have to pay its value at the time of performance (III. – 3:510 (4), in connection with III. – 3:512 (1) (a) DCFR).

Bulgarian law

(i) Notwithstanding the deterioration of the creditor's health and the consequent increase in medical expenses, the debtor Benjamin does not have the right to file a claim for variation or termination of his contractual obligations. Since his obligations are aleatory, it will be held that he has assumed the risk of such a change.

Provided that the debtor Benjamin is temporarily unable to provide care for the other party Anna, the contractual parties can vary their contract by mutual agreement at any time, for instance by changing the obligation for care into a monetary one. If such an agreement cannot be

reached, the debtor can file a claim in court for a temporary variation of the obligation, from one for providing care to a monetary one.

If, as a result of an accident, the debtor becomes permanently unable to perform his obligations, and personal performance is required, he can entrust the performance to a third person and the creditor Anna may not refuse such performance, but only if a personal performance is not required. If personal performance is required, Benjamin's obligation will be extinguished (art. 89 1st sentence of LOC).

That is to say that if the obligation has to be personally performed, the death of the debtor will result in termination of the obligations. Provided that the obligations do not have to be personally performed, the heirs of the debtor will be entitled to decide whether to continue the performance of the obligations or seek termination of the contractual obligation through a judicial decision (art. 89 of LOC).

(ii) The provision of art. 9 of the Bulgarian Law on Obligations and Contracts (LOC) embraces the principle of freedom of contract. The parties can freely determine the content of their contract as long as it does not contravene mandatory provisions of law and morality. The contract between Anna and Benjamin (a contract for care and financial support, under national case law) has been concluded in accordance with the of freedom of contract principle. Bulgarian law does not have special provisions regarding this kind of contract[27]; hence, the general provisions of the Law on Obligations and Contracts will be applicable[28].

One of the parties to the contract, Anna, has the obligation to transfer ownership of immovable property to the other party, Benjamin. Anna performed her obligation. The reciprocal obligation of the debtor is to provide lifetime care and financial support for Anna. Since at the time of conclusion of contract it was not certain how long the one party, Benjamin, would be obliged to provide care and financial support for the other party (since Anna's life-expectancy was uncertain), the contract can be defined as an aleatory one[29].

In the course of performance of Benjamin's obligations, an unexpected change occurred in the circumstances under which the contract was concluded – as a result of a fire caused by lightning the house burnt down and Anna suffered severe injuries.

Nevertheless, the deterioration of Anna's health and the increased medical expenses cannot be treated as such a change of relevant circumstances that gives the debtor the right to seek varia-

[27] А. Кожухаров, *Облигационно право. Отделни видове облигационни отношения* (София, Издателство "Софи-Р", 1996), с. 134 [A. Kozhuharov, *Law of Obligations. Specific Obligation Relationships* (Sofia, SOFI-R, 1996) 134].

[28] Венедиков [Venedikov], *op. cit.*, 13; Кожухаров (1996) [Kozhuharov (1996)], *op. cit.*, 133-134. Тълкувателно решение № 96 от 28.VI.1966г. на ОСГК на ВС на НРБ [Interpretative judgement № 96/1966 of General Assembly of Civil College of SC of PRB].

[29] Венедиков [Venedikov], *op. cit.*, 14; Кожухаров (1996) [Kozhuharov (1996)], *op. cit.*, 134.

tion or termination of his contractual obligations. Since his contractual obligations are aleatory, it will be held that the risk of such changes must have been assumed by the debtor Benjamin[30].

Furthermore, the burning down of the immovable property transferred from Anna to Benjamin, caused by an unexpected and unavoidable event, occurred after the transfer of the ownership. It therefore cannot be considered an excuse for the non-performance of Benjamin's obligation to provide care and financial support for Anna. At the moment of the fire, Benjamin had title to the property and under the principle of *res perit domino* the risk of such loss was born by him.

Whether or not Benjamin's obligation to provide care and financial support can only be performed personally by him or also by a third person is a disputed matter in Bulgarian case law and legal theory. According to legal theory, the obligation requires personal performance[31]. The opposite position, however, is supported by applicable case law[32].

Provided that, as a result of an acute illness, Benjamin is temporarily hospitalized and cannot therefore provide care for the other party, Anna, Bulgarian legal theory maintains that the parties can vary their contract at any time by mutual agreement, so the obligation for care can also be transformed into a monetary one[33]. Furthermore, the debtor can also file a claim in court for a temporary variation of the obligation, from one for providing care to a monetary one[34].

Bulgarian case law and legal theory reach different solutions in the case where as a result of an accident, Benjamin's health deteriorates and he becomes permanently unable to provide care for Anna. Applicable case law holds that in such cases the debtor can entrust the performance to a third person and the creditor may not refuse such performance[35]. According to Bulgarian legal theorists, however, Benjamin's obligation can only be performed personally. Therefore, if the debtor is permanently impeded from performing his obligation personally, it will be extinguished[36].

If such impossibility of performance occurs soon after the conclusion of the contract, this is a case of excusable fundamental non-performance, and the contractual relationship between Anna

[30] Венедиков [Venedikov], *op. cit.*, at 75; Тълкувателно решение № 96 от 28.06.1966г. на ОСГК на ВС на НРБ [Interpretative judgement № 96/1966 of General Assembly of Civil College of SC of PRB].
[31] Венедиков [Venedikov], *op. cit.*, 14.
[32] Тълкувателно решение № 30 от 1981г. на ОСГК на ВС на НРБ [Interpretative judgement № 30/1981 of General Assembly of Civil College of SC of PRB].
[33] Т. Бузева, *За допустимостта на трансформиране на натуралното задължение в парично при договора за издръжка и гледане* (1992) 3 Съвременно право 89-90 [T. Buzeva, *About admissibility of transformation of the obligation for providing care to monetary obligation under contract for care and financial support* (3/1992) Contemporary Law 89-90].
[34] Т. Бузева [Buzeva], *op. cit.*, 89-90.
[35] Тълкувателно решение № 30 от 1981г. на ОСГК на ВС на НРБ [Interpretative judgement № 30/1981 of General Assembly of Civil College of SC of PRB].
[36] Венедиков [Venedikov], *op. cit.*, 100.

and Benjamin may be terminated with retrospective effect (art. 89 of LOC). Benjamin will then have to transfer ownership of the immovable property back to Anna[37].

If on the other hand the impossibility of performance of Benjamin's obligations due to his permanent disability arises long after conclusion of the contract, this becomes a case of excusable partial non-performance[38]. The creditor Anna will then be able to choose between two options: either a claim for a reduction of her obligation (although there may be difficulties in the estimating the amount of the reduction), or termination of her contractual obligation (art. 89 of LOC)[39].

Lastly, the way in which the death of the debtor Benjamin will affect the contractual relationship between Anna and him is disputed as between Bulgarian case law and the relevant legal literature. According to Bulgarian legal theory, since Benjamin's obligation must be performed personally, his death will determine the termination of his obligation[40]. Exactly the opposite is maintained in the relevant case law, which holds that in such a case Benjamin's heirs will be entitled to decide whether or not to continue the performance of the obligation. Only if they decide not to continue performance can they terminate the contractual obligation through a claim before a court in accordance with art. 89 of LOC[41]. Termination will then have prospective effect (art. 88 (1) of LOC).

Comments

This case considers the effect of an unexpected and unavoidable change of relevant circumstances occurring after the conclusion of a contract which is not regulated by special provisions of either the DCFR or Bulgarian law. Legal analysis reveals that the DCFR allows the parties to freely determine the contents of their contract, provided that they are compatible with the applicable mandatory rules (II. – 1:102 (1) DCFR). Therefore, under the DCFR the parties can conclude contracts that differ from those explicitly regulated in Book IV of the DCFR.

Furthermore, the case concerns an aleatory obligation, because at the time of conclusion of the contract the exact content of the obligations is not yet defined[42]. Certain difficulties have been experienced in determining whether or not Benjamin's obligations can be considered aleatory

[37] Венедиков [Venedikov], *op. cit.*, 101.
[38] Венедиков [Venedikov], *op. cit.*, 101.
[39] Венедиков [Venedikov], *op. cit.*, 102.
[40] Венедиков [Venedikov], *op. cit.*, 99.
[41] Тълкувателно решение № 30 от 1981г. на ОСГК на ВС на НРБ [Interpretative judgement № 30/1981 of General Assembly of Civil College of SC of PRB].
[42] Калайджиев [Kalaydzhiev], *op. cit.*, 110.

under the provisions of the DCFR. Furthermore, it is unclear if the rules of the DCFR recognise such a type of obligation. The comments and notes of the forthcoming full edition of the DCFR may shed more light on this matter.

The first core issue of the case is how the subsequent change of circumstances under which the contract was concluded affects the aleatory obligations of the debtor. Both the burning down of the property and the deterioration of Anna's health resulted from a fire caused by lightning, *i.e.* from an unexpected and unavoidable circumstance.

Regarding the effect of this change of circumstance on Benjamin's obligation for providing lifetime care and financial support to the creditor, the outcomes of the two sets of rules appear different.

First, under Bulgarian law the deterioration of the creditor's health and the increase of medical expenses, representing a change of relevant circumstances, are not considered a sufficient reason to give the debtor the right to vary or terminate his contractual obligations. Since his obligations are aleatory, it will be held that the risk of such a change must have been assumed by him.

Furthermore, the burning down of the immovable property cannot be an excuse for non-performance of Benjamin's obligations, because at the moment of the fire the owner of the property was Benjamin and under the principle *res perit domino* the risk of this loss rests with him. Therefore under national law the claim of the debtor Benjamin before a court for termination of his obligations under the contract with the creditor Anna will be rejected.

Second, the outcome of the application of the DCFR provisions depends on whether or not the obligation of the debtor is deemed aleatory. If it is aleatory, it will be held that the debtor has assumed the risk of such a change of circumstances. Therefore not all prerequisites under art. III. – 1:110 (3) DCFR are satisfied, and as a result the claim of the debtor Benjamin for a variation or termination of his contractual obligations will be rejected. If the obligation is not aleatory, the exceptional change of circumstances is considered relevant for the performance of Benjamin's obligations, since at that moment it was only partly performed and became more onerous (but still possible) for the debtor. In such a case, the debtor must firstly try to negotiate an adjustment of the contractual terms regarding his obligations with the creditor Anna. If the attempt fails, the debtor is then entitled to file a claim in court a variation or termination of his obligations, provided that all other requirements are met (III. – 1:110 (2) (3) DCFR).

The second core issue of the case is the effect that death or temporary or permanent disability of the debtor, which occurred after the conclusion of the contract, but before performance, has on the obligations. Both the DCFR provisions and Bulgarian law distinguish two sce-

narios – one where the contract does require a personal performance by the debtor and one where it does not.

First, if the contractual terms do not require personal performance, the outcomes of the application of the DCFR provisions and national law are similar. If the debtor dies or becomes temporarily or permanently disabled, thus not being able to perform his obligations for providing care, they can then be performed by any third person who has legitimate interest in performance (for instance, the heirs of the debtor), and the creditor may not refuse such performance (III. – 2:107 DCFR; art. 73 of LOC).

Generally, the outcomes of the both sets of rules are also similar when: a) the contractual terms require personal performance, and b) the debtor dies or becomes permanently disabled, thus not being able to perform personally. In such cases, the obligation to provide care to the creditor is extinguished (III. – 3:104 (4) DCFR; art. 89 of LOC). However, there is a slight difference in the effect of the extinguishing: under Bulgarian law, in some cases such extinguishing has retrospective effect (for instance, in case of excused fundamental non-performance); in other cases, it has prospective effect (for example, in case of excused partial non-performance). Furthermore, when defining whether under art. III. – 3:104 (4) DCFR the extinguishing of the obligation has retrospective or prospective effect, certain difficulties have been experienced in applying these provisions. Moreover, it is not clear what are, if any, the differences between the terms "termination" (Book III, Chapter III, Section 5 DCFR) and "extinguishing" of the obligation (III. – 3:104 (4) DCFR).

If the contractual terms require personal performance and the debtor becomes temporarily disabled (due to reasons beyond his control) and cannot therefore perform his obligation for providing care personally, both sets of rules regard non-performance during this period as excusable.

3. Concluding Remarks

The legal problem of a subsequent change of relevant circumstances resulting in impossibility or more onerous performance of obligations is considered as a matter of balance between several fundamental principles of private law: On the one hand, the principle of security and stability and the principle of freedom of contract, and, on the other hand, the principles of

fairness, justice and good faith[43]. Generally, the model rules of the DCFR regarding the legal effects of a subsequent change of circumstances on obligations can be considered as in line with the balance among the core aims of European private law – justice, freedom, economic welfare and solidarity[44].

In conclusion, in applying the provisions of the DCFR on the hypothetical cases, the following difficulties have been encountered:

1. Art. III. – 1:110 (2) (3) DCFR: The correct interpretation of the terms "exceptional change of circumstances" and "manifestly unjust" remains somewhat unclear.

2. Art. III. – 3:104 (3) DCFR: It is also not clear whether or not such a termination will have retrospective or prospective effect. According to art. III. – 3:104 (3), in connection with Chapter 3, Section 5, Sub-section 4 (Restitution), restitution of any benefit received under the performance will follow termination of the legal relationship. Therefore, it seems that termination will have retrospective effect. However, this issue can cause difficulties in applying art. III. – 3:104 (3) DCFR.

3. Art. III. – 3:104 (4) DCFR): It is not clear whether or not the extinguishing of the obligations has retrospective or prospective effect.

4. Art. III. – 3:104 (4) and provisions in Book III, Chapter III, Section 5 DCFR: It is not clear what are, if any, the differences between the terms "termination" and "extinguishing" of the obligation.

5. It is unclear whether or not the rules of the DCFR recognise aleatory obligations;

6. It is not clear which provisions are applicable after termination of the contract – whether restitution under Book III, Chapter III, Section 5, Sub-section 4 DCFR or the provisions on unjustified enrichment (under Book VII DCFR).

[43] A. Karampatzos *Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law* (2/2005) ERPL 108-112.
[44] Ch. von Bar (ed.), *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR). Interim Outline Edition* (Munich, Sellier, 2007) 13-14.

Plurality of Debtors

DCFR, Book III: Obligations and other corresponding rights; Chapter 4, Section I: Plurality of debtors

by

Sonja Meier

Summary: 1. Three Cases. – Case 1. – Case 2. – Case 3. – 2. General Observations.

1. Three Cases

Case 1

Forms of plurality of debtors

Mary contracts with Mike, a mason, Paul, a plumber, and Charles, a carpenter, for the construction of a country cottage for a uniform price. Besides this project, the debtors do not usually work together. Paul and Charles are ready to perform, but Mike does not appear. Without Mike's collaboration, Paul and Charles cannot perform. No work is done within the contractually fixed period of performance. This causes a loss to Mary, who had already sold the cottage to another person. Mary claims damages from Paul.

I. Operative Formants

1. DCFR

As Paul obliged himself together with Mike and Charles, the question whether and to what extent he is liable towards Mary depends on the form of plurality of debtors (Art. III 4:102). This is a matter of construction of the contract (Art. III 4:103 (1)).

One might imagine a divided obligation, where Mike is responsible for the masonry, Paul for the plumbing and Charles for the carpentry. However, the contract does not expressly provide for such a division. The fact that no debtor can perform alone and the uniform price indicate that a divided obligation is not intended.

The fact that the debtors will probably work together is a strong indication of a joint obligation. Art. III 4:102 is a slightly modified version of PECL Art. 10:101, where joint obligations are labelled communal obligations. According to comment D, they relate to performances which by their nature have to be rendered in common. The example given in PECL, Illustration 6, resembles case 1: the owner of a piece of ground asks constructors in different trades for a single performance consisting in the construction of a house, the co-contractors agree to work together to achieve that result.

However, it might also be a solidary obligation. The debtors did not expressly agree to work together. In principle, each debtor could take on full responsibility for construction of the house. If all debtors take on this obligation, there is solidarity. According to Art. III 4:103 (2), if the contract does not determine the question, liability is solidary.

It seems that two different interpretations of the DCFR are possible:

a) Where a performance is of such a nature that the debtors usually work together, there is a joint liability, unless the parties have expressly provided for solidarity. The default rule is not applicable because there is no doubt. The obligation in case 1 is joint.

b) According to the default rule, liability is solidary unless the parties agreed otherwise. The fact alone that performance is usually rendered together is not a sufficient indication for a joint obligation unless, as in Illustration 6, the debtors expressly agree to work together, which they did not do in case 1. The obligation is solidary.

As a result, the kind of plurality seems to be unclear.

In case of solidarity, Paul is obliged to construct the house. Mary is entitled to damages for loss caused by Paul's non-performance unless it is excused (Art. III 3:701). The fact that Mike does not perform is no excuse according to Art. III 3:104 (1-2): Non-performance of a co-contractor is not an impediment beyond Paul's control. Paul can reasonably be expected to take the possibility of Mike's non-performance into account when concluding the contract, and also to overcome the difficulty by finding another mason. Therefore, Mary can claim damages from Paul.

If there is a joint obligation and Mary requires performance of the contract, she has to sue all debtors together (Art. III 4:102 (3))[1]. However, where money is claimed for non-performance, the debtors are liable solidarily (Art. III 4:105). According to the illustrations to the parallel norm of Art. 10:104 PECL, in case of non-performance of one debtor, the creditor can claim damages from another debtor. This implies two rules: (i) although Paul was ready and willing to perform his part, he is held responsible for Mike's non-performance; and (ii) the claim for damages is not divided. Mary can sue Paul alone and claim the full amount of damages from him.

2. German Law

Parties contracting together can form a partnership that has, even without registration, independent legal capacity, with the consequence that the partnership itself is the debtor[2]. This is not the case here, as the constructors do not usually work together; therefore there is a plurality of debtors. The BGB only recognizes divided and solidary obligations. The kind of plurality depends on whether the performance is divisible, §§ 420, 427, 431. According to the majority of legal scholars, the obligation to erect a house is not divisible, as it cannot be split into separate obligations of the same kind[3]. § 431 provides that debtors of an indivisible performance are liable solidarily.

However, according to the courts and the majority of legal scholars, there is, besides divided and solidary obligations, a third form of plurality not mentioned in the Code: the common obligation (*gemeinschaftliche Schuld*)[4]. Some authors seem to restrict this form to exceptional cases where performance by one debtor alone is absolutely impossible, like the case of a string quartet[5]. On this view, the construction of a house may not belong to this class, as it does not strictly require collaboration but can be performed by a single debtor. For other authors the common obligation is always possible in cases where the performance is to be rendered, according to the contract, by all debtors together. It is then a question of interpretation of the contract whether

[1] See PECL, Art. 10:101, comment D.
[2] BGHZ 146, 341 (29.1.2001); P. Ulmer, in *Münchener Kommentar zum BGB* (München, Beck, 4th edn, 2004) § 714 n. 31 ff.
[3] U. Noack, in *Staudinger, BGB* (Berlin, Sellier-de Gruyter, 2005) § 420 n. 13-15; P. Bydlinski, in *Münchener Kommentar zum BGB* (München, Beck, 5th edn, 2007) § 420 n. 4.
[4] W. Selb, *Mehrheiten von Gläubigern und Schuldnern* (Tübingen, Mohr Siebeck, 1984) 198 ff.; Bydlinski (n. 3), before § 420 n. 7, § 421 n. 6, § 425 n. 19, § 431 n. 3-4.
[5] K. Larenz, *Lehrbuch des Schuldrechts, Allgemeiner Teil* (München, Beck, 14th edn, 1987) § 36 II c; D. Medicus, *Schuldrecht, Allgemeiner Teil,* (München, Beck, 16th edn 2005) n. 797, 810; P. Schlechtriem and M. Schmidt-Kessel, *Schuldrecht, Allgemeiner Teil* (Tübingen, Mohr Siebeck, 6th edn, 2005) n. 835.

the obligation is solidary or common[6]. A minority rejects the notion of a common obligation, maintaining that obligations are either solidary or divided[7].

The courts characterize the obligation as common in cases where performance requires the collaboration of all debtors for legal reasons, e.g. where co-owners sell their property. The creditor requiring performance then has to sue all debtors together[8]. However, in cases where a service is to be provided by two debtors working together and the collaboration is required merely for practical reasons, the liability is, according to the courts, solidary[9].

As a result, the courts and a part of the legal scholarship would regard the obligation in case 1 as solidary, whereas others would speak of a common obligation.

In case of solidarity, Paul owes the construction of the house and is, after the expiration of the fixed time for performance, liable for damages for delay if he can be held responsible for the non-performance, §§ 280 I, II, 286. Generally, a debtor is only responsible for his own fault (§ 276). However, where a debtor promises a performance that he can render only in collaboration with another debtor, he is held to have undertaken an implied guarantee for the other's readiness to perform and is also responsible for the other's fault[10]. Paul is, therefore, responsible for the non-performance and liable for damages.

If the obligation is common, an action for performance has to be directed against all debtors together[11]. In cases of breach of contract, the courts and a part of the writers recognise an implied guarantee undertaken by each debtor for the performance of his fellow debtors and a responsibility of each debtor for the others' faults. If performance cannot be rendered because of the non-performance of just one debtor, every debtor is solidarily liable for damages[12]. This responsibility for breaches of contract by fellow debtors is denied by other authors[13].

As a result, according to the courts and the majority of scholars Paul is liable for damages.

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[6] D. Reinicke and K. Tiedtke, *Gesamtschuld und Schuldsicherung* (Neuwied, Luchterhand, 2nd edn, 1988) 16 ff.; M. Wolf, in *Soergel, BGB* (Stuttgart, Kohlhammer, 12th edn, 1990) before § 420 n. 11 ff.; Noack (n. 3), before § 420 n. 24 ff., § 431 n. 2-4; F. Wernecke, *Die Gesamtschuld* (Berlin, Duncker & Humblot, 1990) 158 ff.

[7] W. Riering, *Gemeinschaftliche Schulden* (Berlin, Duncker & Humblot, 1991) 27 ff.; H. Ehmann, in *Erman, BGB* (Köln, O. Schmidt, 12th edn, 2008) before § 420 n. 11; S. Meier, in M. Schmoeckel, J. Rückert and R. Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (Tübingen, Mohr Siebeck, 2007) §§ 420-432 I, n. 96-97.

[8] BGH NJW 1980, 2464; NJW 1994, 1470; WM 1999, 453; OLG Braunschweig, NJW-RR 1997, 1038.

[9] BGH NJW 1952, 217; OLG Nürnberg, NJW-RR 1991, 28.

[10] Reinicke and Tiedtke (n. 6), 17, 55-56; Selb (n. 4), 83-84; Noack (n. 3), § 425 n. 43; Riering (n. 7), 46 ff.

[11] Reinicke and Tiedtke (n. 6), 91-92; Wolf (n. 6), before § 420 n. 13; Noack (n. 3), before § 420 n. 26; *contra* Selb (n. 4), 194; Bydlinski (n. 3), before § 420 n. 7.

[12] BGH WM 1999, 455; OLG Braunschweig, NJW-RR 1997, 1038; Selb (n. 4), 195-196; Noack (n. 3), before § 420 n. 27; Schlechtriem and Schmidt-Kessel (n. 5), n. 838.

[13] Reinicke and Tiedtke (n. 6), 17 ff.; Wolf (n. 6), before § 420 n. 14; C. Grüneberg, in *Palandt, BGB* (München, Beck, 68th edn, 2009) before § 420 n. 9; Bydlinski (n. 3), § 421 n. 49, § 425 n. 19.

3. French Law

The form of solidarity regulated by the Code is called *solidarité.* According to Art. 1202, a *solidarité* has to be expressly agreed on. There is an exception in commercial law, where *solidarité* is presumed if the debtors or the creditor are a business[14]. This is, however, not the case here. The requirement of an express agreement is not taken literally. It is for the courts of first instance to decide whether a *solidarité* results clearly from the contractual agreement. This is a mixed question of fact and law: the *Cour de Cassation* quashes judgements only if they do not give sufficient justification for their assumption of a *solidarité*[15]. As long as it justifies its decision, a court of first instance can, even without express agreement, infer a *solidarité* from all the circumstances of the case[16]. In one case a client contracted with five constructors for the construction of a house, without fixing separate responsibilities or prices for each one. The decision of the court, inferring a *solidarité* from these facts, was upheld by the Cour de Cassation[17]. Therefore, in case 1 a French court might focus on the fact that the contract does not distinguish between the three constructors and conclude that there is an implied agreement of *solidarité*.

In case of *solidarité,* Paul owes the construction and is, after the expiration of the fixed time for performance, liable for damages for delay (Art. 1146, 1147), unless the non-performance resulted from a *force majeure* or *cas fortuit* (Art. 1148). As the obligation to construct a house is considered as an *obligation du résultat*, Paul has to show an external impediment for which he is not responsible and which he cannot be expected to avoid or overcome. The unwillingness of Mike to perform is no such impediment, therefore, Paul owes damages.

However, a court might also take note of the fact that the debtors work in different areas (masonry, plumbing, carpentry) and hold that a *solidarité* was not intended. The form of plurality would then depend on the divisibility of the obligation. This is a question of fact. The obligation to construct a house is generally regarded as indivisible, as defined by Art. 1218[18]. It follows that Clara can claim the construction of the house from Paul alone (Art. 1222). However, Paul may call on Mike and Charles to be joined as defendants in order to obtain a judgement against all

[14] Cass. com. (28.4.1987) Bull. civ. IV no. 103; (16.1.1990) JCP 1991 II 21748; P. Le Tourneau and J. Julien, *Solidarité* Encyclopédie Dalloz, Répertoire de droit civil (Paris, Dalloz, 2004) §§ 36 ff.; F. Terré, P. Simler and Y. Lequette, *Droit civil: Les obligations* (Paris, Dalloz, 9th edn, 2005) § 1248.
[15] Cass. 1 civ. (28.6.1986) Bull. civ. I no. 198; Cass. com. (8.3.1988) Bull. civ. IV no. 102; Cass. 3 civ. (12.5.1975) Bull. civ. III no.165; (8.2.1989) Bull. civ. III no. 34; (20.1.1993), Bull. civ. III no. 8; Le Tourneau and Julien (n. 14), §§ 27 ff.; Terré, Simler and Lequette (n. 14), §§ 1248-1249.
[16] Cass. req. (4.8.1896) D 96,1,456; (17.6.1913) D 1914,1,280; Cass. 1 civ. (3.12.1974) Bull. civ. I no. 322.
[17] Cass. 3 civ. (26.1.2005) Bull. civ. III no. 14.
[18] F. Chabas, *Leçons de Droit Civil II 1: Obligations, Théorie générale* (Paris, Ed. Montchrestien, 9th edn, 1998) § 1075; P. Malaurie, L. Aynès and P. Stoffel-Munck, *Les Obligations* (Paris, Defrénois, 2nd edn, 2005) § 1251; P. Delebecque, *Indivisibilité*, Juris-Classeur Civil, Art. 1217-1255 CC, (Paris, LexisNexis, 1987) §§ 65, 67.

defendants. This follows from Art. 1225, which is applied to all debtors in indivisible obligations[19]. The rules on indivisible obligations, in particular whether and how they differ from the rules on *solidarité* in cases of breach of contract, are controversial[20]. It seems that the non-performance of Mike amounts to a non-performance of the indivisible obligation generally and can, in principle, be attributed to all debtors. However, where all debtors are defendants, there is some controversy as to whether the liability for damages has to be split among them. Some judgements order such a division, but they concern heirs of a debtor[21]. One judgement concerning debtors who contracted together did not mention any division[22]. Legal scholars seem to favour a division of liability[23]. However, according to some authors the debtor responsible for the non-performance (here Mike) is liable for the whole amount of damages[24]. As a result, it is difficult to predict the outcome if *solidarité* is rejected. Paul is, in principle, liable for the whole amount of damages, but, if he has Mike and Charles joined as defendants, it may be that he has to pay only a third of the amount.

II. Descriptive Formants and Comparative Evaluation

The result achieved by the DCFR in case 1 (Mary can claim full damages from Paul) corresponds to the result reached by German courts and the majority of the German scholars and may also be the result of a French court. However, it is remarkable that in all three legal orders, there is, besides solidary and divided obligations, another form of plurality of debtors, which is difficult to distinguish from solidarity and whose rules are not always clear.

In French law, the category of indivisible obligations is needed because the law favours divided obligations: they arise if a debtor is succeeded by several heirs (Artt. 873, 1220 CC) and also in the case of contractual co-debtors, unless solidarity is agreed. Therefore, a special rule is needed for cases where the division of the obligation is not possible because of the indivisibility of the performance. One might then think of solidarity, but the *solidarité* of the CC has effects going beyond the liability of each debtor for the whole performance: a delay, the culpable de-

[19] G. Marty, P. Raynaud and P. Jestaz, *Droit Civil, Les Obligations II* (Paris, Sirey, 2nd edn, 1988) § 101; Delebeque (n. 18), §§ 121-122.
[20] Delebecque (n. 18), §§ 132 ff.; M. Bacache, *Indivisibilité* Encyclopédie Dalloz, Répertoire de droit civil (Paris, Dalloz, 2001) §§ 50 ff.
[21] Cass. req. (15.12.1880) D 1881,1,37; Cass. civ. (14.3.1933), DH 1933, 234; Cass. soc. (4.7.1967), Bull. civ. IV no. 554.
[22] Cass. com. (4.1.1967) Bull. civ. III no. 14.
[23] Chabas (n. 18), § 1075; Bacache (n. 20), §§ 14, 32.
[24] Delebecque (n. 18), §§ 52, 119-120; Marty, Raynaud and Jestaz (n. 19), § 102; Terré, Simler and Lequette (n. 14), § 1269.

struction of the object, a reminder or a judgement concerning the relationship between the creditor and one debtor can also affect the liability of another debtor. These side effects are regarded as inappropriate if the solidarity has not been agreed on by the parties. The indivisible obligation may thus be seen as a weaker form of solidarity. In practice, the rules on indivisible obligations are mainly applied to heirs of a single debtor. In cases of contractual co-debtors there is nearly always a clause of *solidarité*.

The situation is different in German law, where solidarity is presumed in case of co-contractors and every heir is liable solidarily for the debts of the deceased (§§ 427, 2058 BGB). Without a presumption of divided obligations special rules on indivisible performances are not needed. The same holds true for the DCFR, which has a general default rule of solidarity.

In favour of a category of common obligations, it is argued in Germany that there cannot be solidarity if the obligation cannot be performed by just one debtor. However, it is not clear why a debtor should not be allowed to oblige himself for a performance he cannot render alone. If Paul can take on the whole responsibility for the construction, then solidarity is evidently possible if all three debtors oblige themselves in such a way.

It is further argued that solidarity does not conform to the intention of the parties who agreed that performance had to be rendered together by the debtors. But this argument loses force when we remember that every debtor of a common obligation is held to be solidarily liable for damages for breach of contract, and is thereby made responsible for the whole performance. As there seem to be no differences between solidary and common obligations regarding remedies for breach of contract, the special quality of common obligations seems to be the requirement that a creditor claiming performance sues all debtors together. This is intended to avoid the difficulties of executing a judgement against one debtor alone.

It may be added that English law distinguishes, in cases of common contractual engagements, between *joint obligations*, on the one hand, and *joint and several obligations*, on the other[25]. In both cases, a single debtor can ultimately be made liable for the whole performance. Originally, the major difference was the requirement that joint debtors had to be sued together. This, however, is no longer required.

The joint obligation of the DCFR resembles the German common obligation, the requirement that the debtors be sued together if performance itself is required being the only feature that distinguishes it from the solidary obligation. However, this is a question of procedure, and the DCFR is not intended to be applied in procedural matters (Art. I 1:101 (2) (h)). An extra category

[25] A. Burrows, *Joint obligations*, in *Chitty on Contracts, General Principles* I (London, Sweet & Maxwell, 29th edn, 2004), chapter 17.

of plurality besides solidarity therefore seems unnecessary. Above that, it leads to uncertainty. A French lawyer will regard the joint obligation of the DCFR as equivalent to the French *indivisibilité*, a German lawyer as equivalent to the German *gemeinschaftliche Schuld* and an English lawyer as equivalent to the English *joint obligation*. These three national categories are different both in their consequences and in their definitions. The distinction between them and solidary obligations is uncertain everywhere. It is remarkable that case 1, apparently seen as an example of a joint obligation by the drafters of the PECL, would be regarded as a case of solidarity by German and perhaps also by French courts. As a result, the category of joint obligations had better been avoided.

Case 2

Recourse between co-debtors
Effect of prescription of creditor's claim against one co-debtor

Clara has a house built with the help of building contractor Bob and architect Andrew, who are employed under different independent contracts. After some years it turns out that Clara suffered a loss due to defective building work. Clara has a contractual claim for damages against Bob, as he is responsible for the defect. She also has a claim against Andrew, because he did not diligently supervise Bob's work, as he was contractually bound to do. Any claim against Bob is, however, time-barred. This is not the case with Andrew, as Clara and Andrew agreed in their contract for a longer prescription period. Andrew pays damages to Clara and claims contribution from Bob. Bob raises the defence of prescription.

I. Operative Formants

1. DCFR

As Clara has a contractual claim for damages both against Bob and Andrew, and as she cannot recover more than her loss, it seems that Bob and Andrew are contractually liable for the same damage according to Art. III 4:103 (2), so that their liabilities to pay damages are solidary as defined by Art. III 4:102 (1).

However, Art. III 4:101 and 4:102 refer to *one obligation.* The question of unity or plurality of obligations is much disputed in European national laws. In the case of contractual liabilities arising from different contracts, however, there seems to be unanimity that there are not only one but several obligations. On this basis, the whole section on plurality would not be applicable. On the other hand, the DCFR is to be interpreted autonomously (Art. I 1:102 (1)). The definition in Art. III 1:101 (1) gives no answer. The PECL (Art. 10:101) speak of a plurality of "solidary obligations" and expressly include the case where damages are owed by one debtor contractually and by another debtor in delict[26]. It is not clear whether the deviation from the PECL in the DCFR was made in order to restrict the scope of application of the rules on plurality of debtors. According to Art. VI 6:105 DCFR, there is solidarity where several persons are (in delict) liable for the same damage. This rule seems to be applicable to independent tortfeasors. This is an indication that there can also be solidarity between independent contractors liable for the same damage. This solution may also be inferred from Art. III 4:103 (3), according to which different grounds of liability do not prevent solidarity.

In case of solidarity, payment by Andrew discharges Bob (Art. III 4:108 (1)). Andrew can claim contribution according to Art. III 4:106-107. If he exercises the rights of Clara according to Art. III 4:107 (2), it seems that Bob can successfully invoke the defence of prescription. However, a recourse claim by Andrew founded on Art. III 4:107 (1) is, according to Art. III 4:111 (b), not affected by the prescription of Clara's claim against Bob. The parallel rule of the PECL gives the illustration that a debtor can claim recourse against a fellow debtor even if he paid the creditor after prescription of the creditor's claim against the fellow debtor[27].

As a result, if the DCFR rules on plurality apply, Andrew has a contribution claim against Bob.

2. German Law

After some hesitation, it has been generally acknowledged since 1965 that a constructor and an architect contractually liable for the same damage are solidary debtors as defined by § 421 BGB, although their liabilities rest on different contracts[28].

[26] Art. 10:102 PECL, Comment C.
[27] PECL, Illustration to Art. 10:110.
[28] BGHZ 43, 227 (1.2.1965); VersR 1965, 803, 804; WM 1971, 101; WM 2003, 29,32; Bydlinski (n. 3), § 421 n. 5; Ehmann (n. 7), § 421 n. 22; F. Peters, in *Staudinger, Kommentar zum BGB* (Berlin, Sellier-de Gruyter, 2003), Annex to § 638 n. 44-46; Selb (n. 4), 58 ff.; Reinicke and Tiedtke (n. 6), 2; J. Busche, in *Münchener Kommentar zum BGB* (München, Beck, 4th edn, 2005), § 634 n. 137-138; Schlechtriem and Schmidt-Kessel (n. 5), n. 843.

The rules on solidarity provide that prescription of Clara's claim against Bob does not, in principle, affect Andrew's liability (§ 425).

Andrew has a recourse claim against Bob (§ 426 (1)) and is additionally subrogated into Clara's claim against Bob (§ 426 (2)). If Andrew proceeds *via* subrogation, Bob can raise the defence of prescription (§§ 412, 404).

Conversely, the recourse claim granted by § 426 I is, according to the courts and the majority of legal scholars, an independent claim not affected by the prescription of the creditor's claim[29]. It comes into being with the solidarity relationship itself and prescribes within the general prescription period, which today is 3 years (§ 195) and begins to run when Andrew acquires knowledge of the damage and of Bob's responsibility (§ 199). Thus, an architect paying damages to the client after the client's claim against the constructor is prescribed, has an enforceable recourse claim against the constructor[30]. This solution has been maintained by the *Bundesgerichtshof* even in a case where the limitation period against the contractor had been contractually reduced by the architect as agent of the client[31]. The case where the architect seeks recourse when the limitation period of his obligation has been contractually expended has not yet been decided. Following the general propositions, it seems that Bob has no defence against Andrew's contribution claim.

This solution is not undisputed in legal scholarship. Some authors want to allow a solidary debtor to raise his defences to the creditor's claim against the recourse claim of another solidary debtor[32]. Following this view, Andrew has to pay full damages to Clara, but has no enforceable recourse against Bob. According to other authors, prescription of a claim against one solidary debtor limits the creditor's claim against the other to the latter's internal share of the liability, so the need for recourse does not arise[33]. Some have suggested that the solution should depend on the reason for prescription of the creditor's claim, e.g. whether it is due to different statutory limitation periods or, instead, to a contractual reduction of one limitation period[34].

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[29] BGH VersR 1956, 32; VersR 1960, 996; NJW 1991, 1683, 1685; NJW 1992, 1507, 1509; Selb (n. 4), 115, 136; Larenz (n. 5), § 37 III; Reinicke/Tiedtke (n. 6), 66-67, 81-82; Wolf (n. 6), § 426 n. 39, 52; Bydlinski (n. 3), § 426 n. 9, 25, 44; Noack (n. 3), § 426 n. 8 seq.; Ehmann (n. 7), § 426 n. 24, 32.
[30] BGH WM 1971, 101, 103; BGH VersR 1965, 804.
[31] BGHZ 58, 216 (9.3.1972).
[32] J. Stamm, *Regreßfiguren im Zivilrecht* (Berlin, Duncker & Humblot, 2000) 71; Stamm, *Die Bewältigung der „gestörten Gesamtschuld"* (2004) NJW 811, 812.
[33] J. Esser and E. Schmidt, *Schuldrecht I 2* (Heidelberg, C.F.Müller, 8th edn, 2000) § 39 III 2 a; B. Keuk, *Die Solidarhaftung der Nebentäter* (1968) 168 AcP 179; B. Keuk, *Anmerkung* (1972) JZ 529; A. Teichmann, in *Soergel, BGB* (Stuttgart, Kohlhammer, 12th edn, 2000) § 635 n. 68.
[34] J. Glöckner, *Gesamtschuldvorschriften und Schuldnermehrheiten* (Baden-Baden, Nomos, 1997) 217 ff.

3. French Law

According to Art. 1202 CC, the *solidarité* has to be expressly agreed on, unless it is provided for by a legal rule. It is generally understood in France that a *solidarité* cannot exist if it is not agreed or expressly provided for by a statutory provision (there being no such provision in case of an architect and a constructor).

Instead, where several debtors are liable for the same damage, whether in delict or contractually, they are generally held to be liable *in solidum*[35]. To this institution *praeter legem* the rules on *solidarité* do not apply. The *obligations in solidum* stem from the fact that every debtor is responsible for the whole loss and that the creditor cannot recover the damages more than once. If one debtor pays, the others are therefore discharged. *Obligations in solidum* arise if an architect and a constructor are liable for the same damage, even if their liabilities rest on different contracts[36].

In case of *obligations in solidum*, the recourse of the paying debtor is in principle founded on subrogation into the creditor's rights against the second debtor (Art. 1251 No. 3 CC)[37]. However, recourse *via* subrogation is not possible if the creditor's claim against the second debtor is prescribed[38]. In the 1960s, the courts would in this case reduce the creditor's claim against the first debtor to the latter's internal share[39]. This reduction to the detriment of the creditor was later abandoned. Prescription of a claim against one debtor no longer prevents the creditor from claiming full damages from the other debtor[40].

As Clara can claim full damages from Andrew and as a subrogatory recourse against Bob is not possible, the question arises whether Andrew has an individual recourse claim independent of Clara's claim. In the case of an architect and a building constructor liable for the same damage by different contracts, the courts often base the recourse on the general delictual liability of Art. 1382 CC[41]. The breach of contract *vis-à-vis* the creditor may thus constitute a delict towards the

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[35] See Chabas (n. 18), §§ 1070 ff.; Le Tourneau and Julien (n. 14), §§ 159 ff.; Terré, Simler and Lequette (n. 14), §§ 1261 ff.; Malaurie, Aynès and Stoffel-Munck (n. 18), §§ 1275 ff.; in English: D. Friedmann and N. Cohen, *Adjustment among Multiple Debtors*, IECL Vol. X, ch. 11 (Tübingen, Mohr Siebeck, 2007) § 11; C. von Bar, *The Common European Law of Torts*, Vol. I (Oxford, Clarendon Press, 1998) n. 52.

[36] Cass. 1 civ. (14.10.1958) Bull. civ. I no. 426, 430; (25.1.1960), Bull. civ. I no. 49; Cass. 3 civ. (20.2.1969) JCP 1969 IV 84; (29.4.1974) Bull. civ. III no. 174; (6.10.1993) Bull. civ. III no. 119; (3.7.1996) JCP G 1997 II 22757.

[37] J. Mestre, *La subrogation personelle* (Paris, LGDJ, 1979) §§ 177 ff.; Le Tourneau and Julien (n. 14), § 99; Terré, Simler and Lequette (n. 14), § 1263; Friedmann and Cohen (n. 35), § 11.

[38] Cass. 2 civ. (6.1.1966) Bull. civ. II no. 5; (22.10.1975) Gaz. Pal. 1976, 1, 192; (6.10.1976) Bull. civ. II no. 262; Mestre (n. 37), § 411.

[39] Cass. 2 civ. (27.1.1966) Gaz. Pal. 1966, 1, 206; J. Boré, *Le recours entre coobligés in solidum*, (1967) JCP I 2126, II A; G. Durry, (1982) RTD Civ 151.

[40] Cass. com. (31.3.1981) Bull. civ. IV no. 169; Cass. 3 civ. (5.7.2000) Bull. civ. III no. 135.

[41] Cass. 1 civ. (14.10.1958) Bull. civ. I no. 428; (7.11.1962) JCP 1963 II 12987; Cass. 3 civ. (3.7.1968) JCP 1969 II 15860, note B. Soinne; (31.1.1969) JCP 1969 II 15937, note G. Liet-Veaux; (3.10.1984) JCP G 1984 IV 338.

other contractor not privy to the broken contract. The delictual action is not excluded by prescription of the creditor's claim[42]. However, it is not clear when exactly such a delict will be recognised by the courts and whether the defective building work by Bob alone can constitute a delict towards Andrew.

In a case decided in 1977, the subrogatory recourse by one debtor *in solidum* was prevented by the fact that the creditor had granted a release to the other debtor. The First Chamber of the *Cour de Cassation* decided that a debtor *in solidum* had also a personal recourse claim which was not touched by the release[43]. It seems to follow from this judgement that a recourse claim is also given in case of prescription[44]. The foundation of such a personal recourse is unclear; legal scholars suggest *negotiorum gestio*[45], unjustified enrichment[46], a modified subrogation[47], a delictual claim[48] or an analogy to the rules on *solidarité*, where a personal recourse is generally acknowledged[49]. Some authors criticise the solution, favouring a reduction of the creditor's claim against the remaining debtor[50]. The judgement of 1977 has not been followed by other judgements. The courts continue to base the recourse of debtors *in solidum* on subrogation[51]. It cannot, therefore, be safely predicted whether a French court today would allow a personal contribution claim in case 2.

II. Descriptive Formants and Comparative Evaluation

The question whether, in case of two debtors solidarily liable for the same damage, recourse is possible against a debtor whose liability towards the creditor is prescribed, has always been controversial[52]. It may be added that the Austrian solution resembles the German one[53], but

[42] Cass. 3 civ. (1.3.1983) Gaz. Pal. 1984, 1, 119, note A. Plancqueel.
[43] Cass. 1 civ. (7.6.1977) Gaz. Pal. 1978, 1, 131.
[44] Durry, (1978) RTD Civ 366; H. Groutel, *La pluralité d'auteurs* (1987) D. Chron. 87; Malaurie, Aynès and Stoffel-Munck (n. 18), § 1281.
[45] Terré, Simler and Lequette (n. 14), § 1263.
[46] N. Dejean de la Batie, *Observation*, JCP 1978 II 19003; Le Tourneau and Julien (n. 14), § 200.
[47] Groutel (1987) D. Chron. 87.
[48] E. Agostini, *Note* D. 1982, 257.
[49] P. Raynaud, *La nature de l'obligation des coauteurs d'un dommage*, *Mélanges J. Vincent* (Paris, Dalloz, 1981) 317, §§ 9-10.
[50] Durry, (1978) RTD Civ 366; C. Larroumet, *Note*, D 1978 J 290; Dejean de la Batie, JCP 1978 II 19003; Raynaud (n. 49), §§ 21-22; Malaurie, Aynès and Stoffel-Munck (n. 18), § 1282.
[51] Cf. Cass. 2 civ. (14.1.1998) D. 1998, 174, note H. Groutel, JCP 1998 II 10045, note P. Jourdin.
[52] Cf. F. Peters and R. Zimmermann, *Verjährungsfristen*, in Bundesminister der Justiz (ed.), Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, Vol. I (Köln, Bundesanzeiger, 1981) 236 ff. (Germany); K. Spiro, *Die Begrenzung privater Rechte*, Vol. I (Bern, Stämpfli, 1975) § 209; P. Loser-Krogh, *Kritische Überlegungen* (2003) ZSchwR II 127; W. Ernst, *Solidarschuld und Verjährung*, in R. Zäch (ed.), Individuum und Verband (Zürich, Schulthess, 2006) 175 (Switzerland); T. Weir, *Complex Liabilities*, IECL, Vol. XI, Ch. 12 (Tübingen, Mohr Siebeck, 1986) §§ 96, 124; Friedmann and Cohen (n. 35), §§ 64 ff.

it has also been criticised[54]. In The Netherlands, recourse is excluded only if both the obligations of the paying and the non-paying debtor are prescribed at the time of payment.[55] In England, recourse is possible if the other debtor's obligation is not enforceable because of limitation, but not if the obligation is extinguished by reason of lapse of time[56]. In Switzerland, where prescription of the recourse claim starts to run, in principle, with performance to the creditor, but is subject to a defence of estoppel if unreasonably delayed[57], the Supreme Court has recently denied recourse by a constructor against an architect when the defect in the building work appeared only after prescription of the claim against the architect[58]. Proposals *de lege ferenda* sometimes subject the contribution claim to the prescription of the creditor's claim but, as an exception, grant the performing debtor a short interval after performance in order to pursue the recourse[59].

The main argument in favour of recourse is that it is an independent claim with its own prescription. The constructor has to take into account the fact that there are other parties involved in the construction whose obligations are subject to longer prescription periods. Prescription is a weak defence, not worthy of protection. The critics argue that the recourse solution places the non-performing debtor in a worse position than if he were the sole debtor. As he is not subject to an enforceable claim by the creditor, performance by the other debtor does not confer a benefit on him. The general justification of recourse between solidary debtors, namely preventing the creditor from deciding who bears the final burden, is not applicable here, as the creditor has no choice.

If recourse is excluded, there are two possible solutions: (1) full liability of the remaining debtor without recourse, (2) reduction of the creditor's claim against the remaining debtor. Against the first solution it is argued that it is not fair to subject a co-debtor to full liability towards the creditor without giving him a chance to recover a part from his co-debtor. For the second solution it is argued that prescription is a sanction for not pursuing a claim and should therefore operate to the detriment of the creditor. Especially in the French discussion, the more general proposition has been put forward that in cases where a loss is caused by two persons, each of them is actually responsible only for a part of the damage, and solidary liability is just a means of protecting the creditor. Prescription of the claim against one debtor puts an end to solidarity, so

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[53] OGH SZ 43/15 (22.1.1970); ZVR 1974 No. 38; SZ 60/55 (26.3.1987); SZ 70/50 (15.1.1997); H. Gamerith, in P. Rummel (ed.), *Kommentar zum ABGB* (Wien, Manz, 2nd edn, 1990) § 896 n. 1-2, 5, 11.
[54] H. Koziol, *Österreichisches Haftpflichtrecht*, Vol. I, (Wien, Manz, 3rd edn, 1997), n. 14/20-21; C. Huber, *Die Verjährung von gesetzlichen Rückgriffsansprüchen*, (1985) JBl 395 and 467.
[55] BW Art. 6:11 (3).
[56] Civil Liability (Contribution) Act 1978, s. 1 (3), see C. Mitchell, *The Law of Contribution* (Oxford, Oxford University Press, 2003) n. 12.31 ff.
[57] BGE 115 II 42 (31.1.1989); BGE 127 III 257 (4.4.2001).
[58] BGE 130 III 289, 369 ff. (23.2.2004).
[59] Bundesminister der Justiz (ed.), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* (Köln, Bundesanzeiger, 1992) 108 ff.; Huber, JBl 1985, 403 ff., 471 ff.

that the other debtor is now responsible only for his "real" part[60]. Other authors maintain that, according to general principles, in cases of co-causation every person is liable for the whole loss. Solidarity is intended to protect the creditor not only in case of insolvency of one debtor, but also in case of prescription of one claim[61]. With the second solution, Clara's claim against Andrew would depend both on the relationship Clara-Bob (issue of prescription) and on the relationship Andrew-Bob (issue of internal apportionment).

There is arguably no uniform solution fitting to all cases of solidary obligations. The recourse solution of the DCFR, following German law, may be inappropriate where the liabilities are merely contractual, as in case 2. The constructor is calculating his price on the basis of the conditions of his contractual duties, including the prescription period. It is not clear why his contractual liability should be indirectly prolonged only because of the contract between the client and the architect. This is particularly so when, as in case 2, the client and the architect agreed on a longer prescription period. In this case, the contract with the architect would amount to a contract to the detriment of third parties. Seen from the perspective of the architect, provided that the defective building work cannot be regarded as a delict towards him, his recourse depends on a breach of contract by the constructor. If Andrew founds his claim on the contract between the client and the constructor, the contractual restrictions of the constructor's liability should arguably also apply. The solution of the DCFR may fit to cases of joint contractors or joint tortfeasors, but not to independent contractors.

This leads to the question of whether the DCFR is applicable at all, regarding that Art. III 4:101 refers to "one obligation". English law seems to assume just one obligation in case of co-contractors and joint tortfeasors, but not in case of independent tortfeasors or contract-breakers. In France, *solidarité* may be seen as just one obligation, but plurality of obligations is generally acknowledged for *obligations in solidum*. From a French point of view, the DCFR rules would then only apply in cases where solidarity is agreed upon or expressly provided for by statute. In German law, there is always a plurality of obligations; following this view, the DCFR rules would not be applicable at all. It is unsatisfactory that the DCFR works with an abstract notion of unity of obligation that is not explained elsewhere, when the question of unity or plurality is highly controversial in the national laws.

[60] J. Boré, JCP 1967 I 2126 and *Observations*, JCP 1971 I 2369; Mestre (n. 37), §§ 285 ff.; Keuk, (1968) 168 AcP 175, and (1972) JZ 528.
[61] F. Chabas, *Remarques sur l'obligation "in solidum"*, (1967) 65 RTD Civ 310; F. Chabas, *Bilan de queleques années de jurisprudence*, D 1970 chron 113; B. Starck, *La pluralité des causes de dommage*, JCP 1970 I 2339.

Case 3

Recourse between co-debtors
Effect of creditor's release in favour of one co-debtor

Donald is given a loan of 10.000 by the Dagobert bank for his start-up enterprise. The loan is secured by a dependent personal security (suretyship guarantee) granted by Donald's trade partner Thomas. It is agreed that the bank has the right to sue Thomas for the whole amount without having first to sue Donald or any other surety. A similar dependant personal security is later given by Donald's employee Earnest. One year later Earnest is dismissed by Donald and asks the bank to release him from his obligation. The bank grants the release. Two years later, when Donald's obligation to repay is due, Donald is insolvent. The bank claims repayment of the loan from Thomas, who in turn asks Earnest for contribution.

I. Operative Formants

1. DCFR

a) Without release:

Thomas and Earnest secure the same obligation and are therefore solidary debtors (Art. IV G 1:105 I). The bank can claim the whole amount from Thomas (Art. IV G Art. 2:105), as no subsidiarity has been agreed on (Art. IV G 2:106), and Thomas is not a consumer (Art. IV G 4:105 (b)).

If Thomas pays the bank, he can claim contribution from Earnest (Art. IV G 1:106 I, Art. III 4:107 I). He can also to this extent exercise the rights of the bank (Art. III 4:107 II). As the internal shares are equal (Art. IV G 1:106 II-IV), he can claim 5.000.

b) Effect of release

Art. III 4:109, providing for a partial release of the remaining solidary debtor, is not applicable (Art. IV G 1:108).

As a consequence of the release, Thomas cannot be subrogated into the bank's rights against Earnest. According to Art. IV G 2:110 (1), the bank's rights against Thomas are reduced to the extent necessary to prevent Thomas from suffering any loss. Thomas would not suffer any loss if he had an individual contribution claim not touched by the release. However, the DCFR

seems to assume there is no such claim. The rules of the DCFR are a modified version of the PEL Personal Security. According to Comment 10 to Art. 1:110 PEL Pers. Sec., Art. 10:108 PECL (which corresponds to Art. III 4:109 DCFR) is not applicable, because the case is already covered by Art. 2:110 PEL Pers. Sec.: the liability of the remaining provider of dependent security is not affected, but he has a damages claim against the creditor, which he can set off against his liability. The creditor's liability in damages has been substituted by a reduction of the creditor's claim in Art. IV G 2:110 DCFR, but the basic solution seems to be the same: Thomas has no recourse claim against Earnest, therefore his liability towards the bank is reduced. This solution can also be inferred from Art. III 4:112 (2) DCFR, according to which a solidary debtor can invoke his defences against the creditor also against a recourse claim, and which is applicable to security providers (Art. IV G 1:108). The bank can claim only 5000 from Thomas, who has no recourse against Earnest.

2. German Law

a) Without release

Thomas and Earnest are co-sureties securing the same debt and therefore solidary debtors, § 769 BGB, irrespective of whether they knew of each other. The bank can claim the whole amount from Thomas (§§ 765, 773 I, 421 BGB). If Thomas pays, he has, like every solidary debtor, a contribution claim against Earnest for 5000 and is to this extent also subrogated into the bank's rights (§§ 774 (2), 426 (1) and (2) BGB).

b) Effect of release

According to § 423 BGB, the release of a solidary debtor releases the other debtors if so agreed. There is no such agreement here. A release may, according to the courts and the legal scholars, have the effect of releasing the other debtors for the amount of the internal share of the released debtor, but only if there is some indication of such an agreement[62]. The default rule is that a release of a solidary debtor does not discharge the other debtors at all. According to the courts and the majority of the scholars, the released debtor remains liable to render contribution to other solidary debtors[63]. Some authors suggest the exclusion of a contribution claim against a released debtor[64], or the reduction of the creditor's claim against the remaining debtor[65].

[62] BGH NJW 1986, 1097; BGH NJW 2000, 1942; Selb (n. 4), 70 ff.; Schlechtriem and Schmidt-Kessel (n. 5); n. 849; Noack (n. 3), § 423 n. 19; Bydlinski (n. 3), § 423 n. 3.
[63] BGHZ 59, 97, 103 (29.6.1972); BGH NJW 1986, 1097; BGH NJW-RR 1989, 918, 920; BGH WM 1991, 399; Reinicke and Tiedtke (n. 6), 43, 66, 83; Wolf (n. 6), § 423 n. 1; Noack (n. 3), § 423 n. 14, 18; Bydlinski (n. 3), § 423 n. 4, § 426 n. 8-9.
[64] Stamm, *Regreßfiguren* (n. 32), 69-71, and (2004) NJW 811 ff.

For co-sureties, there is a special rule in § 776 BGB: if the creditor gives up his right against one surety, the other surety is discharged to the extent he would have been subrogated into the creditor's rights against the discharged if he had paid and the discharge had not taken place. As the discharge of Earnest prevented the subrogation of Thomas into the bank's rights against Earnest, it would seem that Thomas is partly discharged, so that the bank can only claim 5.000 from him.

However, the *Bundesgerichtshof* interprets § 776 restrictively[66]. It applies the general rule of solidarity, according to which a release does not extinguish the released debtor's liability in contribution. The release of Earnest prevents the subrogation, but does not impede Thomas' recourse claim. Therefore, Thomas' situation has not been changed by the release. § 776 is only applicable where the creditor's disposition extinguished Thomas's rights of recourse, which is not the case here. This interpretation of § 776 has been followed by legal scholarship[67]. Only few authors criticise this solution and suggest to reduce the bank's claim against Thomas[68].

According to the courts and the majority of legal scholars, the bank can claim 10.000 from Thomas, who has a recourse claim against Earnest for 5.000.

3. French Law

a) Without release

Thomas and Earnest are sureties securing the same debt. Each of them is liable for the full debt (Art. 2302 (or formerly Art. 2025) CC). As Thomas renounced the defence of division of Art. 2303 (2026) CC, he can be sued for the whole amount. If Thomas pays, he has a contribution claim against Earnest for 5.000, according to Art. 2310 (2033) CC, which is applicable even in cases of independent sureties[69]. He is also subrogated to that amount into the bank's rights against

[65] Keuk, (1968) 168 AcP 193 ff.; W. Goette, *Gesamtschuldbegriff und Regreßproblem* (Bonn, Röhrscheid, 1974), 138 ff.
[66] BGH WM 1963, 1249; NJW 1992, 2286; NJW 2000, 1034.
[67] D. Reinicke and K. Tiedtke, *Bürgschaftsrecht* (Neuwied, Luchterhand, 2nd edn, 2000) n. 243-244, 398; P. Bülow, *Recht der Kreditsicherheiten* (Heidelberg, Müller, 7th edn, 2007) n. 1019; M. Habersack, in *Münchener Kommentar zum BGB* (München, Beck, 4th edn, 2004) § 769 n. 8, § 776 n. 5; Noack (n. 3), § 423 n. 35, § 426 n. 240; Ehmann (n. 7), § 423 n. 5, § 426 n. 13; Bydlinski (n. 3), § 426 n. 9.
[68] H.-P. Pecher, in *Soergel, BGB* (Stuttgart, Kohlhammer, 12th edn, 2007) § 769 n. 8, 16, § 774 n. 29, § 776 n. 20.
[69] Cass. 1 civ. (3.10.1995), Bull. civ. I no. 338.

Earnest (Art. 1251 No. 3 CC)[70]. According to legal scholarship, recourse and subrogation are two distinct ways of obtaining contribution against a co-surety[71].

b) Effect of release

In case of *solidarité*, the release of one debtor also discharges the other, unless the creditor reserved his rights against the others (Art. 1285 (1) CC). In this case, the obligations of the others are reduced for the amount of the internal share of the released debtor (Art. 1285 (2)).

However, the fact that a debt is secured by several sureties, and even a renunciation of the defence of division, does not in itself lead to *solidarité*, which has to be expressly agreed on (Art. 1202 CC). In case 3, a French court may hold that Thomas is a commercial surety and therefore solidarily liable with Donald, and the same is possible with Earnest. However, a *solidarité* between the debtor and a surety does not lead to a *solidarité* between the surety and another surety who separately secures the same debt[72]. Thomas and Earnest are therefore mere co-sureties. Art. 1287 (3) CC provides that a release of a surety does not release other sureties securing the same debt.

Thomas could, however, point to Art. 2314 (2037) CC, according to which a surety is released insofar as his subrogation into the rights of the creditor is prevented by an act of the creditor. Those rights include rights against other sureties[73]. Since the bank, by its release, prevented Thomas's subrogation into the bank's rights against Earnest for the amount of 5.000, Thomas could be partly discharged. However, the courts and a part of the legal scholars restrict Art. 2314 CC to securities that were given before or at the same time as the engagement of the surety[74]. As Earnest engaged himself later than Thomas, Art. 2314 would thus not apply. Other legal scholars suggest instead applying Art. 2314 to all securities[75].

Regardless of this controversy, the courts and the legal scholarship unanimously hold that the release of a surety will, in principle, reduce the liability of other sureties securing the same debt for the amount of the internal share of the released surety, irrespective of the order in which

[70] Cass. civ. (13.6.1939), Gaz. Pal. 1939 II 290; Terré, Simler and Lequette (n. 14), §§ 1374, 1387; Mestre (n. 37), §§ 465, 546-547; E. Savaux, *Subrogation personelle* Encyclopédie Dalloz, Répertoire de droit civil (Paris, Dalloz, 2008) §§ 82, 165.
[71] P. Simler, *Cautionnement et garanties autonomes* (Paris, Litec, 3rd edn, 2000) §§ 631 ff., 651; M. Cabrillac and C. Mouly, *Droit des sûretés* (Paris, LexisNexis Litec, 8th edn, 2007) §§ 282-283; L. Aynès and P. Crocq, *Les sûretés* (Paris, Defrénois, 2nd edn, 2006) §§ 167, 174.
[72] Cass. 1 civ. (23.6.1992), Bull. civ. I no. 192; B.-H. Dumortier, *Observation*, JCP 1986 II 20689; Aynès and Crocq (n. 71), § 146; Simler (n. 71), §§ 91, 548; Cabrillac and Mouly (n. 71), § 378.
[73] Simler (n. 71), § 834; Aynès and Crocq (n. 71), § 283.
[74] Cass. com. (21.2.1977), JCP 1977 IV 102; Cass. com. (25.1.1994), Bull. civ. IV no. 30; Cass. 1 civ. (17.10.1995), Bull. civ. I no. 366; Aynès and Crocq (n. 71), § 284.
[75] Mestre (n. 37), § 619; Simler (n. 71), § 836; Cabrillac and Mouly (n. 71), § 309.

the sureties obliged themselves[76]. The rule in Art. 1287 (3) CC is not taken literally. Insofar as this restriction of Art. 1287 cannot be founded on Art. 2314 CC, it is mainly explained by an application of Art. 1285 (2) CC by analogy.

However, in one case the *Cour de Cassation* held that the release of one surety does not discharge the other surety at all[77] and that, after payment, the other surety does not have a contribution claim against the released surety[78]. The reason for this result, criticised by the scholars[79], might be that the remaining surety (albeit not the released surety) obliged himself to a maximum amount. The judgement seems not to have changed the general rule. A French court would therefore probably decide that the bank can claim 5000 from Thomas, who has no recourse against Earnest.

II. Descriptive Formants and Comparative Evaluation

The effect of a release of just one solidary debtor has always been a matter of dispute[80]. One solution, chosen by the French and Italian (Art. 1301) Civil Codes and the DCFR, is to discharge the other debtors for the released debtor's share. The other solution, chosen by the German, Austrian (§§ 894, 896), Spanish (Art. 1146) and Dutch (Art. 6:14) Civil Codes, is to leave the liabilities of the other debtors intact and to maintain the duty of the released debtor's obligation to contribute.

In favour of the contribution solution it is argued that a released debtor who had to pay his share to another debtor can turn to the creditor and claim a refund if the contract underlying the release provided that the released debtor was to be free of any obligation. Furthermore, the claim of the creditor against the remaining debtor should not depend on the relationship between the creditor and the released debtor (issue of release) and on the relationship between the debtors (issue of internal shares). In favour of the reduction solution it is argued that maintaining the contribution obligation would thwart the effect of the release. Granting the released debtor a refund claim against the creditor would lead to circuity of actions.

The question also arises in the case of several providers of dependent personal security securing the same debt, who are regarded by national laws either as a special case of solidary debt-

[76] Cass. civ. (13.6.1939) Gaz. Pal. 1939 II 290; Cass. 1 civ. (18.5.1978), Bull. civ. I no. 195; (11.7.1984), JCP 1986 II 20576, note Dumortier; (26.5.1994), Bull. civ. I no. 187; Simler (n. 71), §§ 748-749; Cabrillac and Mouly (n. 71), § 297; Terré, Simler and Lequette (n. 14), § 1471.
[77] Cass. 1 civ. (23.6.1992) JCP G 1993 II 22134.
[78] Cass. 1 civ. (3.10.1995), Bull. civ. I no. 338 (same case).
[79] Dumortier, *Note*, JCP G 1993 II 22134; Simler (n. 71), § 749; Cabrillac and Mouly (n. 71), § 297.
[80] See Friedmann and Cohen (n. 35), §§ 41 ff.; Meier (n. 7), n. 168 ff.

ors, or as a form of plurality outside solidarity. In most countries they are protected by a special rule, whereby they are (partly) discharged if the creditor gives up another security. This rule is restricted in some countries to pre-existing securities, arguing that the surety did not rely on securities given later. Against this, it is argued that the surety does not rely on particular securities, but on the general chance of subrogation into any securities, and that subrogation in later securities should not depend on the creditor's choice.

Both in France and Germany, the rule for co-sureties is assimilated to the rule for ordinary solidary debtors, in spite of special provisions in the Codes seemingly ordering a different result. In France, it seems to be taken for granted that recourse against a released surety is not possible. In order to protect the remaining surety against a prejudice resulting from the acts of the creditor, his liability towards the creditor is reduced. Conversely, in Germany it is taken for granted that there is recourse even against a released surety. There seems therefore to be no need to protect the remaining surety. The same result is expressly provided for by the Austrian Code, § 1363[81]. The DCFR follows the French model.

The appropriate solution may depend on whether there is a contractual relationship between the security providers. If Thomas and Earnest provided security separately, with no regard to each other, the DCFR solution seems to be preferable for the reasons already given in Part II of case 2: Earnest should not be prejudiced by the security contract between Thomas and the bank, a contract to which Earnest is not party and which he cannot prevent. To establish his contribution claim, Thomas has to rely on the obligation assumed by Earnest towards the bank, but this obligation does not exist anymore. The German model assumes that Earnest's engagement towards the bank gives contribution rights to Thomas and that the parties cannot deprive Thomas of these rights afterwards, but the security contract between Earnest and the bank is not a stipulation in favour of a third party.

However, security providers often act jointly on the basis of a common understanding. In these cases there is at least a tacit agreement between them providing that everyone has to give security and that, in case of the debtor's insolvency, the final loss shall be shared by the security providers in a certain way. If Thomas and Earnest had provided their securities on the basis of a mutual agreement, Thomas's right of recourse would arguably be a contractual right. The bank cannot, by agreement with Earnest only, interfere with these contractual rights. The contractual recourse claim of Thomas would remain intact. In this case the German model seems to be preferable, as there is no need to protect Thomas when his situation is not changed by the release.

[81] OGH ÖBA 1999, 154; ÖBA 2007, 316, 318.

Earnest, who bound himself by a contract with Thomas, cannot expect to be discharged by an agreement with the bank.

The DCFR, like German and French law, does not distinguish between the cases where there is a contract between the security providers and where there is no such contract. The right to recourse always seems to be the same although in one case it has a contractual foundation. A differentiation depending on the internal relationship between the security providers would arguably allow solutions that are more appropriate.

2. General Observations

Rules on plurality of debtors usually have three functions. They regulate (1) the forms of plurality and when they arise, (2) the external relationship between the debtors and the creditor, and (3) recourse between the debtors. There are, however, considerable differences between the factual situations giving rise to questions of plurality, which may require different rules.

(1) Of major importance in the DCFR is the case of debtors obliging themselves together towards the creditor by one common contract. Each debtor is then obliged either for a part (divided obligation) or for the whole performance (solidarity). The third category of joint obligations is superfluous and harmful (see case 1). If the form of plurality is not agreed on, some national laws have a presumption of divided obligations, others a presumption of solidarity. The DCFR's choice for the solidarity presumption seems to be justified, as presumptions of divided obligations are usually subject to various exceptions (commercial law, special types of contract, co-debtorship for security purposes).

Outside contract, the main cases where every debtor is held liable in full, but the creditor can require the performance only once, are where the debtors are liable for the same loss, or where they provide security for the same debt. Concerning liability for a loss, the scope of application of the DCFR is uncertain because of Art. III 4:101 (see case 2). Concerning security providers, one wonders why, although they are declared to be solidary debtors, only two rules of solidarity are subsidiarily applicable (Art. IV G 1:105 and 1:108). The DCFR does not touch the question whether there may be solidarity in other situations, e.g. between a tortfeasor and an insurer covering the loss, or between two independent insurers covering the same loss. This seems to be justified, because there is too much uncertainty in the national laws about this question.

(2) The DCFR rules on the external relationship (Art. III 4:110 (a), 4:111 (a), 4:112 (1)) are "neutral": in principle, events concerning liability of one debtor have no influence on the liability of another debtor, except a release. They can never work to the detriment of other debtors. This

decision seems to be justified when the liabilities of the debtors arose separately, like in the case of independent tortfeasors, contract-breakers or security providers.

However, it is different when the debtors obliged themselves together towards the creditor by a common contract. In these cases, courts often take account of the debtors' close connection and their common engagement, holding that a notice by the creditor to one debtor is effective towards all, that a breach of contract by one debtor is attributed to all, or that a negotiation or an undertaking to cure performance by one debtor extends the period of prescription against all debtors. In France, this is reflected by the rules of *solidarité*, mainly applicable in cases of common contracts and providing for a number of "common effects". In Germany, the solidarity rules are neutral, but the courts tend to assume such common effects in cases of common contracts, either by holding that the debtors form a partnership having independent legal capacity, or by assuming that the common effects have been impliedly agreed on by the parties. The last solution is also open when applying the DCFR rules. However, it may be regretted that they do not provide any help in this matter of great practical importance.

(3) Concerning recourse, two situations have to be distinguished:

When debtors oblige themselves together, there is usually a pre-existing relationship between them. If there were no statutory recourse rules, courts would probably base the recourse on a contract between the debtors. The DCFR rules (Art. III 4:106-107) then merely reflect the parties' agreement, except the provision of subrogation (Art. III 4:107 II), which is in line with the majority of European laws and seems to be useful. As the creditor cannot interfere with the internal agreement, the rules in Art. III 4:110 (b) and 4:111 (b) on the effects of judgement and prescription are a matter of course, while the rule in Art. III 4:109 is at least doubtful (see case 3). The same holds true for Art. III 4:112 (2): a debtor having a personal defence against the creditor may nevertheless be validly contractually bound towards his co-debtors.

If there is no pre-existing relationship between the solidary debtors, a recourse claim has to be provided for by the law. The rules in the DCFR on apportionment, subrogation and the insolvency of one debtor (Art. III 4:106-107, IV G 1:106) reflect the current developments in the national laws. A question often disputed is whether a debtor's liability to render recourse towards a co-debtor can go beyond his liability towards the creditor. According to Art. III 4:109, a debtor released by the creditor is also discharged from contribution obligations. On the other hand, a debtor whose obligation is prescribed, or against whom the action of the creditor has been dismissed by a court, can nevertheless be subjected to a contribution claim of a co-debtor (Art. III 4:110-111). In this way, the DCFR follows the German model of a legal relationship between the solidary debtors producing contribution claims that are independent of the fate of the creditor's

claim. The situation of a debtor may thus get worse due to the fact that there is another debtor. This solution is questionable, in particular where the liabilities of the debtors are merely contractual (see cases 2 and 3). It also does not fit to the more general rule of Art. III 4:112 (2). More generally, it may lead to a restrictive application of the DCFR rules in cases where a recourse claim going beyond the creditor's claim is not wished in practice.

Questions of plurality of debtors are heavily disputed in national laws. Appropriate solutions are difficult to find as long as one works with a highly abstract concept of solidarity, without having regard to the kind of obligations and to the relationship between the debtors. The DCFR rules look like armchair decisions, partly providing rules that are a matter of course (Art. III 4:103 I and III, 4:104, 4:108 I, 4:112 I 1), but not tackling the real problems. The time for European solutions has arguably not yet come.

Sales

DCFR, Book IV, Specific Contracts and the rights and obligations arising from them; Part A, Sales

by

Roberta Peleggi

Summary: 1. Three Cases. – Case 1. – Case 2. – Case 3. – 2. Comparison and Evaluation.

1. Three Cases

Case 1

Notion of contract for sale
Lack of promised qualities
Remedies

Rainbow Ltd, an enterprise which specializes in the manufacture of noise-abating glass, entered into a contract with Mr. Allen, a record producer, for the supply and installation of windows at Mr. Allen's new recording studio, situated in the proximity of a railway station. During negotiations, Rainbow Ltd assured Mr. Allen that the windows would provide - as Mr. Allen had expressly asked for – an excellent degree of sound isolation. Rainbow Ltd delivered and installed the windows, and Mr. Allen paid in full. However, shortly after installation, Mr. Allen discovered that the windows were not fit for the purpose for which they were intended, and asked that they be replaced with others of a different type complying with its needs. Faced with Rainbow Ltd's refusal, Mr. Allen brought an action against it claiming termination of contract and damages.

Variation: Would the result be different if Mr. Allen was a consumer who needed adequate noise protection for his flat?

The present case raises three main questions: a) whether the contract concluded between Rainbow Ltd and Mr. Allen is a contract for the sale of goods; b) whether Rainbow Ltd is liable towards Mr. Allen for supplying windows that were not sufficient for their intended purpose; and c) if so, what are the remedies available to Mr. Allen against Rainbow Ltd.

The issue as to whether the contract between Rainbow Ltd and Mr. Allen is a contract for the sale of goods is answered in the affirmative both under Italian law and the DCFR.

1. Italian law. In the Italian Civil Code, which deals with the contract for sale in art. 1470 ff., such a contract is defined as a contract whereby the ownership of goods or other rights is transferred from a seller to a buyer for a price (cp. art. 1470 c.c.) A contract of sale can have as its object the transfer of property or other rights *in rem* on both tangible (movable or immovable) and intangible assets (negotiable instruments assets, shares, stocks, trademarks, know-how, *etc.*)[1]. The ownership transfers from the seller to the buyer immediately upon the parties' agreement; therefore, delivery of the goods is not required for such a transfer to be effective (*contratto consensuale a effetti reali*: cp. art. 1376 c.c.) Yet, there exist cases where the transfer of ownership is postponed (*vendita ad effetti obbligatori*), such as where the sale concerns goods specified only as to kind (in this case, the transfer takes place upon identification of the goods: see art. 1378 c.c.) or future goods, for example goods still to be manufactured or produced (in this case, the ownership is transferred as soon as the goods come into existence: see art. 1472 c.c.). Also, no particular form is needed for a contract of sale to be valid, except where the contract concerns immovables or rights on immovables, in which case the contract must be in writing (cp. art. 1350 c.c.).

Where goods to be manufactured or produced are involved, it must be ascertained whether the contract concerns the sale of goods or instead the performance of a piece of work or rendering of services (independent contract: see art. 1655 ff. c.c.) The answer to this question may vary depending on the circumstances. Yet, according to the view repeatedly expressed by the Italian Supreme Court, a contract involving goods to be manufactured or produced is to be considered a sales contract if the obligation 'to do' does not prevail over the obligation 'to give' not only in terms of quantity (that is, the value of the work done or services rendered does not exceed the value of the goods), but also with regard to the parties' intention (that is, the work carried out or the services rendered are not the purpose the parties intended to achieve by entering into the con-

[1] Cp. G.B. Ferri, *La vendita in generale – Le obbligazioni del venditore e le obbligazioni del compratore*, in P. Rescigno (ed.), *Trattato di diritto privato* (Torino, UTET, 2nd edn, 2000) 515 ff.; S. Ferreri and A.M. Musy, *La vendita*, in R. Sacco (ed.), *Trattato di diritto civile* (Torino, UTET, 2006) 78 ff.

tract)[2]. In particular, where the goods ordered by the buyer are the same as those regularly produced by the seller, and the manufacturing does not imply modifications to means or manner of production but only minor changes to adapt the seller's products to the buyer's requests or needs, the contract is to be treated as a contract for the sale of goods[3].

In the present case, the work carried out by Rainbow Ltd does not seem to represent the purpose the parties intended to achieve by entering into the contract, but only a means for making Mr. Allen acquire the goods under the agreement. Moreover, under the circumstances, the windows supplied can be reasonably considered as being of the same type as those ordinarily manufactured by Rainbow Ltd. Consequently, the contract between the parties can be regarded as one for the sale of goods, having effects as from the time the windows are produced and shaped in the form and dimensions requested by Mr. Allen.

2. Draft Common Frame of Reference: In the DCFR, the rules governing contracts for the sale of goods are to be found in Part A of Book IV, from art. IV.A.-1:101 to art. IV.A.-6:108. According to art. IV.A.-1:101 DFCR (*Contracts covered*), these rules apply with appropriate adaptations to contracts for the sale of incorporeal property (electricity, stocks, shares, negotiable instruments, intellectual property, etc.), to contracts conferring rights in information or data and to contracts for the barter of goods or any other asset mentioned in the same provision. However, they do not cover agreements for the sale or barter of immovable property or rights in immovable property. A contract for the sale of goods is defined by art. IV.-1:202 DFCR as a contract whereby a party, the seller, undertakes to transfer the ownership of goods to another party, a buyer or a third party, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price. A contract of sale may also concern goods not yet in existence at the time when the contract is concluded (see art. IV.A.-1:201, lit. (a), DCFR), such as goods to be manufactured or produced. In fact, pursuant to art. IV.A. – 1:102 DCFR, a contract under which one party is bound, for a price, to transfer the ownership of goods manufactured or produced for the other party, is considered primarily a contract for the sale of the goods. Under the circumstances of the case, it therefore seems that the contract between Rainbow Ltd and Mr. Allen falls within the scope of the DCFR's provisions dealing with contracts for the sale of goods.

[2] See, among others, Cass. 17 December 1999, n. 14209, Giurisprudenza Italiana (2000), I, 1, 34; Cass. 29 May 1998, n. 5322, Giurisprudenza Italiana (1999), I, 1, 249.

[3] See, among others, Cass. 21 giugno 2001, n. 8445, (2000) I Contratti 55 ff.; Cass. 21 May 2001, n. 6925, Giurisprudenza Italiana (2001), III, 2240; Cass. 17 December 1999, n. 14209, Giurisprudenza Italiana (2000), I, 1, 34; Cass. 8 September 1994, n. 7697, Giurisprudenza Italiana (1995), I, 1, 1244.

The answer to the question whether Rainbow Ltd is liable towards Mr. Allen for supplying windows that are not sufficient for their intended purpose, may be positive both under Italian law and the DCFR.

1. Italian law. According to art. 1476 c.c., the seller's main obligations are: 1) to deliver the goods to the buyer; 2) to make the buyer acquire ownership in situations where such acquisition is not an immediate consequence of the conclusion of the contract; 3) to warrant that the goods or the rights sold are free from liens, encumbrances or any other claim by third parties (*garanzia contro l'evizione*) and free of defects (*garanzia contro i vizi*).

The warranty against defects in the goods sold has traditionally raised much debate among scholars[4], in particular with respect to its nature and as to whether it may be considered an autonomous obligation arising from the contract[5]. To this question the majority of legal authors has answered in the negative, holding that the seller's obligation to deliver the goods is fulfilled by delivering the goods *as they are* at the time of conclusion of the contract[6]. However, as a result of the implementation of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees[7], Italian law now provides for special rules on consumer sales, according to which professional sellers are bound to deliver goods that are in conformity with the contract (see infra, "variation"). The above-mentioned traditional view therefore appears less convincing today[8].

Another problematic issue concerns the differences among the three categories of defects envisaged by the Italian Civil Code: 'defects' *stricto sensu* (*vizi redibitori*: see art. 1490 c.c.), 'lack of qualities essential for the use the goods are intended' (see art. 1497 c.c.) and 'lack of qualities promised' (see art. 1497 c.c.). Drawing a distinction among these categories is important, because the remedies available to the buyer may change depending on what kind of defects is found in the goods sold (see *infra*, lit. (c)). According to art. 1490 c.c., 'defects' are those which render the goods unfit for the use they were intended for or which appreciably diminish their value. The prevailing view is that 'defects' consist of material imperfections or alterations of the goods caused by defective manufacture, formation or storage[9]. As to lack of essential and promised qualities, neither is defined by art. 1497 c.c. However, 'lack of essential qualities' is tradi-

[4] Cp. G. Gorla, *La compravendita e la permuta*, in F. Vassalli (ed.), Trattato di diritto civile (Torino, UTET, 1937) 121 ff.
[5] A detailed illustration of the various theories formulated by legal scholars can be read in C.M. Bianca, *La vendita e la permuta*, in F. Vassalli (ed.), Trattato di diritto civile (Torino, UTET, 2nd edn, 1993), vol. VII, t. II., 699 ff.
[6] See, among others, D. Rubino, *La compravendita*, in A. Cicu and F. Messineo (eds.), Trattato di diritto civile e commerciale, Vol. XXIII (Milano, Giuffrè, 1962) 634; C.M. Bianca, *La vendita e la permuta*, p. 704.
[7] OJ L 171, 7 July 1999, pp. 12–16.
[8] On this point see, in particular, Ferreri and Musy, *La vendita*, 156 ff.
[9] Cp. A. Luminoso, *La compravendita* (Torino, Giappichelli, 3rd edn, 2003) 267; as to case law see Cass. 22 August 1998, Corriere giuridico (1998) 1155 ff.; Cass. 13 January 1997, n. 244, Repertorio Foro Italiano (1997), Vendita, n. 58.

tionally understood as the lack of any physical or structural feature that goods of the same type or kind usually have, and which is required to render the goods fit for the purpose for which they would normally be used[10]. As to the 'lack of promised qualities', it is understood as the lack of any physical, structural - and according to case law[11] – also juridical feature of the goods[12], whose existence has been promised either expressly or implicitly through contractual terms, advertising materials, or other circumstances of the case[13].

The buyer is entitled to rely on the said warranty if the defects or lack of qualities (or their causes) already existed at the time of conclusion of the contract[14]. Yet, according to art. 1491 c.c., no warranty applies if at the time the contract was concluded, the buyer was aware of the defects or they were easily detectable[15], unless, in the latter case, the seller declared that the goods were free of defects. The same exceptions apply to any lack of essential qualities[16]. The burden of proving the existence of defects or lack of qualities is on the buyer[17].

Although defects and lack of qualities (essential or promised) may appear clearly distinguishable[18], the decisions rendered on this topic demonstrate that it is quite the contrary[19]. Moreover, further uncertainty in this matter is brought about by the courts' tendency to widen the scope of the *alium pro alio datum* doctrine[20]. *Aliud pro alio* is a category originally developed by case law to cover situations where the goods delivered are completely different from those agreed upon[21], or they belong to a kind other than that agreed upon[22], but which gradually has been construed so as to encompass situations where the delivered goods, though corresponding to the ones

[10] See Luminoso, *La compravendita*, 267; Bianca, *La vendita e la permuta*, 888.
[11] Cp. Cass. 13 January 1984, n. 276, Repertorio Foro Italiano (1984), voce Vendita, n. 78; Cass. 26 January 1982, n. 508, Repertorio Foro Italiano (1982), Vendita, n. 90.
[12] See Luminoso, *La compravendita*, 268.
[13] *Ibidem*, 268. As to case law see, among others, Cass. 4 March 1993, n. 6240, Repertorio Foro Italiano (1982), Vendita, n. 76.
[14] See Rubino, *La compravendita*, 780; Luminoso, *La compravendita*, 269; Cass. 4 March 1981 n. 1260, Giustizia civile (1981), I, 2698.
[15] See Cass. 1 December 2000, n. 15395, Repertorio Foro Italiano (2000), voce Vendita, n. 49; Cass. 30 January 1995 n. 1082, Repertorio Foro Italiano (1982), Vendita, n. 57.
[16] See C. Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, in P. Rescigno and E. Gabrielli (eds), Trattato dei contratti – I contratti di vendita, vol. VII (Torino, UTET, 2007) 1119.
[17] Luminoso, *La compravendita*, 275; as to case law see, among others, Cass. 10 September 1998, n. 8963, Repertorio Foro Italiano (1998), Vendita, n. 58.
[18] However, according to some scholars there is no significant difference between defects and lack of essential qualities, while the lack of promised qualities is to be considered as an autonomous category (for this opinion see, for instance, Rubino, *La compravendita*, 762 ff.; Luminoso, *La compravendita*, 259). For further details see Ferreri and Musy, *La vendita*, 219 ff.
[19] For some examples see C. Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, 1116 ff.
[20] On this topic see Bianca, *La vendita e la permuta*, 904 ff.; for some examples regarding false works of art and delivery of food unsuitable for consumption see C. Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, 1114 ff.; L. Cabella Pisu, *Garanzia e responsabilità nelle vendite commerciali*, *Quaderni di giurisprudenza commerciale* (Milano, Giuffrè, 1983) 200 ff.
[21] Cp. Luminoso, *La compravendita*, 260.
[22] Cp. Cass. 30 July 2004, n. 14586, Repertorio Foro Italiano (2004), voce Vendita, n. 89; Cass. 3 August 2000, n. 10188, I Contratti (2001) 262 ff.

agreed upon, turn out to be unfit for the economic or social function for which they would ordinarily be intended[23], or which has been agreed by the parties[24]. In all these situations, the buyer is granted wider protection, since he can avoid the short periods of forfeiture and prescription foreseen by arts. 1495 and 1497 c.c. (see *infra*, lit (c)), and resort to general remedies for non–performance (specific performance, termination of contract, damages).

Turning to the case, it can be considered to fall within the scope of art. 1497 c.c. ('lack of promised qualities'), as it involves a promise by Rainbow Ltd that the windows will serve the purpose requested by the buyer and made known to the seller. Furthermore, the lack of quality can be regarded as already existing at the time the contract was concluded. Accordingly, since after their installation the windows were found not to isolate the recording studio adequately from noise, Rainbow Ltd is liable towards Mr. Allen.

2. Draft Common Frame of Reference. Within the DCFR, the liability of Rainbow Ltd towards Mr. Allen can be readily established. Pursuant to art. IV.A.-2:101, lit. (d), DCFR, one of the main obligations of the seller is to ensure that the goods are in conformity with the contract. According to art. IV.A.-2:302, lit. (a), DCFR, the goods are not in conformity with the contract if they are not fit for any particular purpose made known to the seller at the time of conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgment. Also, art. IV.A.-2:302, lit. (f), DCFR, provides that the goods do not conform with the contract if they do not possess such qualities and performance capabilities as the buyer may reasonably expect. Under the circumstances, it seems that Mr. Allen may invoke both lit. (a) and (f) of IV.A.-2:302 DCFR to support his claim against Rainbow Ltd: He has in fact expressly informed the seller of the purpose the windows would serve, and he has reasonably relied on Rainbow Ltd's skills and judgment, the latter being an enterprise that specializes in the production of noise-abating glass. Moreover, the windows do not possess such qualities and performance capabilities as Mr. Allen had reason to expect under the circumstances.

The remedies available to Mr. Allen against Rainbow Ltd are different under the Italian Civil Code and the DCFR.

1. Italian law. According to art. 1497(1) c.c., the buyer is entitled to ask for termination of the contract if promised qualities are lacking and the defects in quality exceed the limits of toler-

[23] Cass. 14 January 1998, n. 272, Giurisprudenza Italiana (1998), 2045; Cass. 28 January 1997, n. 844, Foro Italiano (1997), I, 147.
[24] Cass. 17 September 2004, n. 18757, Repertorio Foro Italiano (2004), Vendita, n. 90; Cass. 19 January 1995, n. 593, Foro Italiano (1995), I, 2504.

ance established by usages[25]. The right to terminate the contract is subject to the same conditions as those prescribed in the event of defects in the goods sold (see art. 1497(2) c.c.[26]). As a result, the buyer loses the right to demand termination of the contract if it fails to notify (either orally or in writing) the seller of the lack of quality within eight days of discovery, except where otherwise established by the parties or by law. Yet, notice by the buyer is unnecessary when the seller has acknowledged the defects or has concealed their existence. Furthermore, the buyer's action against the buyer is time-barred one year from delivery.

By giving the buyer the right to terminate the contract, art. 1497(1) c.c. makes reference to art. 1453 ff. c.c., and according to legal doctrine and case law this means that, except for the aforementioned rules relating to forfeiture and limitation of actions, the general provisions on termination of contracts apply. As a result, a sales contract may be terminated under art. 1497 c.c. only if the seller's fault is demonstrated[27]; also, the lack of the promised qualities should amount to a serious non-performance in accordance with art. 1455 c.c. (which prevents a contract from being terminated if non-performance by a party is of only minor importance with respect to the interests of the other party[28]). It must be noted, however, that the majority of scholars[29] and some courts[30] take a different position: The rules on defects in the goods sold (art. 1490 ff. c.c.) apply by way of analogy to lack of qualities (essential or promised) and, consequently, a contract may be terminated pursuant to art. 1497 c.c. regardless of the seller's fault (as foreseen by art. 1490 c.c. in the case of defects). It remains unclear, however, whether or not for the same objective the lack of promised qualities must be serious in accordance with art. 1455 c.c.[31] The authors who answer this question in the affirmative[32] also admit that in the case of lack of essential or promised qualities the seller may ask for a reduction of the price (as foreseen by art. 1492 c.c. for defects in the goods sold[33]), and the same opinion is followed in a minority of applicable case law[34].

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[25] See Cass. 24 May 2005, n. 10922.

[26] Art. 1497(2) c.c. refers indeed to art. 1495 c.c., which deals with the time limits and the conditions of action in the case of defects in the goods sold.

[27] See Ferri, *La vendita in generale*, 588; P. Greco and G. Cottino, in A. Scialoja and G. Branca (eds), *Commentario al Codice civile, arts. 1470-1547* (Roma-Bologna, Zanichelli-Soc. Ed. Foro, 1981) 233. As to case law cp. Cass. 21 January 2000, n. 639, (2000), p. 903 ff.

[28] As to seriousness of non-performance as a requirement for termination of the contract see, among others, Cass. 24 May 2005, n. 10922, Repertorio Foro Italiano (2005), Vendita, n. 62.

[29] See, among others, Bianca, *La vendita e la permuta*, 949; Luminoso, *La compravendita*, spec. 273; F. Martorano, *La tutela del compratore per i vizi della cosa* (Jovene, Napoli, 1959) 16 ff.

[30] Cp., among others, Cass. 19 October 1994, n. 8533, Repertorio Foro Italiano (1994), Vendita n. 54.

[31] For this opinion see Bianca, *La vendita e la permuta*, 950; Luminoso, *La compravendita*, 274, seems to left open the issue. As to case law see Cass. 10 January 1981, n. 247, Repertorio Foro Italiano (1981), Vendita, n. 69.

[32] See, for instance, Bianca, *La vendita e la permuta*, 954; Luminoso, *La compravendita*, 275; *contra*, among others, Ferri, *La vendita in generale*, 565.

[33] Cp. Cass. 11 April 1996, Corriere Giuridico (1997), 95 ff.

[34] See for example Cass. 18 September 2000, n. 12301. It is worth noting that case law has found the way to overcome the divergence existing between arts. 1492 and 1497 c.c. with respect to the remedies available to the buyer, by admitting that compensation for damages can be demanded independently from termination of the contract and it can

The choice between termination of the contract and reduction of the price would be irrevocable only when made by judicial action (cp. art. 1492(2) c.c.).

From these rules it follows that Mr. Allen is not entitled to ask Rainbow Ltd to replace the windows[35]; nonetheless, he can ask the judge to terminate the contract, on condition that – as seems to be the case here - he has notified Rainbow Ltd of the lack of promised qualities within eight days of discovery. For Mr. Allen to be able to terminate the contract, he must prove that the windows are lacking in the promised qualities, while it is unclear if the seller's non-performance would be inexcusable and serious in accordance with art. 1455 c.c. Still, neither of these requirements appears problematic here. As to the seller's fault, no event which has rendered the exact performance impossible and is not imputable to the seller, thereby exempting him from liability, has occurred (see arts. 1218, 1256 ff., 1463 ff. c.c.). With respect to the importance of non-performance – to be evaluated taking into account all the circumstances of the case according to objective and subjective criteria – it seems in this case to be 'significant' or 'serious' as required by the prevalent case law[36], as the delivery of windows unfit for the particular purpose made known to the seller has deprived Mr. Allen of what he legitimately had the right to expect under the contract. Finally, at least according to the view taken by some authors and case law, Mr. Allen might be entitled to ask, *in lieu* of termination of the contract, for a reduction of the sum paid to Rainbow Ltd.

Pursuant to art. 1493 c.c., on termination of the contract each party is entitled to recover the performance already rendered to the other party: Rainbow Ltd would then have to refund the price and reimburse the buyer for expenses, whereas Mr. Allen would have to return the goods. In addition, art. 1494(1) c.c. gives the buyer the right to recover the damages suffered as a result of the lack of quality in the goods sold, unless the seller demonstrates that it has overlooked the defects without fault (see art. 1494(1) c.c.)[37] It is commonly accepted[38] that the claims for damages

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be awarded in an amount proportional to the difference between the contractual price and the value of the rendered performance (see in particular the decisions referred to by L. Cabella Pisu, *Garanzia e responsabilità nelle vendite commerciali*, 222).

[35] The Italian case law has traditionally excluded that in contracts for the sale of goods the aggrieved party may ask for specific performance either in form of repair or replacement of the goods (cp., among others, Cass. 17 December 1993, n. 12507, Repertorio Foro Italiano (1993), Vendita, n. 93), though admitting that the same result may be achieved by asking compensation for damages (cp. for example Cass. 18 August 1990, n. 8336, Repertorio Foro Italiano (1990), Vendita, n. 63). On the contrary, some scholars are inclined to recognize the buyer's right to demand repair of the goods whether or not the seller's conduct was negligent of the seller's fault: see for instance Giorgianni, *L'inadempimento* (Milano, Giuffrè, 1975) 74 ff.; Bianca, *La vendita e la permuta* (according to which it would be a kind of specific redress under art. 2058 c.c.; for a similar approach see also Greco and Cottino, *Commentario al Codice civile, arts. 1470-1547*, 280 ff.) Some authors also admit that the buyer may ask for replacement of the goods: see for instance Giorgianni, *L'inadempimento*, *ibid.*; Luminoso, *La compravendita*, 285 (who holds that a right to replacement - as well as to repair - is only admissible when the seller was the manufacturer of the goods itself). For a different opinion see Bianca, *La vendita e la permuta*, 1013.

[36] See for all Cass. 18 February 2008, n. 3954, Nuova Giurisprudenza Civile Commentata (2008) 821 ff.

[37] See Cass. 20 May 1997, Repertorio Foro Italiano (1997), Vendita, n. 69.

are subject to the same short periods of forfeiture and limitation as those foreseen by art. 1495 c.c. (*i.e.*, eight days and one year, respectively)[39]. Since in the present case Rainbow Ltd is an enterprise which specializes in the field of manufacturing of noise-abating glass, it can be assumed that it did have the necessary skills to realize that their products would not meet Mr. Allen's needs. This means that Mr. Allen, who brought his claim for damages timely, would likely obtain compensation for any expense incurred, loss of profit, and so on.

2. Draft Common Frame of Reference. If a party to a sales agreement fails to perform its obligations under the contract, the other party may resort to the general remedies for non-performance provided in Book III, Chapter 3, DFCR. This is the result of the application to specific contracts of the rules dealing with obligations in general[40]. Therefore, the remedies available to the buyer in the event of breach of contract by the seller are those envisaged by art. III.-3:301 ff. DCFR: specific performance (by means of repair or replacement of the goods), withholding of performance, termination of contract, price reduction and damages[41]. All these remedies are subject to specific conditions and may be cumulated, when not incompatible (cp. art. III-3:102 DCFR); yet, as a general principle, in the field of contracts for the sale of goods repair or replacement prevail over the other remedies.

According to art. III.-3:301 DCFR, specific performance of non-monetary obligations – which includes the remedying free of charge of a performance not in conformity with the contractual terms, and therefore encompasses both replacement and repair of the goods (though the latter remedy is irrelevant here) - must be requested within a reasonable time after the aggrieved party has become, or could reasonably be expected to have become, aware of non-performance. Nonetheless, specific performance cannot be enforced when: a) it would be unlawful or impossible; b) it would be unreasonably burdensome or expensive; or c) it would be of such a personal character that it would be unreasonable to enforce it.

In this framework, Mr. Allen's request to have the windows replaced shortly after becoming aware of their non-conformity is legitimate and timely, and therefore enforceable despite

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[38] See, among others, Bianca, *La vendita e la permuta*, 982; Cass. 3 August 2001, n. 10728, I Contratti (2002) 175 ff.

[39] It must be recalled that pursuant to art. 1494(2) c.c. the buyer can also recover damages caused by the goods to any person or goods; however, according to some legal scholar and case law, this action is subject to the five-year limitation period laid down in art. 2043 c.c., being an hypothesis of extra-contractual liability: for this opinion see Bianca, *La vendita e la permuta'*, 988 ff.; Luminoso, *La compravendita*, 278; Cabella Pisu, *Garanzia e responsabilità nelle vendite commerciali*, 257 ff. As to case law see, among others, Cass. 5 February 1998, n. 1158, Repertorio Foro Italiano, Vendita n. 54.

[40] It is worth mentioning that in the DCFR edition appeared in 2008, there was one article (art. IV.A.-4:101) expressly referring to the remedies in Book III, Chapter 3, as available to one of the parties to a sales contract in the case of non-performance by the other party. This provision has been deleted, probably as being considered as redundant.

[41] The former art. IV.A.-4:201 DCFR listed all those remedies under the heading 'Overview of Remedies'. This article has been deleted.

Rainbow Ltd's refusal. Yet, should Rainbow Ltd's means or manner of production or skills not be enough to develop a noise-abating glass meeting Mr. Allen's needs, then the replacement might be considered impossible or too burdensome or expensive. In this scenario, Mr. Allen may demand termination of the contract or a reduction in price.

Focusing on termination of the contract, which is the relevant remedy here, it is worth pointing out that under the DCFR it requires non-performance to be fundamental (except where the contract is a consumer contract: see infra, variation), that is to substantially deprive the creditor of what it was entitled to expect under the contract, unless at the time the contract was concluded the party did not foresee and could not reasonably be expected to have foreseen such result (cp. art. III-3.502, lit. (a), DCFR). Non-performance is also fundamental where it is intentional or reckless and gives the creditor reason to believe that the debtor's future performance cannot be relied on (cp. art. III-3:502, lit. (b), DCFR). In the present case, the grounds for contract termination under lit. (a) of art. III-3:502 DCFR are present: The windows supplied by Rainbow Ltd are unfit for the purpose requested by Mr. Allen, thereby substantially depriving him of what he was entitled to expect under the contract. Nor could Rainbow Ltd allege that it did not foresee, or could not reasonably be expected to have foreseen, such a result at the time the contract was concluded, given that during negotiations it was informed by the buyer of the use the windows would serve. Finally, it is worth noting that, since within the DCFR (in contrast to Italian law) the right to terminate to contract is exercised by notice to the debtor (cp. art. III.-3:507 DCFR), Mr. Allen would not need to have recourse to a court in order to reach such a result.

Following termination of the contract the parties are obliged to return any benefit resulting from the other party's performance (see art. III - 3:510 DCFR). This means that Rainbow Ltd would have to give back amounts paid and Mr. Allen would have to return the goods. According to art. III-3:102 DCFR, the creditor is also entitled to claim damages, such remedy not being pre-empted by resorting to other remedies for non-performance. However, damages can be awarded (for both economic and non-economic loss) only where non-performance cannot be excused (cp. art. III.-3:701 DCFR). Recoverable damages are those foreseen or foreseeable by the debtor at the time the contract was concluded as a likely result of non-performance, unless non-performance was intentional, reckless or grossly negligent (cp. art. III.-3:703 DCFR). In the present case, no impediment excusing non-performance by the seller has occurred (cp. art. III. – 3:104 DCFR[42]); therefore, Mr. Allen may successfully allege, for instance, that on account of Rainbow Ltd's non-

[42] According to art. III. – 3:104 DCFR, a debtor's non-performance is only excused when it is due to an impediment beyond the debtor's control and that the debtor could not reasonably expected to have taken into account at the time when the obligation was incurred.

performance he had to postpone the opening of his new recording studio, thus delaying his work schedule and suffering a loss of reputation, as such damages could have been foreseen by Rainbow Ltd as a likely consequence of its non-performance.

Variation: If Rainbow Ltd's counterpart is not a professional but a consumer (i.e. a natural person acting for purposes which are not related to his trade, business or profession) who seeks adequate sound isolation of his flat, the rules applicable under Italian law are closer to those described with respect to the DCFR.

1. Italian law. If Mr. Allen has acted in his private capacity, the relevant rules are to be found in the Italian Consumer Code. Art. 128 ff. Consumer Code[43], which correspond almost literally to the former arts. 1519-bis ff. c.c. established by Legislative Decree 2 February 2002, n. 24[44], as a result of the implementation of Directive 1999/44/EC, concern consumer contracts for sale. These rules also cover a wider range of contracts: barter contracts, supply contracts, independent contracts, contracts for work and labour and contracts for the supply of goods to be manufactured or produced (cp. art. 128(1) Consumer Code). This means that where goods to be manufactured or produced are involved, there is no longer need to ascertain whether the obligation 'to give' prevails over the obligation 'to do', that is if the parties have concluded a contract for the sale of goods or an independent contract: In either case the rules set out in art. 128 ff. Consumer Code apply[45].

The aforementioned contracts must have as their object consumer goods, i.e., any tangible movable items, even to be assembled, with the exception of goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity, and electricity (cp. art. 128(2) Consumer Code). According to art. 129(1) Consumer Code, the professional buyer is bound to deliver goods that are in conformity with the contract. The goods are presumed not to satisfy this requirement, *inter alia*, when: they do not conform to the description made by the seller (see art. 129, lit. (b), Consumer Code, which seems to be concerned with the situation described by the Italian Civil Code as the lack of promised qualities[46]), and when they do not show the quality and the performance which are normal in goods of the same type and which the consumer can reasonably expect, having regard, among other things, to the nature of the goods (see art. 129, lit. (d), Consumer Code, which substantially

[43] *Codice del consumo*, Legislative Decree 6 September 2005, n. 206, G.U. 8 October 2005, n. 235, S.O. (and following amendments).
[44] G.U. 8 March 2002, n. 57, n. 40, S.O.
[45] Cp. G. De Cristofaro, *Vendita di beni di consumo*, in Enciclopedia giuridica Treccani (Roma, Treccani, 2003) 3.
[46] For this opinion see Luminoso, *La compravendita*, 309.

covers the lack of essential qualities as envisaged by the Italian Civil Code[47]). The seller is liable towards the consumer for any lack of conformity existing at the time of delivery of the goods (cp. art. 130(1) Consumer Code)[48].

In this framework, it can be concluded that if Rainbow Ltd has expressly promised that the windows would provide a specific degree of sound isolation, Mr. Allen may rely on art. 129, lit. (b), Consumer Code. Absent an express promise to this end, should the windows exhibit lesser quality than or inferior performance to ordinary goods of the same type and lesser quality than or performance inferior to what the buyer may reasonably expect, Mr. Allen may invoke art. 129, lit. (d), Consumer Code.

If the goods supplied by Rainbow Ltd were found to be not in conformity with the contract, Mr. Allen would be entitled to resort to the remedies envisaged by art. 130 Consumer Code, which substantially correspond to those available under the DCFR. In fact, Mr. Allen would have the right first to demand the replacement of the goods free of charge (as repair is clearly impossible in this case)[49], and only where replacement is impossible or burdensome or, if any was offered, it had not been completed by the seller within a reasonable time or has caused significant inconvenience (but this is not the case here), may he ask to terminate the contract (or, alternatively, to reduce the price). Yet for the contract to be terminated, the lack of conformity cannot be of minor importance[50], and notice of the lack of conformity must be given within two months from discovery (cp. art. 132(2) Consumer Code). Having regard to the circumstances of the case, both requirements seem to be satisfied here.

In contrast to DCFR, the Italian Consumer Code does not expressly recognize the buyer's right to recover damages; according to legal authors, this right can, however, be derived from art. 135 Consumer Code, which embodies the principle that the rights resulting from art. 126 ff. Consumer Code cannot exclude or limit other rights the consumer may invoke under other provisions of law. Mr. Allen's claim for damages should therefore be allowed[51].

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[47] *Ibidem*, p. 309.

[48] To this end, it suffices that the cause giving rise to the lack of conformity is already present at the time the goods are delivered: cp. De Cristofaro, *Vendita di beni di consumo*, 9.

[49] Pursuant to art. 130(2) Consumer Code, the buyer has the right to choose between repair and replacement of the goods, unless the remedy required is impossible or too burdensome compared to the other. A remedy is considered too burdensome when it imposes on the seller costs which, in comparison with the alternative remedy, are unreasonable, having regard to the value the goods would have absent non- conformity, the size of the defect of conformity and the possibility that the alternative remedy is available without serious inconvenience for the consumer (see art. 130(4) Consumer Code).

[50] See art. 130(10) Consumer Code. According to legal doctrine, this criterion has to be construed in accordance with art. 1455 c.c.: see Luminoso, *La compravendita*, 344; A. Zaccaria and G. De Cristofaro, *La vendita dei beni di consumo* (Padua, Cedam, 2002) 94.

[51] However, the regime for the claims for damages may change (for instance, with respect to the applicable limitation periods) depending on whether the seller's liability under art. 129 Consumer Code is construed as a liability arising from breach of contract, with the result that the general rules laid down in art. 1218 ff. c.c. apply, or as a war-

2. Draft Common Frame of Reference. If Mr. Allen is a consumer, the applicable rules on lack of conformity of the goods and related remedies are substantially the same as those applicable between professionals (as to the validity of agreements limiting or excluding consumers' rights in the case of seller's non-performance see however Case n. 3, "variation", below,). This means that in order to support his claim against Rainbow Ltd, Mr. Allen may rely on art. IV.A.-2:303, lit. (f), DCFR, according to which – as discussed above – the goods must possess such qualities and performance capabilities as the buyer may reasonably expect. Mr. Allen may also resort to all the remedies mentioned above. However, for the contract to be terminated, the lack of conformity need not be fundamental; it suffices for it to be of greater than minor importance (cp. art. IV.A.-4:201 DCFR).

Case 2

Passing of risk
Examination of the goods and notice of defects
Buyer's obligation to pay the price – formalities of payment

F.lli Rossi Ltd, an Italian producer of cheese, and Happy Food Ltd, an exporter with its headquarters in Italy and several branches in Europe, concluded a contract for the sale of a certain amount of cheese to be resold to third parties. Under the contract, the goods were to be handed over to a carrier in Genoa and from there redirected to other destinations. An inspection carried out by Happy Food Ltd as soon as the cheese arrived at the final destinations revealed that it had partly deteriorated due to defective packaging by the seller; however, F.lli Rossi Ltd was informed thereof only ten days after discovery. Subsequently, Happy Food Ltd filed a lawsuit against the seller claiming a reduction of the price and damages; in response, F.lli Rossi Ltd alleged that the defects had appeared after the risk had passed to Happy Food Ltd, and that payment by the latter had failed on account of non-compliance with certain formalities required by its bank.

Variation: Would the result be the same if Happy Food Ltd's headquarters were situated in Germany?

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ranty against defects, with the result that art. 1494 c.c. on compensation for damages applies (see for further details Luminoso, *La compravendita*, 357).

This case raises the following main issues: a) whether F.lli Rossi Ltd has to bear the risk of loss or damage to the goods; b) whether notice of the defects by Happy Food Ltd is effective; and c) whether Happy Food Ltd's failure to comply with certain payment formalities amounts to breach of contract.

a) The Italian Civil Code and the DFCR provide similar solutions as to the question of whether or not F.lli Rossi Ltd must bear the risk of loss or damage to the goods.

1. Italian law. Art. 1510 c.c., which deals with the place of delivery, prescribes that absent any agreement or usage to the contrary, delivery must be made at the place where the goods were at the time the contract was concluded if the parties knew this place, or in the place where the seller has its domicile or place of business. If the contract involves carriage of the goods, however, then the seller fulfils its obligation to deliver by handing the goods over to the carrier. This means that the risk of loss or damage to the goods is transferred to the buyer upon handing over of the goods to the carrier and that the buyer is not released from its obligation to pay the price even if the goods perish or suffer damages during transportation[52]. This principle does not apply, however, when loss or damage to the goods is due to an act or omission by the seller. Indeed, according to legal scholars and case law[53], where the contract involves carriage of the goods, the seller is required to take such measures as are reasonable in the circumstances to avoid loss or damage to the goods (for instance, by packaging the goods in a way appropriate to their nature and to the duration and conditions of transportation), to procure any authorization or certification needed for transportation, as well as to ensure timely arrival at destination (for instance, by choosing an appropriate carrier under the circumstances). In this scenario, F.lli Rossi Ltd cannot successfully contest liability for the damage to the goods. As the inspection revealed that the cheese had deteriorated on account of defective packaging, it follows that F.lli Rossi did not take all the measures necessary for avoiding loss or damage to the goods.

2. Draft Common Frame of Reference. According to art. IV.A.-2:201 DFCR, the seller fulfils its obligation to deliver the goods by making them (or the documents representing them, in circumstances where the seller is allowed under the contract to deliver only the documents) available to the buyer. If the contract involves carriage of the goods by a carrier or series of carriers, the seller fulfils the obligation to deliver the goods by handing them over to the first carrier for transmission to the buyer and by transferring to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding them. Furthermore, according to art. IV.A.-

[52] Cp. Cass. 12 December 1999, Repertorio Foro Italiano (1999), Assicurazione, n. 138.
[53] Bianca, *La vendita e la permuta*, 48; F. Bocchini, *La vendita di cose mobili*, in (P. Rescigno ed.), Trattato di diritto privato (Turin, UTET, 2nd edn, 2000) 587.

5:101 DCFR, loss or damage to the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller. In addition, art. IV.A.-5:202(2) DCFR states that, in a sales contract involving carriage of goods, if the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. It follows that, while the risk normally passes to the buyer upon handing over of the goods to the first carrier, this is not true where it was an act or omission by the seller that provoked loss or damages to the goods. Therefore, the DFCR also provides that F.lli Rossi Ltd cannot invoke the fact that the damages to the goods have appeared after the risk passed to Happy Food Ltd.

b) The answer to the question of whether or not notice of the defects by Happy Food Ltd is effective may be different under Italian law and the DCFR.

1. Italian law. Notice of the defects by Happy Food Ltd cannot be deemed effective under Italian law. As already pointed out[54], according to art. 1495 c.c. the buyer normally loses the right to rely on the warranty against defects in the goods sold if he fails to notify the seller thereof within eight days from discovery. It is commonly accepted that such notice need not take any particular form and can be given by any means appropriate to the circumstances[55]; however, where the notice of the defects is given in writing, it suffices that it is dispatched within eight days of discovery[56]. Pursuant to art. 1511 c.c., in a contract involving carriage of the goods the eight-day time limit for notice of patent defects (*i.e.*, defects which can be detected by using due diligence[57]) and deficiency in quality starts to run from the time of delivery of the goods, such a time being the moment when the goods are at buyer's disposal[58] and can be examined[59]. The Italian Civil Code does not contain any explicit rule on the time of examination of the goods. Art. 1513 c.c., which regulates the inspection of the goods, only provides that in the case of disagreement as to the quality or condition of the goods, either party may require inspection under the rules of the Code of Civil Procedure and, at the request of the interested party, the court may order the deposit or the attachment of the goods, or their sale, on behalf of the party entitled to it.

[54] See *supra*, Case n.1, lit. c).
[55] See Bocchini, *La vendita di cose mobili*, p. 599. As to case law see, among others, Cass. 15 January 1991, n. 328, Repertorio Foro Italiano (1991), Vendita n. 48; Cass. 27 January 1986, n. 539, Repertorio Foro Italiano (1986), nn. 61-62.
[56] Cp. Bianca, *La vendita e la permuta*, 1029; as to case law see Cass. 18 April 1975, n. 1470, Giurisprudenza Italiana (1976), I, 2, 787 ff.
[57] See Bocchini, *La vendita di cose mobili*, 599; cp. also Cass. 8 January 1996, Foro Italiano (1996), 528 ff.
[58] See Bocchini, *La vendita di cose mobili*, 597 and 600. As to case law see, among others, Cass. 25 July 1984, n. 4347, Giustizia civile (1985), I, 824 ff.
[59] See, among others, Cass. 8 January 1996, Foro Italiano (1996), 528 ff.

Nonetheless, it is clear that art. 1513 c.c., by imposing on the buyer the burden to notify the patent defects within eight days of delivery, requires him to examine the goods, or have them examined, within a very short period after their receipt. This condition seems to be satisfied in the present case, since the goods were examined upon arrival at their destination and the defects, being apparent, were immediately discovered. Nevertheless, the notice that the cheese had deteriorated was given only ten days after delivery, that is, two days beyond the eight-day period established by art. 1513 c.c. As a consequence, Happy Food Ltd has lost the right to rely on the remedies against defects and lack of quality in the goods sold, with the result that both the claims for reduction of the price and for damages have to be dismissed.

2. Draft Common Frame of Reference. In the DCFR, there exist rules dealing with the time of examination of the goods. Art. IV.A.-4:301 DCFR states that the buyer is obligated to examine the goods, or cause them to be examined, within as short a period as is reasonably possible under the circumstances; however, if the contract involves carriage of goods, examination may be deferred until after the goods have arrived at their destination. According to these rules, the examination of the goods conducted by Happy Food Ltd can be regarded as timely. Yet, it remains to be ascertained whether notice of the defects is effective, given that art. III.-3:107(1) DCFR provides that in the case of an obligation to supply goods or services, the creditor may not rely on the lack of conformity unless he gives notice to the debtor thereof within a reasonable time, specifying the nature of the lack of conformity. The length of the reasonable time, which runs from the time when the goods are supplied or the service is completed or, if it is later, from the time when the creditor discovered or could reasonably be expected to have discovered the non-conformity (cp. art. III.-3:107(2) DCFR), may vary depending on the circumstances (nature of the goods and the defects, situations of the parties and so on). However, according to art. IV.-4:302(2) DCFR, in contracts between professionals the buyer loses the right to rely on the lack of conformity if he does not give notice thereof to the seller at the latest within two years from the time at which the goods were actually handed over to him.

In the present case, it is clear that the reasonable time for giving notice of the lack of conformity has started to run from the time Happy Food Ltd discovered the existence of damage to the goods, that is, immediately after the delivery of the goods. Yet, taking into account both the perishable nature of the goods and the easily detectable defects, a notice of lack of conformity after ten days from discovery might be considered not timely, thus leading to the dismissal of Happy Food Ltd's claims. However, under all the relevant circumstances, the competent court may reach the opposite conclusion, thereby granting the buyer the right to resort to the remedies against non-conformity of the goods.

c) Happy Food Ltd's failure to comply with some payment formalities can be regarded as a breach of contract under both Italian law and the DCFR.

1. Italian law. In a contract for the sale of goods, the main obligation of the buyer is to pay the price agreed in the contract. Pursuant to art. 1498 c.c., the buyer is bound to pay the price within the time and in the place fixed by the contract; absent an agreement by the parties or usages to the contrary, payment has to be made at the time when and in the place where the goods are delivered. Although the Italian Civil Code does not explicitly address this issue, legal scholars maintain that, in order for the obligation to pay the price to be fulfilled, the buyer must comply with all required formalities[60]. Hence where, as in this case, payment has failed on account of non-compliance with the formalities required by the seller's bank, the obligation to pay the price cannot be regarded as fulfilled.

2. Draft Common Frame of Reference. The same result can be reached under the DCFR. Paragraph 2 of art. Art. III.-2:113 DCFR provides that, in the case of a monetary obligation, the debtor's obligation to pay includes taking such steps and complying with such formalities as may be necessary to enable payment to be made. This means that, if the buyer fails to do so, he is in breach of contract and this is the result here, where failure to pay the price has been caused by non-compliance with specific formalities required by the seller's bank.

Variation: If Happy Food Ltd had its headquarters in Germany, the solutions described above with respect to Italian law may be partly different and more in line with the solutions to be found in the DCFR. In such a case, indeed, the relevant provisions are those set forth by the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter: CISG).

This Convention applies, with some exceptions[61], to contracts of sale (and equivalent contracts[62]) concluded between professionals having their places of business in different contracting States (cp. art. 1(1)(a) CISG), except where the parties have expressly or implicitly excluded its application (cp. art. 6 CISG). The Convention is also applicable when the international private

[60] See G. Cottino, *Commento all'art. 54*, in (C.M. Bianca, G. Alpa *et al.*, eds), *Convenzione di Vienna sui contratti di vendita internazionale di beni mobili*, in Le nuove leggi civili commentate (Padua, Cedam, 1989) 257 ff.

[61] See art. 2 CISG, where it is stated that the Convention does not apply, *inter alia*, to sales of goods bought for personal, family or household use; to sales on execution or otherwise by authority of law; to sale of stocks, shares, negotiable instrument, etc.; to sale of electricity.

[62] According to art. 3(1), CISG also applies to contracts for the sale of goods to be manufactured or produced, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

rules of the forum lead to the application of the law of a contracting State (cp. art. 1(1)(b) CISG)[63].

Therefore, if Happy Food Ltd's headquarters were situated not in Italy but in Germany, the requirements of art. 1(1)(a) CISG would be satisfied: the parties would have their places of business in two different States, Italy and Germany, both parties to the Convention[64]. This means that, provided that the parties do not opt out of the CISG, the issue as to whether F.lli Rossi Ltd has to bear the risk of loss or damage to the goods should be resolved in accordance with arts. 66 and 67 CISG, which provide, respectively, that loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller; and that in a contract involving carriage of the goods, the risk normally passes to the buyer when the goods are handed over to the first carrier. It follows that CISG rules would prevent F.lli Rossi Ltd from successfully alleging that the defects have appeared after the risk has passed to Happy Food Ltd.

With respect to examination of the goods, attention must be given to art. 38 CISG, where it is stated that the goods must be examined within as short a period as is practicable under the circumstances and if the contract involves carriage of goods, examination may be deferred until after the goods have arrived at their destination. As to the notice of lack of conformity, the relevant provision is art. 39 CISG, according to which such notice must be given within a reasonable time after the buyer has discovered, or ought to have discovered, the defects. In this scenario, whereas the examination of the goods by Happy Food Ltd may be considered as timely as it appears to be so under both the DCFR and the Italian Civil code, it remains uncertain whether notice given after ten days from discovery of the defects would be effective. It is true that when perishable goods are involved, as in the present case, the courts normally tend to apply shorter periods for the notice of lack of conformity[65]; nevertheless, the ultimate answer will depend on the circumstances, including any usage the parties have agreed to or any practice they have established between themselves (cp. art. 9(1) CISG)[66], and any usage widely known and regularly observed in international trade by which the parties are bound (cp. art. 9(2) CISG)[67]. Ultimately, also under the CISG Happy Food Ltd's failure to comply with the requests of F.lli Rossi Ltd's

[63] As to the material and territorial scope of the CISG, as well as to the possibility of excluding its application, see F. Ferrari, *La vendita internazionale - Applicabilità ed applicazioni della Convenzione di Vienna del 1980*, in Trattato di diritto commerciale e di diritto pubblico dell'economia, II edn, Vol. XXI (Padua, CEDAM, 2005).
[64] In Italy, CISG has been ratified by Law 11 December 1985, n. 765, G.U. 27 December 1985 n. 303. The list of all the parties to the Convention is available at the UNCITRAL official website, www.uncitral.org.
[65] See, for example, *Oberlandesgericht Saarbrücken*, 3 June 1998; *Rechtbank Zwolle*, 5 March 1997 (abstract and fulltext of both decisions are available at the UNILEX database website: www.unilex.info; hereinafter: UNILEX).
[66] See, in this respect, Arbitration Court of the Chamber of Commerce and Industry of Budapest, 5 December 1995 (abstract and fulltext in UNILEX).
[67] See, in this respect, *Rechtbank Zwolle*, 5 March 1997 (abstract and fulltext in UNILEX).

bank would amount to breach of contract: Art. 54 CISG expressly requires the buyer to take any steps and comply with any formality as may be required under the contract or any laws and regulations in order to make payment possible[68].

Case 3

Exclusion or limitation of buyer's rights in case of lack of conformity of goods
Consumer contracts for sale

A&B Ltd entered into a contract with Dreamland Ltd, a travel agency, for the supply of two fax machines to be installed at Dreamland Ltd's office. Under the seller's standard terms reproduced in the document embodying the offer, A&B Ltd was exempted from liability with respect to any defect in the machines sold. Approximately one week after Dreamland Ltd's employees started operating the machines, a severe malfunctioning was encountered. A technician chosen by Dreamland Ltd to fix the problem ascertained that the malfunctioning was due to some obsolete components. When Dreamland Ltd sent a letter to A&B Ltd reporting the malfunctioning of the machines, A&B Ltd invoked the clause in the contract excluding its liability for the defects in the goods sold.

Variation: Would the result be different if A&B Ltd's counterpart was Mr. Smith, a consumer?

The main issue raised by this case is whether A&B Ltd can successfully rely on the exemption clause contained in its standard terms. In order to answer this question, two points must be addressed: first, whether and within what limits the parties are allowed to exclude or limit the seller's warranty against defects in the goods sold; second, if the exemption clause is binding on Dreamland Ltd.

1. Italian law. Under Italian law, the parties are free to exclude or limit the seller's warranty against defects in the goods sold (see art. 1490(2) c.c.) Likewise, the parties are allowed to extend the seller's warranty to any defect or deficiency in quality not envisaged by arts. 1490 and

[68] For applications of this rule see, among others, Tribunal of Int'l Commercial Arbitration at the Russian Federation Chamber of Commerce, 17 October 1995; ICC Court of Arbitration – Paris, n.7585/1992 (abstract and fulltext of both decisions in UNILEX).

1497 c.c.[69], and give the buyer the right to resort to remedies other than those foreseen by arts. 1492 and 1497 c.c. (like for example replacement or repair of the goods)[70]. However, the parties' agreement aiming at excluding or limiting the seller's liability is ineffective where the seller has in bad faith failed to reveal defects to the buyer (see art. 1490(2) c.c.). Legal scholars are divided on the issue of whether or not the same rule applies also where the seller has not revealed the defects by gross negligence[71]. Significantly, decisions that have resolved this question in the affirmative are very rare[72]. In contracts between professionals, an exemption clause contained in the seller's standard terms must be signed specifically by the buyer[73], since it falls within the list of clauses deemed to be ineffective unless the adhering party has separately accepted them (see art. 1341(2) c.c.). Accordingly, the buyer's signature at the bottom of the document embodying the offer and in which the standard terms are reproduced is not sufficient for such a clause to be binding; instead, the clause may be considered as accepted where the buyer has signed a separate document where the clause (and, according to a stricter view, a short description of its content) is referred to with the same number by which it is indicated in the offer[74].

It follows that, although under Italian law a clause exempting a party from liability is in principle effective, such result is nonetheless excluded where - as seems to be the case here – the adhering party has not accepted this clause specifically. Consequently, Dreamland Ltd would not be bound by this clause.

Even assuming that Dreamland Ltd has specifically signed and therefore accepted the clause limiting its rights in the case of A&B Ltd's non performance, this clause would be likewise ineffective if A&B Ltd has in bad faith failed to reveal the defects existing in the machines, or at least – according to some scholars and case law – has acted with gross negligence. Since in this case it has been ascertained that the malfunctioning was due to the use of obsolete components, it is reasonable to believe that A&B Ltd, being the manufacturer of the two machines, could not have been unaware that such components were too old and would cause the machines not to function properly. As a result, A&B Ltd might be prevented from relying on the exemption clause contained in its standard terms.

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[69] See Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, 1125.
[70] See Rubino, *La compravendita*, 861 ff.; Bianca, *La vendita e la permuta*, 925; Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, 1125. As to case law see, among others, Cass. 5 September 1997, n. 8578, Repertorio Foro Italiano (1997), Vendita, n. 62.
[71] For a positive answer to this question see C. Terranova, *La garanzia per vizi e difetti di qualità della cosa venduta*, 1123; Bianca, *La vendita e la permuta*, 919; Cabella Pisu, *Garanzia e responsabilità nelle vendite commerciali*, 272 ff.; F. Galgano, *Vendita*, in Enciclopedia del diritto, vol. XLVI (Milano, Giuffrè, 1993) 493. For the opposte view see Rubino, *La compravendita*, 865; Greco and Cottino, *Commentario al codice civile, arts. 1470-1547*, 254.
[72] See for instance App. Roma, 19 January 1971, Giurisprudenza italiana (1972), I, 1, 776.
[73] See Cass. 23 March 1993, n. 3418, Foro Italiano (1993), I, 2517.
[74] Cp. V. Roppo, *Il contratto*, in G. Iudica and P. Zatti (eds), Trattato di diritto privato (Milan, Giuffrè, 2001) 908.

2. Draft Common Frame of Reference. Within the DCFR, the parties are free to exclude the application of, or derogate from, the rules dealing with the sale of goods, and in particular from the provisions relating to the remedies for non-performance[75]. Yet, some exceptions apply where one of the parties to the contract is a consumer (see *infra*, variation). In a contract of sale between professionals, limits to the parties' autonomy can, however, be found in other provisions of the DCFR. For instance, art. II.-9:103 DCFR provides that a term not individually negotiated (*i.e.*, a term supplied by one party if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms: cp. art. II.-9:403) may be invoked against the other party only if the latter was aware of such a term or the party which supplied the term took reasonable steps to draw the other party's attention to the term before or when the contract was concluded. To this effect, it is not sufficient that the document contains a mere reference to such term, even if the other party has signed the document. Moreover, pursuant to art. III.-3:105(2) DCFR, which is explicitly concerned with one party's exemption from liability, a term excluding or restricting a remedy for non-performance of an obligation, even if valid and otherwise effective having regard in particular to the rules on unfair contract terms, may nevertheless not be invoked if doing so would be contrary to good faith and fair dealing. Under the rules on unfair contract terms[76] – which apply not only to consumer contracts, but also to contracts between professionals and between non-business parties – a term not individually negotiated in a contract to which professionals are parties should be drafted and communicated in plain, intelligible language (see art. II.-9:402(1) DCFR) and it will be considered unfair only if it forms part of the standard terms supplied by one party and is of such a nature that its use grossly deviates from commercial practices in a manner contrary to good faith and fair dealing (see art. II.-9:405 DCFR). To assess the unfairness of a term, regard has to be given, *inter alia*, to the nature of what is to be provided under the contract and to the circumstances prevailing during the conclusion of the contract (see art. II.-9:408 DCFR). An unfair term is not binding on the party who has not supplied it (see art. II.-9:409(1) DCFR).

In this scenario, it can be said that, although the DCFR does not establish any explicit limit to the validity of agreements between professionals and purporting to exclude or restrict the buyer's rights in the event of non-conformity of the goods, such limits can be derived from the rules regarding terms not individually negotiated and unfair terms, as well as from art. III.-3:105. This means that in the present case, for A&B Ltd legitimately to invoke the exemption clause

[75] The former art. IV.A.-1:301 DCFR, which has not been reproduced in the DCFR final version, read as follow: «The parties may exclude the application of any of the rules in this Part of Book IV or derogate from or vary their effects, except as otherwise provided in this Part».
[76] See Book II, Chapter 9, Section 4, DCFR.

contained in its standard terms, it should prove that Dreamland Ltd was aware of such a clause or took reasonable steps to draw Dreamland Ltd's attention on it before or at the time the contract was concluded. Even if such evidence is brought by A&B Ltd, Dreamland Ltd may nonetheless rely on art. II.-9:405 DCFR to demonstrate that the clause in question is unfair – i.e., against ordinary commercial practices, good faith and fair dealing – and therefore ineffective. Again, if such an argument is dismissed, Dreamland may invoke art. III.-3:105 DCFR and argue that, since the seller has acted, if not intentionally, at least with gross negligence, it would be contrary to good faith and fair dealing to allow him to rely on the exemption clause.

Variation. If A&B Ltd's counterpart was Mr. Smith, a natural person acting in his private capacity, the exemption clause contained in A&B Ltd's standard terms would be ineffective under both Italian law and the DCFR. This means that Mr. Smith may freely resort to all the remedies provided for by Italian law and the DFCR with respect to defects in the goods sold.

1. Italian law. Art. 134 of Italian Consumer Code sets forth the principle that any agreement concluded before a notice of lack of conformity is brought to the attention of the seller and aimed at excluding or limiting the buyer's rights, even indirectly, is void. Although avoidance can be raised *ex officio* by the judge, the consumer is the only party entitled to invoke it[77]. According to some legal scholars, even an agreement concluded between the parties after a notice of lack of conformity is brought to the seller's attention would be ineffective (since, under the rules on unfair contract terms, it would amount to an agreement purporting to limit the actions available to the buyer in the event of partial or total non-performance or defective performance: see art. 33(2), lit.(b), Consumer Code[78]), while other scholars maintain that such an agreement should be valid, because it is an expression of the parties' contractual autonomy[79].

2. Draft Common Frame of Reference. Under the DCFR rules, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention and which directly or indirectly waives or restricts rights resulting from the seller's obligation to ensure that the goods conform to the contract, or remedies available to the buyer against lack of conformity, is not binding on the consumer (see arts. IV.A.-2:309 and IV.A.-4:101 DCFR, respectively). It remains uncertain whether or not a contractual term or agreement concluded after the lack of conformity has been notified to the seller would be effective. The rules on unfair terms seem to lead to a negative answer. In fact, in contracts between a consumer and a business, a term not individually negotiated is deemed unfair when it significantly disadvantages the other

[77] For some comments on this regime see Luminoso, *La compravendita*, 354.
[78] Cp. M. Hazan, *Attuata la direttiva 99/44/CE: si rafforza la tutela del consumatore* (2002) I Contratti 406.
[79] See for instance Zaccaria and De Cristofaro, *La vendita dei beni di consumo*, 135.

party and is contrary to good faith and fair dealing (see art. II-9:404 DCFR). Moreover, a term is presumed unfair (thereby allocating the burden of proving the contrary on the party which has supplied such a term) if it inappropriately excludes or limits the remedies available to the consumer in the event of the business's non-performance of obligations under the contract (see art. II-9:411(1), lit. (b), DCFR). It follows that even a term or agreement concluded after a lack of conformity has been notified to the seller may be considered as not binding on the consumer.

2. Comparison and Evaluation

Case n. 1

The notion of contract for sale under the Italian Code substantially corresponds to the one embraced by the DCFR; however, contrary to the Italian Civil Code, the DCFR is not concerned with contracts which have as their object the transfer of property or other rights on immovables. A contract concerning future goods such as goods to be manufactured or produced can be regarded as a contract of sale under both Italian law and the DCFR. An opposite result may however be reached where, for instance, the value of the work carried out or services rendered is higher than the value of the goods, or the work or services concerned are the purpose the parties intended to achieve by entering into the contract.

Unlike the DCFR, the Italian Civil Code provides neither for a unitary notion of lack of conformity nor for a unitary system of remedies against lack of conformity. This means that the applicable rules and the remedies available to the buyer may vary depending on what kind of defect is found in the goods sold. This is particularly evident where essential or promised qualities are lacking. There also exists a significant divergence between the Italian Civil Code and the DCFR with respect to the remedies available to the buyer. Indeed, as a general principle, under Italian law the buyer is entitled to ask neither for repair nor for replacement of the goods.

Variation: Following implementation of the EU legislation, in Italy the consumer contracts for sale are governed by special rules that are closer to the ones to be found in the DCFR. This is true not only with respect to the buyer's obligation to deliver goods conforming to the contract, but also with respect to the remedies the buyer can rely on in the case of the seller's non-performance.

Case n. 2

Under both the Italian Civil Code and the DCFR, in a sales contract involving carriage of goods the risk is transferred to the buyer upon handing over of the goods to the carrier. However, the seller is not released from his obligations if damage or loss to the goods is due to its act or omission.

The buyer loses the right to rely on the remedies against defects in the goods sold if he fails to notify the seller thereof. The period within which such a notice must be given is of eight days under the Italian Civil Code, while it is of reasonable length under the DCFR. It follows that the same factual situation can lead to different results in the two systems.

Under both the Italian Civil Code and the DCFR, the obligation to pay the price is fulfilled only if the buyer takes all measures as may be required under the circumstances in order for payment to be effective.

Variation: if the contract is regarded as international for the purpose of the CISG, the rules provided in the Italian Civil Code are replaced by the provisions of that Convention, which correspond to a large extent to the ones to be found in the DCFR.

Case n. 3

Under both the Italian Civil Code and the DCFR, the parties are free to derogate from the rules governing defects or lack of qualities in the goods sold and related remedies. Limits to party autonomy can, however, be found where the term excluding or restricting the buyer's rights in the event of the seller's non-performance has not been individually negotiated, e.g., when it becomes part of the contract by virtue of its inclusion in the seller's standard terms.

Variation: Under both the Italian Civil Code and the DCFR, in consumer contracts for sale a term or agreement concluded before a notice of lack of conformity is brought to the seller's attention is ineffective.

Lease of Goods

DCFR, Book IV, Specific contracts and the rights and obligations arising from them; Part B, Lease of goods

by

Grzegorz Panek

Summary: 1. Three Cases. – Case 1. – Case 2. – Case 3. – 2. Final Remarks.

1. Three Cases

Case 1

Lease for definite and indefinite period

The Production Company "Movie Maker" leases a rare model of car from the 1930's for their next film from John M., a car collector. The parties do not establish any definite period for the lease. The rent accrues daily at a rate of 1000 Euros for every 24 hours. The vehicle is delivered to the lessee. Three weeks later the lessee receives a notice of termination from the lessor, who now needs the car for a collectors' jamboree taking place the following week. No notice period may be found in the terms agreed by the parties. The lessor specifies in the notice that the contract of lease should end three days after the date of reception of the notice. The lessee does not agree to such terms and claims that the three-day period of notice is unreasonable, as the Production Company needs the car for the next 2 weeks at least. Is Movie Maker obliged to hand back the car to John M., or can it keep the vehicle for some more time?

I. Operative Formants

Under Polish law John M.'s claims are unjustified. In the first place, the rules of the Civil Code provide for specific periods of notice applicable when the lease period is indefinite and where the parties to the contract have not stipulated otherwise. Pursuant to art. 673 §1 of the Code, where the period of lease is indefinite, both the lessor and the lessee may terminate the relationship so long as they comply with the period of notice provided in the agreement or with statutory periods if this is not specified in the contract. In the following paragraph of this article such statutory periods are defined and their length depends – in a manner that resembles provisions of German law[1] - on the intervals between rent payments. Nowhere does the Polish Code allow for termination "at reasonable time after the notice has reached the other party," as does art. IV.B - 2:102 of DCFR. In this respect the Polish enactment and provisions of German Bürgerliches Gesetzbuch are similar.

As mentioned, the above rules concern contracts of lease concluded for indefinite periods. In a case where the duration is specifically defined, the BGB determines in §542 that the lease may be terminated before the time agreed by the parties only under extraordinary circumstances. Section 543 specifies the circumstances under which a party may exercise the right to terminate the relationship immediately for important reasons. This enumeration is not exhaustive, however. None of the grounds listed in the German Civil Code could justify the early termination in this case. The Polish Civil Code also sets significant restraints on early termination of leases concluded for definite periods. Such termination is generally not permissible except under certain special circumstances provided for in arts. 664 §2 and 673 §3. The latter provision allows the parties to include clauses regulating possible instances of early termination in the agreement.

The key question regarding our case is indeed whether the contract was for a definite or indefinite period. The text of the DCFR on its own does not seem to provide any comprehensive answer. The distinction is expressed, e.g., in art. IV.B. – 2:102, which states that "a definite lease period ends at the time determinable from the terms agreed by the parties", but the enactment does not provide specific elements concerning the interpretation of the word "determinable". It appears, then, that the necessary criteria have to be elaborated. In the Polish system we would consider a contract of lease concluded for a predictable period needed for producing a particular movie as a contract for a definite period. According to the Polish Supreme Court, the parties need not stipulate a particular date as the end of the lease period. Instead, the end may be determined

[1] The German expression "wenn die Miete nach ... bemessen ist" (where the lease period is measured in...) found in §580a of the German Civil Code (BGB) is explicitly linked in §579 BGB to the intervals at which the rent is paid.

by a future event whose occurrence is predictable and relatively certain.[2] Clearly, this rule provides the appropriate means for interpreting the term "determinable" used in art. IV.B. – 2:102 DCFR. As a result, the lessor's claims in this particular case should be considered unjustified under the DCFR as well.

II. Descriptive Formants

The division between definite and indefinite lease periods seems more structured in Polish law than in the DCFR. It appears in the initial article of the Title of the Civil Code devoted to the definition of lease, art. 659. According to this provision, a contract of lease gives rise to a relationship in which the lessor is obliged to deliver the object to the lessee and the latter is entitled to use it for a definite or indefinite period of time, as well as obliged to pay the agreed rent in exchange. Such an agreement creates a legal relationship for a period of time. In one of the commentaries to the Code we can read that as a consequence of concluding a contract of lease – whether for definite period or not - a continuous relationship is established between the parties. The characteristic feature of such relationships is the influence of time on the content of the obligations and the assessment of their performance.[3] In the commentary, a passage devoted to art. 659 explains that the period of lease may be determined by setting a specific date, by reference to another conventional measurement of time, or not at all, in which case it remains indefinite. In the last case, either party may terminate the relationship by notice on agreed terms or pursuant to statutory rules provided for in the Civil Code.[4]

Apart from continuity there is another doctrinal concept referring to certain continuous obligations, the notion of "durability." Certain scholars use both terms more or less interchangeably when referring to obligations whose performance is stretched over time.[5] However, a more thorough analysis of a body of court decisions[6] confirms the distinction, and it becomes apparent that the term "durability" (trwałość) *sensu stricto* is often used to convey a sense of stability in obligational bonds. Consequently, not all continuous (ciągłe) obligations are equally durable.

[2] Decision of the Supreme Court, 30 August 1990, OSN 1991, position 125
[3] J. Jezioro, in E. Gniewek (ed.), *Kodeks cywilny. Komentarz* (Warszawa, C.H. Beck, 2006) 1068; see also A. Klein, *Elementy zobowiązaniowego stosunku prawnego* (Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego, 2005) 135.
[4] *Ibid.*, 1068.
[5] J. Pokrzywniak, *Wypowiedzenie najmu* (2001) Monitor Prawniczy 21/2001, 1062: "...zobowiązania terminowego o charakterze ciągłym (trwałym)..."; Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna* (Warszawa, C.H. Beck, 2005) 295.
[6] E.g., Supreme Court Resolution, 21 November 2006, OSN – III CZP 92/06, No. 7-8, pos. 102; 21 December 2007, OSN – III CZP 74/07, No. 9, pos. 95.

According to the Polish Supreme Court, the provisions of the Polish Civil Code (arts. 660, 661, 669 §2, 673 §1 and 3, 678 §2, 688 and 689) indicate that the law-maker regards the contract of lease for a definite period as a durable relationship, a contract which links its parties through a firm bond for a specific period of time.[7] Out of this durable character emerges stability, which in turn provides certainty for parties as to their rights and obligations stemming from the agreement and provisions of law. The Court goes on to state that one of the fundamental features of durable obligations is that they allow the interested parties to act with the expectation that the acquired rights and incurred obligations are not going to expire before the lapse of a specific time.[8] This statement is in fact an expression of the Latin maxim "pacta sunt servanda". Additionally, in a broader perspective, without directly referring to the term "durability," the Court describes the contract of lease for a definite period as a relationship which guarantees stability in a number of other decisions – which might suggest that the sense of the word "durability" invoked in this paper is less rigid than the meaning of durable/continuous obligations as understood by Radwański and Pokrzywniak.[9] Still, the understanding of durability as implying stability is recurrent in case law.

Not all lease contracts exhibit equal durability, even if continuity – connected with the "temporary right of use"[10] (something stretched over time) - is an inherent element of lease. The basic distinction we are trying to examine here, the one between leases for definite and indefinite period, itself stems from the fact that certain obligational bonds are more permanent than others, which does not necessarily stand in opposition with the principle of *pacta sunt servanda*. It is the definite period as agreed between parties that makes the relationship more stable within the contracted time-span.

The Polish Supreme Court has stressed on many occasions the dichotomous character of this definite/indefinite period division.[11] It is emphasized that the law-maker did not provide for any possibility of a "mixed type" which would encompass elements of both definite and indefinite period contracts.[12] If the parties conclude a contract of lease for an indefinite period, either of them may lawfully terminate the relationship by notice; and where the lease was concluded for a specific time, early termination is possible only if the Civil Code so provides.[13] As a result, stabil-

[7] Resolution of the Supreme Court, 21 November.2006, OSN Civil Chamber 2007 No. 7-8, pos. 102.
[8] *Ibid.*
[9] E.g., S.C. Resolution, 03 March 1997, OSN – III CZP 3/97, No. 6-7 pos. 71.
[10] Art. IV. B. – 1:101 DCFR.
[11] E.g., in the Resolution of the Supreme Court (seven-judge bench), 21 December 2007, OSN – III CZP 74/07, No. 9, pos. 95.
[12] A. Szpunar, Gloss to the S.C Decision, 15 February 1996 (1996) P.S. *11-12/1996.*
[13] Cp. Supreme Court Decisions, 15 February 1996, III CZP 5/96; 03 March 1997, III CZP 3/97; 27 October 1997, III CZP 49/97.

ity of lease contracts concluded for a definite period of time is (by decision of the law-maker) greater than in the other type.

This duality derives directly from the formulation of art. 673 of the Polish Civil Code, which states that where the lease period is indefinite, either party may terminate the relationship in accordance with the notice period provided for in the agreement or the statutory periods in the lack of agreed terms. *A contrario*, the statute does not consider notice as grounds for terminating the contract for a definite period, except in certain extraordinary instances defined in the Code (art. 664 §2 CC). Under German law, even if the situations which justify an early termination of a lease for a definite period must be exceptional, they need not to be provided for in advance. It suffices that the lessee encounters serious obstacles to exercising his right, or that his important interests are endangered.[14]

Various degrees of durability in the case of a contract for the lease of goods may also stem from another source: in Polish or German civil law there are at least two contractual types that correspond to what is referred to as "lease of goods" in the DCFR. Under one of these (najem/Miete), the lessee may only use the object of the lease, whereas under the other (dzierżawa/Pacht) she is also entitled to the fruit of the thing.[15] Due to its socio-economic purpose, the latter type is generally considered more durable than the former, even though both may be concluded for definite or indefinite periods.[16] For example, in a number of decisions Polish courts assert that in this latter type, unlike in the former, the sublease is not going to expire *ipso iure* on the termination of the main lease relationship, but continues between the original lessor and the sublessee.[17] As a result, we may conclude that the notion of durability, even if distinct in the statutory division of lease contracts into those concluded for definite and indefinite periods, is more abstract than the basic definite/indefinite time-span opposition.

The durable character of definite period contracts in general may also be inferred *a contrario* from art. 365^1 of the Polish Civil Code, introduced in 2001.[18] Pursuant to this provision, obligations of undetermined duration may be terminated by notice of either debtor or creditor, in accordance with contractual, statutory or customary regulation of notice or, absent such rules, immediately after the notice has reached the addressee. Even before the introduction of this rule, it

[14] W. Gitter and J. Gernhuber, *Gebrauchsüberlassungsverträge* (Tübingen, Mohr Siebeck 1988) 36-37.
[15] *Ibid.*, 117 ff.
[16] Apart from the example given in the text, it seems worth adding that the law-maker provides for maximal definite periods of lease. In the case of "najem" (plain use) the period amounts to 10 years; in the case of "dzierżawa" (use + gathering fruit) it is 30 years. Longer periods are considered indefinite *ex lege*. This rule also confirms the varying degree of durability of the two types.
[17] A. Szlęzak, *Wygaśnięcie umowy dzierżawy a poddzierżawa w świetle orzecznictwa Sądu Najwyższego* (2008) P.S. 9/2008; S.C Decisions, 25 November 2005, V CK 370/05; 07 November 1997, III CKN 249/97; 20 July 2006, V CSK 200/06.
[18] Dz.U. (Official Journal) No. 71/2001, pos. 773.

was argued that an excessively broad possibility of early termination of contracts for a definite period, e.g. as a result of circumstances providing important reasons for their expiration, could unnecessarily breach the principle of "pacta sunt servanda".[19] Conversely, certain scholars claimed that every contract which creates a continuous obligation could be terminated by notice for important reasons.[20] The 2001 amendment to the Civil Code dispelled such doubts: since the law-maker decided that only obligations of undetermined duration may be terminated by notice on the basis of the general provision of art. 365^1, and did not introduce any analogous right of notice in the case of contracts concluded for a definite period, the latter may be terminated only in accordance with certain special rules of the Code.[21] Special provisions in the context of the contract of lease include arts. 664 §2 and 673 §3. Neither would resolve the hypothetical case, in which the lessor terminates the contract because of an oncoming car collector jamboree, of which he should have thought in advance, before entering into the contract of lease.

In common law systems, where the occurrence of certain special conditions (supervening events) undermines the value of contract performance for one of the parties, the affected party may terminate the contract on the basis of the so-called doctrine of frustration.[22] The concept generally permits the promisor to discharge his obligation to perform – even if such performance is possible – because the purpose for which the contract was concluded has been destroyed. Still, the doctrine of frustration, being probably the only imaginable means of defense available to the lessor in the situation discussed, by no means justifies John M.'s claims, as the purpose of the contract remains valid for both parties, regardless of the lessor's recklessness in entering into the contract. Strong commitment to contractual stability is probably one of the characteristic features of the Anglo-American law of contract. Even if English and American courts devote a great deal of attention to particular circumstances of given cases and common law is more contextual than civil law[23], it would be difficult to imagine a court decision in favor of the lessor in the case discussed.

Context should not be neglected in civil law either. This is why the concept of durability seems useful – it is connected with the socio-economic dimension of contractual types. The question whether a particular relationship is durable or not should be determined, then, on the basis of the overall content of a contract and not just the agreed ending date.[24] It follows that it is not merely in relationships with a pre-established ending date that the court should enforce a contract

[19] Z. Radwański, (1965) *Uwagi o zobowiązaniach trwałych (ciągłych) na tle kodeksu cywilnego* (1965) S.C., v. XIII-XIV.
[20] W. Pyzioł, G. Tracz, *Wypowiedzenie umowy kredytowej* (1994) Prawo Bankowe, No. 4/1994, 101.
[21] J. Pokrzywniak (2001), 1062.
[22] D. Keenan, *English Law* (London, Financial Times Pitman Publishing, 1998) 311, 354.
[23] G. Lamond (2005) *Do precedents create rules?*, (2005) L.T. 11/2005, 1-26.
[24] S.C. Decision, 21 December 2007, OSN – III CZP 74/07, No. 9, pos. 95.

of lease as a relationship for a definite period. Rather, courts will investigate the overall content of the contract to determine its proper construction. In the case discussed, since the parties agreed that the vehicle would be leased to the production company for a particular film, civil law provisions on lease for a definite period should foreclose the lessor from early termination of the relationship to the detriment of the lessee in a situation where the notice would interfere with the very purpose to the contract – the car was leased for the production of a particular movie. Once again, it should be emphasized that Polish provisions on the definite period are interpreted in such a way as to define in the agreement of lease predictable and relatively certain future events ending the relationship.[25] As a result, it seems that the completion of the movie should be regarded as a relevant future event from the point of view of contract durability.

III. Meta-legal Formants

In an article by J. Raz in *Legal Theory* we can read a statement which may sound familiar to most comparative law scholars: "The law is, however, not merely a set of guides for court decisions. It is a political institution of great importance to the working of societies and to their members."[26] The way societies operate implies certain social and economic expectations concerning private law. Legal norms meet these expectations at two levels: first of all when legal acts (codes, international agreements, etc.) are drafted; secondly, in the process of interpreting the existing rules. By meta-normative formants we usually mean the stage of interpretation - as we analyze law in action. In so doing, we may search for doctrinal concepts in a body of judicial decisions which enrich the statutory text and reflect socio-economic needs of certain groups within particular interpretative communities. It seems that the notion of "durability" understood as stability is one of such notions – a reflection of the community's expectations as to the enforcement of certain contracts.

"Vital distinctions are not necessarily sharp ones."[27] Perhaps the emergence of the concept of durability in a number of court decisions will help the interpretative community in filling certain gaps left by various dichotomous distinctions, such as the differentiation between lease contracts for a definite and indefinite period. Sharp boundaries do not always suffice to reflect the complexity of private law relationships. After all, not all of these relationships enjoy the same

[25] Z. Radwański and J. Panowicz-Lipska, *Zobowiązania – część szczegółowa* (Warszawa, C.H. Beck, 2005) 96; similarly: E. Gniewek (ed.), (2006), 1081.
[26] J. Raz, *Incorporation by Law*, (2004) L.T. 10/2004, 15.
[27] *Ibid.*, 15.

degree of stability and durability. Ownership, for instance, is generally going to be more durable than obligations. Such a dynamic view does not contradict the "pacta sunt servanda" principle. Rather, it helps in adjusting traditional distinctions to the needs of evolving societies and European law, as we probably share the same general sense of durability.

Case 2

Financial leasing

A small jazz Recording Studio leases professional recording equipment from Company Alpha, bought by the lessor from a seller selected in advance by the lessee. The contract has a financing purpose and the parties agree to a definite lease period of four years. The rent is calculated so as to take into account amortization of the cost of the goods. According to the contract terms, the rent is paid every three months. The four-year lease period ends and neither party sends a notice of termination. The lessee pays the rent due three months after the ending date, assuming a tacit prolongation of the contract, however the rent is significantly reduced (by 2/3) to what the lessee considers reasonable, having regard to the amount already paid. The lessor does not agree to this significant rent modification and sues the lessee for the remaining part determined in the original contract. Can the lessor receive the full rent after the end of the lease period?

I. Operative Formants

The contract of lease with a financing purpose is regulated differently in various countries. The authors of the DCFR decided to place this type of relationship in the section devoted to the lease of goods.[28] As a result, provisions of Book IV Part B apply directly to so-called financial leasing,[29] together with several special rules specific to this type of contract. As confirmed by a number of national laws,[30] what is understood by lease for a financing purpose need not always

[28] See art. IV. B. – 1:101(4).
[29] The term used in the UNIDROIT Convention on International Financing Leasing (Ottawa 1988) may actually help us render various dissimilarities between the type of contract discussed and lease of goods as defined in the DCFR better than the description used in the latter.
[30] J. Brol, *Umowa leasingu* (Warszawa, LexisNexis, 2002) 25-26.

constitute an integral part of the rules on lease. In fact, in many countries there is a specific type of contract defined in the Civil Code or other statutes corresponding to the DCFR regulation concerning relationships in which the transaction "has a financing purpose, the lessor has the role of a financing party, or the lessee has an option to become owner of the goods." The Polish lawmaker, for instance, regulates financial leasing as a distinct type of contract in arts. 709^1-709^{18} of the Civil Code, introduced in 2000. As a consequence, there are a number of significant differences between the contract of financial leasing and other types of lease of goods under Polish law.

The fact that Poland and a number of other European countries have created a separate type of contract means that various legal systems will provide different solutions in the case discussed. In general, national legislations highlight more specific traits of financial leasing than do the authors of the DCFR. The Polish rules do not allow for tacit prolongation in this situation for two basic reasons. First, art. 709^1 of the Civil Code, defining the essence of this type of contract, specifies that the determination of the period of the lease is an essential contractual element. There is no financial leasing for an indefinite period in Polish law, thus the relationship cannot be tacitly prolonged for an indefinite period. The second rationale is connected with the character of the payment owed to the lessor. In art. 709^1 of the Code, as opposed to the regulation of ordinary leases (art. 659-692), this is called "remuneration" (wynagrodzenie pieniężne), rather than "rent" (czynsz). The name itself, as well as a number of other provisions (e.g. art. 709^{17} *in fine*), suggests that the payment does not correspond to rentals accrued separately in relation to specified periods of time. The lessee's performance in this respect is not continuous. Rather, remuneration consists of the agreed total sum, though divided into installments, as in installment purchases.[31] Not only is the definite period an essential element of the agreement between the parties, so is the value of the remuneration: It must be determined in advance.[32] As a result, after the agreed contract period has lapsed and the sum due has been paid, in the Polish law there is hardly anything to be limited to "what is reasonable having regard to the amount already paid"[33]; the lessee is released of any further payments unless a new agreement is concluded between the parties. Obviously, on the expiry of the financial leasing the parties are free to conclude a subsequent contract of lease for indefinite period; yet tacit consent is not enough to produce such an effect *ipso iure*. In the case of lack of relevant stipulations, the lessee is obliged to return the object of the financial leasing on its expiry to the lessor, according to art. 675 of the Polish Civil Code, having

[31] W. Dubis, in E. Gniewek (ed.), *Kodeks cywilny. Komentarz* (Warszawa, C.H. Beck, 2006) 1119.
[32] J. Brol (2002), 102.
[33] IV. B. – 2:103(1) DCFR.

regard to art. 709^{17}.[34] He might also be sued for damages or made to pay for illegitimate possession pursuant to the Civil Code provisions on the protection of ownership.

Like many national laws in this field, the Polish rules are based on the UNIDROIT Convention on International Financial Leasing.[35] It is worth taking a glimpse at financial leasing as defined in the text of the Convention. In this document, the concept is not particularly precise: it does not determine whether we are dealing with a subtype of lease or a specific contract type, yet it applies and not national laws where contracts of this type are concluded internationally (art. 3). Pursuant to art. 1 of the Convention a financial leasing transaction includes the following characteristics:

> *a) the lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor;*
>
> *b) the equipment is acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and*
>
> *c) the rentals payable under the leasing agreement are calculated so as to take into account in particular the amortization of the whole or a substantial part of the cost of the equipment.*

From the point of view of the case discussed, the provisions of the Convention do not determine what happens on the expiry of the agreed period. According to art. 1.3, the Convention applies "whether or not the lessee has or subsequently acquires the option to buy the equipment or to hold it on lease for a further period, and whether or not for a nominal price or rental."

Under the DCFR the solution seems more straightforward: according to art. IV. B. 2:103 (and the general provision of III. – 1:111) the lease will be prolonged for indefinite period, and the rent (coming back to the original DCFR nomenclature) will be limited to "what is reasonable." The reduced value cannot be defined *a priori*, without examining the contract in detail. However, it seems worth mentioning that under the DCFR rules various misunderstandings between parties may arise as to what they consider reasonable.

[34] *Ibid.*, 161.
[35] *Ibid.*, 26.

II. Descriptive Formants

Despite its lack of precision, the Convention on International Financial Leasing paved the way for national rules, including the new provisions of the Polish Civil Code.[36] Both the new national provisions and the Convention have systematized previous case law, for financial leasing had developed as a non-statutory contract type shaped by commercial practice and court decisions.[37] Still, there appear to be a number of empirical types not covered directly by statutory law, e.g. operating leasing.[38] Some of these are characteristic for particular countries, and suited to their national tax regulations. Under Polish law, the broadly conceived freedom of contract expressed in art. 353^1 of the Civil Code allows for contracts different from the statutory type.

According to the amended Polish Civil Code, the necessary elements of financial leasing contracts are: a) specification of the object of lease and the supplier, b) the agreed value of remuneration and installments, and c) the determined period of the lease.[39] Moreover, the time-span must not be significantly shorter than the estimated period of amortization of the cost of goods.[40] As a result, where the period is considerably shorter and the remuneration reflects the usual loss in value (operating leasing), the contract does not match the statutory requirements and should be considered a transaction similar to the classical type of lease - to which provisions on lease are duly applicable.[41]

The relevant question concerning the case discussed is how the existing contract should be enforced, classified and interpreted. In classifying agreements courts avail themselves of the functional method of comparing the socio-economic purpose of the contract, the position of the parties, and the mutual relation of various elements of the relationship, with particular statutory contract types.[42] In Poland, because the transaction between Alpha and the Recording Studio meets the criteria described above, especially bearing in mind that the rent was calculated so as to take into account amortization of the cost of the goods, we would apply the Civil Code provisions on financial leasing to this contract.

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[36] Z. Radwański and J. Panowicz-Lipska, *Zobowiązania – część szczegółowa* (Warszawa, C.H. Beck, 2005) 146.
[37] W. Dubis, in E. Gniewek (ed.), (2006), 1115.
[38] Contractual type where the lessor acquires the contracted goods from a supplier and delivers them to the lessee for the agreed use, but the lease period is shorter than the amortization of the costs of goods; the rent reflects the usual loss in value connected with the wear and tear of the leased objects; cp. Z Radwański and J. Panowicz-Lipska (2005), 145.
[39] J. Brol (2002), 102.
[40] M. Pazdan, *Kodeksowe unormowanie umowy leasingu* (2002) Rt. 5/2002, 45-46.
[41] *Ibid.*, 29.
[42] *Ibid.*, 44-45; M. Sośniak, *Zagadnienia typologii i systematyki umów obligacyjnych* (Katowice, Wydawnictwo UŚ, 1990) 32, 76 ff.; Art. II. – 1:108 DCFR seems to lead to similar results.

In Polish law, tacit prolongation would seem possible for the so called operating leasing, even though it is inadmissible as regards financial leasing, because this type of transaction bears more resemblance to the classical model of lease in which tacit prolongation of a definite period lease for indefinite time is possible pursuant to art. 674 of the Civil Code. According to this provision, in the event that the lessee should continue to use the object of the contract with the consent of the lessor (there are no formal requirements regarding consent, which means that it may also be implied), it is presumed in case of doubt that the contract has been prolonged for an indefinite period. It seems that in such cases the payment of the lessee assumes the classical form of a rent rather than a financial leasing remuneration where the total sum is always agreed in advance. As a result, we could not apply provisions concerning installment purchases to early payment of the remaining remuneration as provided for in art 709^{17} (*in fine*). Also the socio-economic purpose and the position of the parties to operating leasing resemble the traditional lease more than financial leasing or installment purchases, which both share a crediting purpose. In such circumstances it seems advisable to assume continuity and let the parties themselves decide whether to terminate the relationship or allow for tacit prolongation without unnecessary formalities, according to art. 674 of the Civil Code.[43] As to the rent, it does not need to be reduced, since rentals accrue over time and their value is not based on the costs of amortization, but on the usual value decline in value and wear and tear of the contracted goods.

Also under the DCFR there is no need to resort to art. IV. B. – 2:103(1), as operating leasing would be treated as an ordinary contract of lease, prolonged under III. – 1:111.

The construction of financial leasing in the Polish Civil Code, on the other hand, provides for a different position of the parties to the relationship in contrast to the rules governing regular leases. The situation of the lessee is generally worse than in the basic model of lease, in which it is principally the lessor who, pursuant to art. 662 §1, has the duty of maintenance and preservation of the contracted object. In the case of financial leasing the situation in this respect is reversed:[44] According to art. 709^{7} of the Code it is the lessee who incurs the obligation to keep the goods in proper condition. The lessor is not liable for the unfitness of the object for the agreed use, which is reasonable if we bear in mind that it is the lessee who specifies the goods and selects the supplier - without relying primarily on the skill and judgment of the lessor. The latter should however deliver the object as it was when he obtained it from the supplier (art. 709^{4}). The lessor's rights against the supplier stemming from the lack of conformity or guarantees are transferred to the lessee (art. 709^{8} §2). This makes his/her position closer to that of a buyer. If we add

[43] Cp. E. Wójtowicz, B. Książek, *Uprawnienia korzystającego konsumenta w razie wad przedmiotu leasingu,* (2008) Rt 5/2008, 137.
[44] J. Brol (2002), 98.

that tax regulations sometimes assume fictitiously that the goods are a part of the lessee's assets,[45] it can be easily understood why tacit prolongation on the expiry of the contracted period would seem unfavorable for the lessee in the Polish system if – as provided for in art. III. – 1:111 DCFR – other terms of the contract, apart from the rent reduced under IV. B. – 2:103, were not affected by the prolongation.

Once it is clear that Polish law does not allow for tacit prolongation of financial leasing, there remains a problem: What happens to the goods once the contract expires? Due to the lack of stipulations in the agreement, the lessee is obliged to return the object to the lessor pursuant to art. 675 of the Civil Code (art. 709^{17}).[46] According to scholarly writings on the expiry of lease, the lessee ceases to enjoy rightful possession of the contracted object. In practice, however, the parties generally provide in advance for the lessee to have an option to become the owner of goods. Most often the entitlement becomes a sale option. Taking into account contemporary technological progress, the outdated goods usually remain of little importance to the lessor, but they may still be useful to the lessee, who has the option of buying them at a price agreed in the contract. That is why in certain countries the sale option at a price determined in advance is a necessary element of any financial leasing contract. Such is the case in Belgium, where the statutory contract type is shaped as a relationship closer to installment purchase as regards the socio-economic purpose.[47]

Coming back to the Polish law, the Supreme Court has stated in a controversial decision[48] that only a clause in the original agreement of financial leasing may provide grounds for the lessee's rightful possession after the contract expires. M. Pazdan claims that such a clause may also be included in a separate document.[49] The amendment of the Code introducing financial leasing as a new statutory contract type did not regulate the issue of post-expiry possession. There is only art. 709^{16} which states that in the event that the lessee should have an option to become the owner without payment, he/she may exercise the right to claim the ownership transfer within one month from contract expiry. Still, the option as such does not make rightful the lessee's possession after the expiry and before the actual transfer of ownership. A separate agreement is required for that purpose.[50]

[45] M. Grabowska, *Clifing jako szczególna forma leasingu finansowego*, (2006) P. i Pod. 7/2006, 43.
[46] W. Dubis, in E. Gniewek (ed.), (2006), 1130; J. Brol (2002), 161.
[47] J. Brol (2002), 27.
[48] Decision of the Supreme Court, 07 February 2000; OSN – Civil Chamber, No. 9, pos. 155; I CKN 949/99.
[49] M. Pazdan (2002), 44.
[50] W. Dubis, in E. Gniewek (ed.), (2006), 1129.

Since Polish law does not directly regulate the concept of option, it is necessary to resort to one of the three concepts that may be a substitute: an offer for sale, a right conditionally suspended (dependent on the payment of the total agreed remuneration), or a preliminary contract.[51]

Finally, it is noteworthy that in the case discussed the object of the contract of financial leasing is not a single movable (chattel), but a set (group) of movables. From the point of view of the DCFR this poses no significant difficulties, as the term "goods" defined in Annex I encompasses both sets of movables and singular items. Understood literally, art. 709^1 of the Polish Civil code involves a single thing (whether movable or not). Nevertheless, scholars and courts accept that a set of functionally linked things may be the object of a financial leasing.[52]

III. Meta-legal Formants

Different conclusions may be reached on the basis of other national laws. Financial leasing has become a statutory contract type in France, Belgium, the United States, Canada, Portugal, Italy, etc.[53] The differences among particular systems frequently derive from differences in national tax law. From the early days of the construction of financial leasing in the United States and Great Britain, one of its main purposes has been to optimize tax relief, and allow one or both of its parties to enjoy savings and tax benefits.[54] In Germany the only provisions concerning financial leasing (except §500 BGB referring consumer transactions of this type to other parts of the Code) are tax regulations.[55]

The overall dependence on tax law determines a vast number of variations of financial leasing; moreover, defining the boundaries of various contract types may facilitate the normative role of judicial precedents in civil law systems which do not – in general – officially accept case law as a source of norms binding *pro futuro*.[56] Court decisions may also confirm the emergence of certain new types of non-statutory contracts in the field. For example, such was the case with Polish "clifing,"[57] whose name does not come from English (as the ending might suggest), but

[51] A. Kidyba, *Prawo handlowe,* (Warszawa, C.H. Beck, 2007) 885.
[52] M. Pazdan (2002), 32; J. Brol (2002), 67, 111; see also SN Decision, 09 December 1986, III CZP 6/86; OSNCP 1987 No. 9, pos. 129.
[53] J. Brol (2002), 25.
[54] J. Morrow, *Rób biznes* (Warszawa, Morrow Publishing, 1991) 162.
[55] J. Brol (2002), 29.
[56] Cf. L. Morawski, *Główne problem współczesnej filozofii prawa. Prawo w toku przemian* (Warszawa, LexisNexis, 2005) 259.
[57] Decision of the Supreme Court, 03 March 2003; OSN No. 12, pos. 202, III RN 42/01; Decision of the Constitutional Tribunal, 02 July 2003, OTK (A series) No. 6, pos. 59; on the contrary, in the Decision, 16 October 2001, the Supreme Administrative Court declined to accept the name "clifing" as a legal term: III SA 1309/2000.

was based on an acronym of a Polish company, Center for Leasing and Finance (CLIF), which first introduced the type.

Case 3

Lack of conformity of the leased good

Beta Building Company leases a crane for its next undertaking from Company Zet. Acquainted with the plans of the construction, and consequently with the purpose for the use of the crane, the representative of the lessor offers a particular crane model for the rent. The building company accepts the offer, and the crane is delivered to the lessee. Only then does the lessee realize that this particular crane type is unsuitable for the job, as the crane arm reaches only twenty meters high, while the building under construction is supposed to be fifteen meters higher. The lessee decides to return the crane to the lessor and asks for another one, fit for the job. Additionally, Beta wants to recover the expenses connected with the delay in the construction. Zet Company claims that the suggested lack of conformity is out of question, and so is the remedy, as the crane model was stipulated in writing in the agreement. Can Beta Building Company receive a different crane and have its expenses reimbursed?

I. Operative Formants

The situation under the Polish law is not simple. It is indeed a general obligation of the lessor to deliver goods apt for the agreed purpose (art. 662 of the Civil Code), however, it is the actual contract terms which determine that purpose. Where such stipulations are lacking, the object should be appropriate for a normal use of goods of that type, taking into consideration the specificities of the particular thing contracted.[58]

In the case discussed, the problematic point is the agreed type of equipment – and not the fitness of the delivered crane for its normal use, for which the crane seems suitable. Art. 664 §2 of the Civil Code, regulating the consequences of the lack of conformity at the start of the lease

[58] J. Jezioro, in E. Gniewek (ed.), *Kodeks cywilny. Komentarz* (Warszawa, C.H. Beck, 2006) 1072; J. Panowicz-Lipska in *System prawa prywatnego*, vol. 8 (Warszawa, C.H. Beck, 2004) 25.

period, allows the lessee to terminate the relationship without a further period of notice, unless the lack of conformity has been remedied by the lessor in due time. This provision relates to defects which make it impossible to use the goods as provided for in the agreement, which obviously is not the situation in the case.

Even though the claim of the lessee does not seem to find sufficient grounds in the rules of the Polish Civil Code devoted to the contract of lease of goods, Beta Company may still legitimately invoke the general provisions of the Code on vices of consent and avoid the contract for mistake of fact, pursuant to arts. 84 and 88. Also, reimbursement of Beta's expenses might be due on the basis of tortious liability (art. 415 of the Civil Code).

The DCFR offers a comprehensive meaning of conformity of the leased goods with the contract at the start of the lease period. The broad scope of the rule in this area appears to be meant to protect the lessee. There are two comprehensive articles on this matter: IV. B. – 3:102 and IV. B. – 3:103. The former deals with conformity with the contract at the start of the lease period in a strict sense, whereas the latter defines the more abstract notions of "fitness to the purpose, qualities, packing, etc." In the light of the latter article it is clear that in order to be in conformity with the contract the goods must be "fit for any particular purpose made known to the lessor at the time of the conclusion of the contract, except where the circumstances show that the lessee did not rely, or that it was unreasonable for the lessee to rely, on the lessor's skill and judgment." Whether or not we consider this provision as a norm suspiciously extending the contract content beyond the terms negotiated or included in the agreement, it must be admitted that the article provides sufficient ground for recognizing the lack of conformity in the case discussed: even if the parties did not provide for the purpose of contracting the crane of the specified type, it is enough that the lessor as a prospective offeror was acquainted with the plans of the construction undertaken by Beta Building Company in order to give rise to the lack of conformity. Consequently, there are legitimate grounds for the lessee's action, and the lessee's claims seem justified. Pursuant to art. IV. B. – 4:101, the lessee "may have any lack of conformity of the goods remedied and recover any expenses reasonably incurred…"

II. Descriptive Formants

The protective character of the DCFR rules in this area seems to alter the traditional positions of the parties to a contract of lease of goods. In ancient Roman law the corresponding construction of *locatio conductio* was considered a consensual contract similar to the contract of

sales, which practically favored the position of the lessor, and Roman jurists generally would not be willing to protect the weaker party.[59] Such a traditional approach seems consistent with the classical *pacta sunt servanda* principle, which ensures that what is agreed should generally bind the parties and prevail over general circumstances of a particular case. It might be advisable to draft and interpret provisions of law in a way which does not excessively blur contract content. According to the traditional view, it is the pivotal notion of certainty rather than social justice that shapes the general framework of private law. Traditionally, the concept of justice permeates civil law by means of various specific institutions, such as the *rebus sic standibus* clause and rules concerning vices of consent.[60]

The solutions adapted in Continental European welfare states do not diverge radically from this classical model. For example, in the provision defining the essence of the contract of the lease of goods (§535 of the German Civil Code, Bürgerliches Gesetzbuch) – the German law-maker provides that the lessor should deliver the object of lease to the lessee in a condition fit for the use specified in the agreement (*zum vertragsgemäßen Gebrauch*). The expression appears also in §536, providing for rent reduction based on lack of conformity, and §543 which allows the lessor to terminate the contract if the lessee's use of the goods significantly differs from the use specified in the agreement. As a result, it becomes clear that the wording of the norm does not allow extension of the contract content in a manner comparable to extensions available under the DCFR. Fikentscher and Heinemann confirm that it is the agreement which explicitly determines the use (Einigung).[61]

The Polish Civil Code rules in the field have already been discussed, yet, it seems advisable to take a brief glimpse also at the provisions regulating conformity in the contract of sales, because they seem closer to the solutions offered in the DCFR than the Polish rules on lease. The rules for contract of sales will not be applied in the case discussed, but there might be some common ground between these regulations, because of the common institution of conformity itself, and also because of the suggestion which appears in modern literature on the subject that the provisions on the seller's risk-based statutory obligation to remedy defects of the sold goods may duly apply to lease as regards the definition of a legal defect of a thing.[62] According to art. 556 §1 of the Polish Code, the seller is liable to the buyer if the sold goods have defects which decrease their value or reduce fitness for the purpose specified in the contract, according to the

[59] K. Kolańczyk, *Prawo rzymskie* (Warszawa, LexisNexis, 2001) 400; W. Rozwadowski, *Prawo rzymskie* (Poznań, Ars boni et aequi, 1992) 180.
[60] Cf. Z. Radwański and A. Olejniczak, *Zobowiązania – część ogólna* (Warszawa, C.H. Beck, 2005) 281-283.
[61] W. Fikentscher and A. Heinemann, *Schuldrecht* (Berlin, De Gruyter, 2006) 492, 496
[62] Legal defects concern issues as the seller's lack of title to the object of sale; J. Jezioro, in E. Gniewek (ed.), *Kodeks cywilny. Komentarz* (Warszawa, C.H. Beck, 2006) 1074; J. Panowicz-Lipska, in *System prawa prywatnego*, v. VIII (Warszawa, C.H. Beck, 2004) 30.

circumstances or the object's use, and if the goods lack the characteristics warranted by the seller to the buyer or have been delivered incomplete. In consequence, if our case concerned a sales contract rather than a lease, acquainting the offeror with the construction plans would suffice to justify the other party's claims (unless the lessee had the opportunity to check the equipment earlier: art. 563 §2). It may be added that in consumer sales the application of these norms is excluded by an act implementing quite faithfully Directive 99/44/EC.[63]

As for the contract of the lease of goods, protective rules of this type have not yet entered into most of national legislations. Novelties of this type, offered by the DCFR, may be perceived as solutions determined by certain ideological assumptions, rather than results of the type of comparative method which helps in elucidating and reaffirming a common interpretative culture throughout Europe – the method advocated strongly by Mauro Bussani and Ugo Mattei.[64] By implementing preferences existing only in certain particular legal cultures these rules serve and express certain policy preferences, the options favored by the DCFR drafters. That is why the formulation of art. IV. B. – 3:102 and IV. B. – 3:103 seems more detailed than neighboring provisions. The norms must be precise in order to be interpreted in a uniform way, which in turn signifies more certainty and equal treatment of contractual parties throughout Europe.[65]

The lessee might resort to Polish law rules on defects of consent, particularly the concept of mistake. The notion of mistake covers certain discrepancies between the objective reality and its subjective reflection in the human mind.[66] From the point of view of the Civil Code (art. 84), such an error is relevant only if it concerns the content of the juridical act and when it is substantial, which means that the mistaken party would not have entered into the contract had it not been for the mistake. Both criteria must be fulfilled: If the error affects only the motivation of the affected party and does not directly relate to the content of the juridical act, such a mistake is irrelevant.[67] In the case of the lease the requirements are met: the error relates to the type of crane stipulated in the juridical act (in the contract), and the lessee would not have concluded that contract had he known that the selected type was not fit for the planned job. In fact a mistake as to the essential properties of the contracted thing is a classical example of the application of art. 84 of the Code.

[63] Directive of 25 May 1999, OJ L 171, 12 ff.
[64] Cf. M. Bussani and U. Mattei, *The Common Core Approach to European Private Law* (1997) Colum. J. Eur. L., Fall/Winter 1997/98 (available at: http://works.bepress.com/ugo_mattei/18).
[65] Cf. S. Kalus, *Wykorzystywanie orzecznictwa w badaniach prawno porównawczych w warunkach europeizacji prawa prywatnego*, paper presented on 17.10.2008 at the conference „Prawo sądowe cywilne - wyzwania dla Europy" organized by the Catholic University of Lublin.
[66] Cf. Z. Radwański, *Zobowiązania – część ogólna* (Warszawa, C.H. Beck, 2005) 269.
[67] Decision of the Supreme Court, 15 October 1997; III CKN 214/97, OSN – Civil Chamber, No. 6, pos. 112.

As regards mistaken declarations of will addressed to another person (e.g., contractual offer and acceptance) the rules apply if the addressee has (even unintentionally) caused the mistake, knew about it or could have easily spotted it. In the case analyzed it was the lessor who selected the crane type first in his offer, and it does not have to be proven that the Zet Company's conduct in this respect was intentional.

In certain situations, invoking mistake requires that the interested party demonstrate its own due care. Such is the case in the Polish law of succession. One may not avoid a declaration concerning acceptance of inheritance if he did not attempt to verify the condition of the inherited estate.[68] In the case discussed, however, the situation seems more clear, since the mistake itself was evidently caused by the offeror and not by the conduct of the offeree acting in reliance on the skill and judgment of the prospective lessor.

In the case of consent vitiated by mistake, the affected juridical act is not automatically void, but only voidable. Pursuant to art. 88 of the Civil Code avoidance of the act becomes effective after the notice in writing reaches the other party, a solution that seems similar to the DCFR requirement of notification of the lack of conformity.

Under the English common law one of the vices of consent could lead to similar results: "A negligent misrepresentation is a false statement made by a person who had no reasonable grounds for believing the statement to be true."[69] Nevertheless, there are other rules of statutory character applicable to this case. The regulation on implied conditions[70] of hire contracts (the equivalent of the DCFR lease of goods) appears in section 9 of the Supply of Goods and Services Act 1982 (currently s. 9, subsections 4-7). To summarize the relevant rules, there is "an implied condition that the goods hired are reasonably fit for any purpose to which the customer is going to put them. (…) [W]here goods are to be hired for a special purpose, the supplier should make it clear that the customer must not rely on him if he wishes to avoid the implied condition of fitness."[71] In the context of the case, pursuant to section 9 of the Act, the purpose must be made known to the lessor, though not necessarily in an explicit manner; as provided for by the statute, it suffices to indicate the purpose by implication in order to exercise the rights based on the implied condition. The lessor is relieved in long term contracts, since the leased goods do not always have to remain fit for the specific purpose throughout the lease period. Sometimes, it is enough if they are fit at the outset.[72] Finally, it may be added that similar regulations appear also in the English law on the

[68] Decision of the Supreme Court, 30 June 2005; IV CK 799/04, OSN – Civil Chamber, No. 5, pos. 94.
[69] D. Keenan (1998), 236.
[70] In the common law, contract terms are divided into conditions and warranties. Conditions are the essential terms.
[71] D. Keenan (1998), 269.
[72] Cp. the case, *USB Leasing Ltd. v Holtom* (1987) 137 NLJ 614.

contract of sales.[73] This similarity brings to mind analogies drawn by ancient Roman jurists. At that time they sought to bring about more stability in lease agreements. Today, on the contrary, the similarities in the attitude of the law-maker seems to derive from a desire to protect the potentially weaker party of the contract.

In the actual text of the Supply of Goods and Services Act there appears a phrase concerning reliance on the skill and judgment of the other party, which appears in a couple of places in the DCFR[74] and is also present in the 1988 UNIDROIT Convention on International Financial Leasing. The division of various contracts into those where the skill and judgment of one of the parties is relied on by the other and those where it is not seems to support various regulations shaping different contractual positions differently, interfering with the freedom of contract but also protecting the weaker party. It seems that constructions of this type may successfully complement market solutions in order to make the exchange of goods more fluent and reliable.

III. Meta-legal Formants

The fundamental goal of the authors of the DCFR was to establish a systematic document incorporating uniform principles, definitions and model rules of European private law. One of the frequently invoked reasons for drafting such a text, or a European civil code in a wider (and more distant) perspective, is the present level of trade in goods in the contemporary common market and the costs of legal services for the competing actors in this market.[75] As a consequence these are the concerns that should influence the content and interpretation of documents of the type. Its provisions should be framed in such a way as to appear attractive for transnational contracting parties, because only then will the parties be willing to refer to the CFR in a choice of law clause. Even if we assume that a European civil code is going to function as hard law eventually, its norms must not be less attractive to the participants of international trade. The goal of the prospective European law-maker is to create not only common but also good law, a law that must be reliable. One of the best possible ways to establish preferences suitable for the actors in the market is to check which legal systems are most frequently chosen as applicable by parties to actual contracts. For example, we know that in the US the commercial law of the State of Delaware is especially attractive for businesses.

[73] D. Keenan (1998), 256.
[74] Preserving the traditional spelling of „judgEment" the authors seem even more British than the Supply of Goods and Services Act itself.
[75] Cf. J. Pisuliński, *Kilka pytań o europejski kodeks cywilny* (2/2006) Transf. Pr. Pryw. 100.

In Europe a tendency to choose English law is observable, even in instances where none of the parties come from Britain or operate there.[76] Common law is renowned for the high status of the principle of contractual freedom, stability and consistence in problem-solving. Paradoxically, the system generally based on the precedent ensures more stability than codified civil law, and where a statute interferes with and overrides case law, it is usually based on the experience of courts handling cases. If we have to search for solutions which implement policies unknown to a number of particular national private law systems, English law is a good place to start because of its operative character, especially given that the common European interpretative culture has still not developed.

2. Final Remarks

The DCFR defines "goods" in Annex I as corporeal movables. The concept includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.[77] If we look at the definition of movables, the notion central to the above category, the Annex reads that it covers corporeal and incorporeal property, other than immovable property.

Such a definition of the object of the contractual type provided for in Book IV Part B narrows the scope of what Continental Europeans recognize as a lease. Most corresponding national types, such as the German *Miete/Pacht*[78] or Polish *Najem/Dzierżawa*,[79] refer also to immovable property, meaning land and everything attached to land as not subject to change of place by normal human action. The literature concerning such contractual types, at least in Poland, most commonly relates to leases of flats or apartments. In the German law, particular rules referring to these occupy most of the Bürgerliches Gesetzbuch Title devoted to the contract of lease (§ 549 to § 577a BGB). This makes sense, since accommodation at least from the social point of view is probably the most common area where contracts regarding temporal use of another's property are concluded.[80] If we add that the vast majority of case law covering the contract of lease in Poland (najem) refers to leases of flats for the purpose of accommodation, it becomes apparent that separating rules which relate to the lease of goods (movables) from leases concerning immovable property results not only in the emergence of a division which seems "unnatural" from the point

[76] R. Mańko, *Prawo prywatne w Unii Europejskiej. Perspektywy na przyszłość* (Warszawa, Podyplomowe Studium Prawa Europejskiego UW, 2004) 106, 107.
[77] Draft Common Frame of Reference, Outline Edition (Munich, Sellier, 2009) 555.
[78] W. Gitter and J. Gernhuber (1988), 14 ff., 177 ff.
[79] Z Radwański and J. Panowicz-Lipska (2005), 94-140.
[80] C.f. F. Zoll, *Najem lokali mieszkalnych* (Kraków, Zakamycze, 1997) 15 ff.

of view of many national laws, but also undermines the relevance of well-developed case law to the field of movables. This separation may cause major interpretative problems of the type discussed in Case 1. In consequence, even if certain rules relating to the contract of lease of goods as defined in the DCRF may serve as detailed guides for national law-maker (one of the objectives of the DCFR authors was to create a toolbox for the drafters of national rules[81]), it seems unlikely that a separate contractual type is going to emerge in the Civil Codes of European states, as was the case after the entry into force of the UNIDROIT Convention on International Financial Leasing (Ottawa 1988). The broad understanding of the lack of conformity discussed in Case 3 may prove an influential model.

The need for specific rules relating to contracts concerning temporal use of another's property depends on manifold socio-economic conditions: accommodation standards, credit availability, income structure of the local community or national tax provisions. As a result, drafters of any uniform European law, even if it is meant as an optional instrument for the actors in the internal market, would have to draft the law in such a way as to ensure its compatibility with the principle of subsidiarity expressed in Art. 5 of the EC Treaty. The scope of the rules on the contract of lease of goods in the possible future European Civil Code should encompass lease types of certain significance from the point of view of the whole of the EC internal market. Such is the case of financial leasing, discussed in Case 2, where the need of regulation on the super-national level was recognized already in the Ottawa UNIDROIT Convention. However, the rules of the DCFR seem much more specific than the general provisions of the Convention; and the most vital question is whether it is advisable, or possible at all, to introduce a truly uniform law on financial leasing without harmonizing tax provisions.

[81] Draft CFR, Outline Edition (2009) 16.

Mandate

DCFR, Book IV, Specific contracts and rights and obligations arising from them,

Part D: Mandate

by

Carlos Gómez Ligüerre

Summary: 1. Introduction. – 1.1. A Wide and Unified Concept of Mandate. – 1.2. Implied Mandate, Right to Compensation and Gratuitous Representative. – 1.3. Termination of the Mandate Relationship. – 2. Three Cases. – Case 1. – Case 2. – Case 3.

1. Introduction

In line with the Continental tradition, the Draft Common Frame of Reference (DCFR, hereinafter) distinguishes the external relationship between the principal and the representative from the internal relationship between them. The former is the 'representation', which allows the representative to affect the legal position of the principal. The latter is the 'mandate relationship', the authorization and the instructions given by the principal to the representative. 'Mandate' is the agreement whereby one person undertakes to negotiate or carry out a transaction for another, and 'representation' is the external performance of such agreement. This distinction is unknown by the common law systems, which use the term 'agency' to designate all agreements that enable the representative to participate in commercial transactions by acting pursuant to a request, instruction or authorization from the principal.[1]

[1] As K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn, trans. by T. Weir (New York, Oxford University Press, 1998) 434, stated: "The doctrinal and legislative structure on representation in Continental systems is the result of a discovery made in 1847, namely the distinction between the contract between the principal and the

The DCFR takes the distinction between representation and mandate for granted, and regulates them in two separate places: representation in Book II, Chapter 6 (articles 6:101 to 6:112), and mandate in Book IV, Part D (articles IV. D.-1:101 to IV. D.-7:104). The difference in the size of the two bodies of rules shows that the DCFR finds greater cause for concern in relation with mandate than in representation. This seems logical in the continental understanding even though it sounds strange for the lawyers of the common law. In any case, the distinction drafted in the regulation is artificial. Even the DCFR, which differentiates the two types of relationships and regulates them in different ways, must incorporate part of the regulation of the irrevocable mandate (article IV.D-1:105) into its regulation of the termination of representation for extraordinary reasons (article II-6:103), for example. Furthermore, the internal relationship between principal and representative is concerned not only with internal limitations to the representative's powers, but also the whole of the legal rights and duties of the principal and the agent as between themselves. Thus, the internal relationship involves such questions as whether or not and if so how much remuneration is payable to the agent, as well as what standard of care the agent must use in acting on the principal's behalf.

Thus, the DCFR has opted for a classic (and typically continental) conception of the mandate relationship and representation. Other previous unification attempts have blurred the distinction that is again drawn by the DCFR. This is the case of, significantly, the Unidroit Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983), concerning the relations between the principal or the agent on the one hand, and their relationships with third parties on the other.[2]

In the same way, the DCFR has adopted the distinction between direct and indirect representation historically drawn by Continental systems (see article IV.D.1:102, sections d and e). Direct representation refers to contracts made by the representative in the name of the principal, while in indirect representation the representative acts in his or her own name, and the relevant issue is whether or not the third party nonetheless has a cause of action against the principal. Article 6:106 DCFR, Representative acting in own name, establishes that: "*When the representative, despite having authority does an act in the representative's own name or otherwise in such a way*

agent and the grant of authority by the principal to the agent, whereby he confers on the agent the power to represent him in making contracts with third parties". See L. Díez-Picazo, *La representación en el derecho privado* (Madrid, Civitas, 1979) 65 ff.

[2] See *Diplomatic Conference for the Adoption of the Unidroit Draft Convention on Agency in the International Sale of Goods, Geneva 31 January-17 February 1983. Acts and Proceedings* (1983) Uniform Law Review I-II; J.M. Bonell, *The 1983 Geneva Convention on Agency in the International Sale of Goods* (1984) 32 AJCL 717; B. Fernández Gregoraci, *Representación indirecta y Undisclosed agency: su convergencia (la Convention on Agency in the International Sale of Goods y los Principles of European Contract Law),* (2002) 55 Anuario de Derecho Civil 1717-1750. The Convention has been ratified only by Italy and France, and since it has not reached the minimum number of ratifications, it is not yet applicable. In spite of this, there is no doubt about its theoretical and academic interest.

as not to indicate to third party an intention to affect the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It does not as such affect the legal position of the principal in relation to the third party unless this is specifically provided for by any rule of law." So, the solution of the DCFR resembles the traditional regulation on indirect representation in continental systems. See, for example, article 1717 of the Spanish Civil Code, article 1388 of the Italian Civil Code, or article 1984 of the French Civil Code.[3] The distinction between direct and indirect representation is also present in the Chapter 3 of the Principles of European Contract Law. On the contrary, such distinction was left in the Convention on Agency in the International Sale of Goods, which seems to be closer to the common law categories of disclosed and undisclosed agency.[4] This topic is beyond the scope of matters considered here.[5]

The distinction between representation and mandate has an undisputable justification: the representation phenomenon is wider than the contract of mandate. In fact, the authorization given to the representative may have origins that differ from those of the mandate relationship. The relationship between principal and representative is not necessarily always based on mandate, but also on employment or partnership, for instance.

In spite of the different origins of the representation, the DCFR seems to regard the contract of mandate as the main source of the relation in which a person (the representative), conducting negotiations, can generate rights and duties in a third party (the agent or principal). In fact, the DCFR regulates mandate in a more detailed way (33 articles) than it does representation (12 articles). This comparison shows clearly that the DCFR considers the internal relationship between agent and representative more sensitive than the external one. It is true, on the other hand, that mandate can be used for concluding juridical acts that can affect the legal sphere of the principal without interfering with third parties, or without signing contracts. The last point suggests that the rules of representation are only useful in limited ways for solving the problems of mandate. Hence, the contract of mandate is regulated in an extremely detailed way.[6]

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[3] See, B. Fernández Gregoraci, *La representación indirecta* (Cizur Menor, Aranzadi, 2006); and B. Fernández Gregoraci, *Representación indirecta. Artículo 1717.II Cc: cosas propias del mandante. Ámbito objetivo de aplicación y ¿responsabilidad del representante? (a propósito de las SSTS de 3 de enero de 2006 y 22 de abril de 2005)*, (2006) Anuario de Derecho Civil.

[4] "English lawyers are not familiar with the distinction drawn on the Continent between acting 'in one's own name' and 'acting in the name of another', and they cannot see why it is only in the latter case that the principal acquires rights and liabilities. For them 'agency' arises whenever a principal authorizes and agent to act on his behalf in some way, typically by making contracts with third parties": K. Zweigert and H. Kötz, *Introduction to Comparative Law*, cit., 433.

[5] See B. Fernández Gregoraci, *Representación directa e indirecta: definición y efectos conforme al DCFR y a los PECL* (4/2008) InDret (www.indret.com).

[6] This extension contrasts with the regulation of other contracts in the DCFR. See, in general, R. Schulze (ed.), *Common Frame of Reference and Existing EC Contract Law* (Munich, Sellier, 2008); A. Quiñones Escámez, *Hacia un derecho contractual europeo* (3/2008) InDret (www.indret.com).

Before analyzing the three cases considered herein, it is necessary to describe some questions raised by the regulation on mandate in the DCFR.

1.1. A Wide and Unified Concept of Mandate. – In view of the great importance of the mandate relationship to trade, the DCFR may have a profound impact on economic relations. Since article I.1:101 DCFR states that the new rules apply to private and commercial relations as well, the new rules on mandate will also manage the internal relationship of the business mandate, with the sole exception of mandate contracts pertaining to investment services and activities delineated in article IV.D-1:101.5. Thus, the DCFR blurs the traditional distinction between civil and commercial mandate (see for example article 1400 of the Italian Civil Code, or articles 59 and 84 of the German Commercial Code).[7]

From the general point of view adopted by the DCFR, the distinction drawn between representation and mandate makes sense. The DCFR seems to consider mandate as a contract which operates regardless of the success of the representative in conducting the representation. The mandate as governed by the DCFR sometimes recalls the idea of an abstract mandate; an idea that is doubtless very useful for providing confidence and certainty to business relations. The distinction, however, cannot be as strict in actual practice as the DCFR seems to draw. We will consider this point again in examining the consequences for the principal of acts carried out by the representative beyond the scope of the mandate.

1.2. Implied Mandate, Right to Compensation and Gratuitous Representative. – The DCFR defines the scope of its regulation on mandate broadly. According to article IV.D-1:101, in the contract of mandate a person, the representative, is authorized and instructed by another person, the principal, to conclude a contract between the principal and a third party, or otherwise affect the legal position of the principal in relation to a third party. The representative carries out the mandate in exchange for a price, for an indefinite period of time, for a fixed period, or until such time as a particular task is concluded (article IV.D- 1:103). The obligation of the principal to compensate the representative is established by article IV-D-2:102. In fact, the prevision of a price for the tasks carried out by the representative is an innovation. Some jurisdictions establish gratuity, unless the contrary is agreed (see for example, article of the 1711 Spanish Civil Code, article 1986 of the French Civil Code, and article 662 of the German Civil Code).[8]

[7] See for further references Á. Rojo, *La representación en el derecho mercantil*, in R. Uría and A. Menéndez, *Curso de derecho mercantil*, vol. 1, 253-269.

[8] On the effects of harmonize the rules, see in general, F. Gómez Pomar, *The Harmonization of Contract Law Through European Rules: A Law and Economics Perspective*, (2/2008) InDret (www.indret.com).

Article IV.D-1:101 applies the regulation of mandate to contracts and unilateral juridical acts under which the representative is to represent the principal otherwise than in exchange for a price, to contracts under which the representative is instructed to perform the activities leading to the conclusion of a contract where the representative is not authorized to conclude it; and to contracts and unilateral juridical acts under which the representative is merely authorized to act but not instructed or obliged to act, and who does act (article IV.D-1:101.3). Therefore, the origin of the mandate is not only the will of the principal, but also specific facts, under certain circumstances. These circumstances differ greatly from those that form a traditional tacit or implied agreement, which is not expressly regulated in the DCFR as a possible origin of the mandate relationship. Whether or not a relationship is one of mandate is determined after an assessment of the facts of the relationship. The scope of the definition of the mandate in the DCFR may cause problems in some cases, particularly in relation to the rules provided by the DCFR on exclusivity in the authorization, which is not presumed according to article IV-D-3:301, and to the rules on irrevocable mandate in article IV.D-1:105.

Moreover, there is a partial contradiction between the conception of mandate as a rewarded contract and the possibility of terminating the relationship when it is gratuitous (article IV.D-6:104). The explanation may be that the gratuitous performance of the mandate is related to the kinds of mandates aforementioned, that is to say, those formed under special circumstances instead of those that reflect the expressed will of the principal.

1.3. Termination of the Mandate Relationship. – Probably as a consequence of the conceptual unification of the mandate for both private and commercial purposes, the DCFR strictly regulates the termination of mandate. In fact, in the DCFR, mandate can be effective beyond the death of the principal. According to article IV.D-7:103, the death of the principal does not end the mandate relationship. The rule implies the breach of the traditional principle *functa voluntate, functo est mandato*, which binds the validity of the mandate to the will of the principal and therefore implies the end of the mandate relationship when the principal passes away. Article IV.D-7:103 vests the representative with a strong position, until now unknown in some European jurisdictions (cfr. article 1732 of the Spanish Civil Code, article 2003 of the French Civil Code, but article 1399 of the Italian Civil Code).

d) Some unforgivable omissions

Despite the detailed regulation of some aspects regarding the contract of mandate, the DCFR fails to address three important topics directly. First, there is no provision on capacity.

Thus, the rules provided by DCFR do not provide guidance for handling the problems that may arise surrounding a the mandate ordered by a person who lacks the capacity for conducting the act assigned to the representative. The traditional solution to the lack of capacity of the principal is that no one can do through a mandate what he or she could not carry out personally (cp. articles 1389 and 1390 of the Italian Civil Code, and article 1716 of the Spanish Civil Code).

Second, there is no provision on the rules governing the situation of co-agents, in which one principal instructs more than one representative, wholly or partially. However, the rules on representation by article II.-6:110 expressly foresee representations carried out by multiple representatives. It seems unwise to regulate the external effects of a representation involving several representatives while disregarding how their internal relations with the principal should work (cfr. the regulation provided by articles 1995 and 2002 of the French Civil Code).

Third, the DCFR does not say anything regarding the formal requirements of the mandate. Indeed, there is no general provision regarding the freedom of form of the contract of mandate, like in article 167 of the German Civil Code. The traditional solution provided by the European Civil codes is that a mandate should be established through the same instrument that the representative will need to carry out the instructed work, that is to say, if the mandate consists in selling real property, and the rules governing such transactions require a specific form, the mandate should comply with such formal requirements. On the contrary, such a solution is neither endorsed nor rejected by the DCFR (see clearly, article of the 1392 Italian Civil Code, and in the same vein article 1985 of the French Civil Code).

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As compared with the existing rules on mandate currently in force in Europe, the DCFR implies an innovation in three areas. First, the DCFR regulates potential conflicts of interest between principal and representative. Second, the DCFR deals with irrevocable mandate. Finally, the DCFR contains specific liability rules for a representative acting beyond mandate. In these topics, the DCFR provides solutions that in most European jurisdictions, due to the silence of the codes, have been traditionally provided by the case law, sometimes in a way that differs greatly from the one now provided by the DCFR. The cases address these three topics which are the greatest innovations of the DCFR as compared with the current rules in some European jurisdictions.

2. Three Cases

Case 1

Irrevocable mandate

Rousmanier had given Hunt a power of attorney to sell a brig and a schooner owned by Rousmanier, to be exercisable if Rousmanier defaulted in repaying loans he owed to Hunt. After Rousmanier died insolvent, following his default on the loans, the court held that the power was not enforceable[9].

The case raises two questions covered by innovations in the DCFR. The problems were the irrevocability of the mandate, and its effect after the death of the representative. On the one hand, the mandate is given to safeguard a legitimate interest of the representative, which is the recovery of his loans. On the other hand, the death of the principal is one of the general causes of termination of a mandate relationship recognized in most European jurisdictions. According to the first element, the mandate tends to be irrevocable. According to the second, however, the mandate should terminate.

The questions raised by the case will help us to analyze two important and innovative rules of mandate in the DCFR: the definition of the irrevocable mandate and the effects of the death of the principal before the fulfillment of the work instructed or authorized by the principal to the representative. These are two different though linked questions that must be analyzed in turn.

The solution provided by the DCFR for the proposed case is clear. According to article IV.D-1:103, the mandate given by Rousmanier to Hurt is irrevocable. It is given "in order to safeguard a legitimate interest of the representative other than the interest in the payment of the

[9] The example is proposed by the Restatement of the Law on Agency as an illustration of the problems regarding irrevocable powers of mandate. It is a real case, decided in the United States at the beginning of the XIXth century. The case is *Hunt v. Rousmanier's Administrators*, 21 U. S. (8 Wheat.) 174 (1823). The court held that the power created only a revocable agency, which ended with Rousmanier's death, as apposed to a power coupled with an interest that survives its creator's death and may be exercised after it. To create such a power, the holder must be vested with an interest or estate that accompanies the power. The focus of the court's opinion is the demise of Rousmanier's legal personality with his death, not the commercial function of the power, which the parties intended as a substitute for a mortgage on the ships that might not have been enforceable. See American Law Institute, *Restatement of the Law (Third): Agency* (St. Paul (Minn.), American Law Institute Publishers, 2006) §3.12, comment c.

price". The price mentioned by the article is the reward associated with the mandate, not, like in the present case, the amount of money that the principal owed to the representative that explains the origin of the mandate relationship. In this case the debtor, who acts as the principal, assigns the right of selling some properties to the creditor, who is the representative.

According to article IV.D-7:102, the death of the principal does not end the mandate relationship. Hence, the representative, in spite of the death of the principal, is entitled to act. The DCFR foresees, however, that the death of the principal can be an extraordinary and serious reason to terminate the mandate (see article IV.D-7:102 in relation with article IV.D-6:103). So the principal, and after his or her death the principal's heirs, can terminate the mandate.

The problem raised by this case is that the mandate could be treated as irrevocable. In such a scenario, if the principal cannot revoke the mandate, such a power will not be held by his or her heirs. The result is irrevocability of the mandate, based in the safeguard of the rights of the representative, and the impossibility of its revocation, even after the death of the principal. In such a case, the fulfillment of the mandate, which consists in selling some properties of the principal, will interfere with the rights of the heirs of the principal. The result is paradoxical, because even the DCFR provides that the possibility of revocation of the mandate in all cases for extraordinary and serious reasons cannot be excluded to the detriment of the principal's successors (article IV.D.6:103), which is precisely what happens here.

An additional problem caused by the rules of the DCFR on irrevocability and termination of the mandate comes from the presumption against exclusivity stated by article IV.D-3:301. According to the article, the principal is free to conclude the prospective contract directly or to appoint another representative to conclude it. Even though the article does not say anything more, the possibility of nominating another representative to conclude the contract would imply that the former representative loses his or her mandate and therefore forfeits the right to any compensation attached to the success of his or her work. In this way, the DCFR adopts a solution equivalent to article 2006 of the French Civil Code, according to which the appointment of a new agent for the same transaction entails the revocation of the first one, from the day of notice to the latter. The lack of regulation of situations in which more than one representative carries out the transaction sought by the principal reinforces the idea that non-exclusivity provides the mandate under the DCFR an aspect of provisional nomination, unless exclusivity was agreed. However, a clearer statement of the DCFR on this issue would be desirable.

The aforementioned possibility, that is to say the nomination of another representative, does not square well with the principle of irrevocability of mandate, especially in those cases in which

irrevocability is directly provided by the circumstances, for example due to the interests protected by the mandate relationship as in the case here.

In conclusion, there seems to be a contradiction in the DCFR between irrevocability of some kinds of mandate, the independence of the mandate with regard to the death of the principal and the rights and duties of the heirs of the principal that nominated the representative without possibility of revocation.

The contradiction is caused by the DCFR. The problem arises because it provides that under some circumstances the mandate can be considered irrevocable, yet seeks to maintain the effects of the mandate after the death of the principal.

Some European jurisdictions follow a narrower test than that employed by the DCFR, under which it is necessary that a power holder possesses a proprietary interest in the subject matter, or in any case that the principal has defined the mandate relationship as irrevocable.

The traditional point of view, which appears to be modified by the DCFR, considers the mandate a relationship based on trust in the representative, a legal relationship similar to fiduciary duty. After the death of the principal, trust is no longer possible, and therefore the mandate must terminate.

An irrevocable mandate is in line with the opposite view of this conception. Therefore, the traditional regulations on mandate restrict irrevocable mandate. Some jurisdictions (e.g. Spain and France) do not foresee irrevocability of mandate in their Civil Codes. In these cases, case law has elaborated a narrow theory of irrevocable mandate. Specifically, irrevocable mandate is allowed in cases in which the mandate protects the rights of third parties, as in the proposed example. Those jurisdictions, however, foresee at the same time the termination of the mandate after the death of the principal. Thus, they solve the problem set out by the proposed example.

It is true that the doctrine of the irrevocable mandate has been widened in the past years as a consequence of the widespread authorization of irrevocable proxies to vote in shareholders' meetings. However, in general, irrevocable proxies voting sufficient shares to constitute control are much more likely in closely held corporations or other business organizations than in publicly held corporations. In closely held enterprises, it is also more likely that most members will assent to, or at least be aware of, the circumstances that led to a proxy holder's irrevocable appointment.

Case 2

Consequences of acting beyond mandate

P, who urgently needs money to pay his debts, drafts a document authorizing A to sell a piece of property. A will be compensated with a percentage of the final price. After A receives authorization from P, P sends A a letter asking for a status report on A's efforts to lease the property. The letter also states that P is glad the property will not be sold. After receiving P's letter, A lacks actual authority to sell the property, because it is not reasonable for A to believe that P wishes A to sell it. However A, who has already negotiated a very high price to sell the property, agrees to sell it. A thinks, first of all, of his own compensation, and secondly of the dire economic situation of P. A thinks that the sale will provide P desperately needed relief[10].

The DCFR addresses the consequences of acting beyond mandate in the Section 2 of the chapter on mandate (articles IV.D-3:201 and 3:202). First, the chapter states the circumstances under which the representative is able to act beyond instructions. Second, it provides rules on the consequences of ratification by the principal.

According to article IV.D-3:201, the circumstances under which the representative may act beyond authorization, are broad: reasonable ground of acting on behalf of the principal, lack of opportunity to discover the principal's wishes, and ignorance about the real and current prejudices caused to the principal in acting without authorization.

So, the DCFR here contemplates a mandate relationship in which the trust and confidence between principal and representative is so strong that it allows the latter to act, even in the absence of clear instructions or in a state of reasonable ignorance about the real wishes of the principal. For an initial observation, it is strange to find in the DCFR some rules contrary to the fiduciary logic of the mandate (like the IV.D-7:103) alongside others for which the fiduciary logic is the only explanation (like the whole chapter on consequences of acting beyond mandate).

Most conferrals of authority combine two elements. The first, always present, is a manifestation, general or specific, by a principal as to the acts or types of acts the principal wishes to be performed. The second, not always present, consists of instructions or directions that specify how or within what constraints such acts must be performed. A principal's communications to an agent begin with an initial expression granting authority, followed in many instances by instructions or directions that clarify matters, prescribe in more specific terms what the principal wishes the agent to do, or reduce or enlarge the scope of the agent's authority. A principal's instructions

[10] The proposed case is an adaptation of Illustration n. 6 in the first chapter of the American Law Institute, *Restatement of the Law (Third): Agency*, cit., § 2.01, comment b.

may leave questions unresolved as to whether the principal wishes the agent to move beyond the acts explicitly specified in order to fulfill the principal's implicit objectives; and also as to whether implicit restrictions apply beyond the limits the principal has stated. An agent must interpret the principal's instructions and determine how to act. The context in which the relationship takes place, including the nature of the principal's objectives and the customs generally followed in such circumstances, affect the way in which the agent should interpret the principal's manifestations.

In fact, the regulation of the consequences of acting beyond mandate seems to be excessive in the DCFR. To solve most of the problems derived from a lack of instructions or confusion generated by contradictory instructions from the principal, the DCFR already has the rule provided by article IV.D-4:102, which imposes on the representative the duty of requesting explanations regarding the directions received. It is difficult to imagine a case in which the representative has acted beyond the mandate and, at the same time, has complied with the duty of requesting directions. The clearest case is that in which the representative has acted with intent, that is to say, in which acting beyond mandate was intended. In such a case, non-performance of the contract is crystal clear, and it would not be wise to bind the principal to the third party in a case in which the representative voluntarily damages the principal’s interests.

Similarly, broad regulation on the consequences of acting beyond mandate is not the best complement to article IV.D-4:103, which outlines the consequences that the principal must accept when he or she failed in giving the correct direction. The article provides the representative with an opportunity to sue the principal for non-performance of the mandate contract.

In the same way article IV.D-4:104, which concerns the necessity of acting even when the representative has no time or a reasonable chance to ask or wait for directions, should solve most of the problems related to acts conducted beyond mandate. The scope of the specific rules on acting beyond mandate in the DCFR are, in conclusion, solutions for problems that perhaps could be solved directly according to the rules of non-performance of the mandate by the representative.

Article IV.D-3:201 allows the representative a defense in a case like the one proposed above. In the case, the representative has reasonable grounds for acting as he does on behalf of the principal, since he knows that the principal needs money urgently, and the sale of the property is a good transaction. Regarding the necessity of concluding the sales contract, our representative can easily prove that he did not have a reasonable opportunity to discover the real principal’s wishes. In the case, the principal had ordered the representative to sell the property, and only later

asks for a leasing contract. Because of the desperate financial situation of the principal, the representative cannot presume reasonably that the sale is detrimental to the principal.

The case is doubtless a hard one. In other cases it is common to change the initial instructions, or to fine-tune them at further stages during the relationship between principal and representative. Indeed, such will often be the case when the relation between them is of indefinite duration. Most often the principal first decides on the goals to pursue with the representative, and after, according to the circumstances, the principal gives to the representative the operative authorizations. Engagements for the buying and selling of property or shares in a stock market are usually conducted in this way. So the case is not so far from some real situations that the rules of the DCFR will have to solve.

It is important to note that the third party, i.e. the person who buys the property in our example, is completely protected by the rules of the DCFR governing representation. So, the problem stated by the regulation of the consequences of acting beyond mandate in the DCFR only concerns the effects of such action in the internal relationship between principal and representative. In fact, action beyond mandate is where the connection between mandate and representation tends to be more evident. In the tension between the strict performance of the contract of mandate, and the protection of third parties that interact with the representative, the latter receives stronger protection from the rules proposed by the DCFR.

Despite this connection between actual and apparent authority, actual authority itself affects a principal's legal relation with third parties separately and without reference to any apparent authority conferred on the agent by the principal. This is because by conferring actual authority, a principal consents to the agent's power to act with legal consequences for the principal, regardless of the belief of third parties concerning the existence or extent of that authority.

The architecture of the DCFR is clear. The representative can act beyond the received mandate under some circumstances. Third parties are protected if they relied on the apparent authority of the representative. In the internal relationship between principal and representative, ratification by the principal protects the representative from any liability. Lacking ratification, the representative faces a claim for non-performance of the mandate.

As the term is used in the DCFR, ‘ratification’ is both an act and a set of effects. The act of ratification consists of an externally observable manifestation of consent to be bound by the prior act of another person. The main effect is to bind the principal to the acts of the representative. In the section of the DCFR devoted to the action beyond mandate, ratification is also the means by which the representative can be exonerated of liability. The connection between ratification and a

lack of liability for a representative who acts beyond mandate suggests the possibility that the consequences of such action would vary depending on the type of representation. If the objective of the DCFR is to protect a third party who relies on the apparent power of the representative, the consequences of acting beyond mandate should be different in the context of direct representation than in the context of indirect representation. Such a distinction is absent from the chapter of the DCFR concerning acts of the representative beyond mandate, but it seems to be very important for establishing the appropriateness of the representative's action and, above all, for balancing the rights of the third parties with the duties that the principal intended to assume.

The problem is the broad range of possible circumstances and the potential for a wide interpretation of the acceptable causes under which the representative can act beyond mandate. In fact, most European jurisdictions have a narrower conception of the mandate relationship, and forbid the representative from complementing or even constructing the principal's will. On the contrary, the DCFR allows a representative who acts beyond the authorization to protect himself against lack of ratification and associated claims for non-performance. It is easier to forbid action beyond the mandate: Such a rule better protects the interests of both the principal and the representative. This rule appears in article 1989 of the French Civil Code: "An agent may do nothing beyond what is expressed in his agency". In a case like the proposed, in which the authorization is changed after the beginning of the representation, it seems clear that – in spite of the change of mind of the principal – the representative acted without actual authorization. The Italian Civil Code, in articles 1398 and 1399, contains a solution that also seems more satisfactory than the DCFR. The Italian Civil Code makes the representative liable for the damages caused to third parties in his or her action beyond mandate. It is true that the same Code allows the principal to ratify the acts, and even allows the third party to ask the principal for such ratification, with a presumption that the principal has not ratified if he or she does not say anything against it in the period established by the third party. The Italian solution seems more protective of the principal while at the same time allowing some protection to the third party. In fact, the subject who has to bear the consequences of acting beyond mandate is the representative, not the principal. As in the Italian solution, article 1727 of the Spanish Civil Codes assigns responsibility for the acts concluded beyond mandate to the representative. Only later ratification by the principal can exonerate the representative from liability.

The broad regulation of acting beyond mandate in the DCFR is a departure from the traditional position of European jurisdictions. As a rule, a representative may be liable in damages to his principal on either of two grounds. In the first place, liability may arise if the agent does not safeguard the principal's interests sufficiently, for example by not taking care in making a con-

tract that binds the principal to ensure that the other party is creditworthy and that the terms of the contract are satisfactory. However, even if the agent acts with care on the principal's behalf, the representative may still incur liability by failing to comply with the limitations on his or her freedom to act imposed under the internal relationship between the representative and the principal, for instance by ignoring the principal's instructions or exceeding the authority granted. In both cases liability will as a rule be based on a positive breach of contract.

The DCFR, in spite of the aforementioned well established doctrine, restricts liability to cases of lack of ratification by the principal. The solution recalls that provided by the Unidroit Convention on Agency. In this case, however, after stating that where an agent acts without authority or acts outside the scope of his authority his acts do not bind the principal and the third party to each other (article 14.1), the Convention recognizes that if the third party acting in good faith has relied on the representative, the principal will be bound (article 14.2). In such cases, the principal can ratify the acts of the representative (article 15). The Convention foresees the possibility of partial ratification, even though the third party may refuse to accept it (article 15.4).

The PECL have the same approach. Article 3:204 states that where a person acting as an agent acts without authority or outside the scope of its authority, its acts are not binding upon the principal and the third party. Like in the Unidroit Convention, the second paragraph of the article 3.204 provides that the principle can ratify the act of the representative without actual authorization (art. 3:207).

If a principal gives directions to an agent in general or open terms, the agent will have to exercise discretion in determining the specific acts to be performed to a greater degree than if the principal's statement specifies in detail what the agent should do. It should be foreseeable to the principal that an agent's exercise of discretion may not result in the decision the principal would have made. Regardless of the level of detail in a principal's statements or other conduct, an agent's duty is to interpret them reasonably to further the purposes of the principal that the agent knows or should know, in light of the facts that the agent knows or should know when he or she acts. When a principal's instructions are ambiguous, or if circumstances change, it will often be reasonable for the agent to seek clarification from the principal rather than speculating about the principal's wishes.

So a reasonable rule in the DCFR would be to impose on the representative the duty to ask for clarification of the instructions. Maybe it would be more sensible to create rules protecting the representative in case of error or misunderstanding of the instructions received from the principal,

rather than regulating in a such broad way the consequences (only negative for the principal) of action beyond mandate by his or her representative.

At least the regulation of the DCFR should vary according to circumstances instead of establishing a general regulation on action beyond mandate. Moreover, the rules on action beyond mandate apply in all cases and for all kinds of mandates. Maybe the consequences should be different depending on the scope of the mandate. Acting without instructions or according to implied or supposed instructions in a long term mandate is different from acting in this way in a mandate for a particular task (see article IV.D-1:103). Some connection between the consequences of acting beyond mandate and the duration and characteristics of the mandate would have been desirable.

The norms provided by the DCFR on this topic can also be problematic in scenarios in which the principal pursues the goals of the authorization with more than one mandate. The DCFR does not preclude a principal from nominating more than one representative for the same task (see article IV.D-3:301). In such scenarios, acting beyond mandate by one of the representatives can be extremely dangerous for the principal.

In short, the consequences of acting beyond mandate should not be independent of the kind of representation, direct or indirect (disclosed or undisclosed), carried out by the representative. The requirement that the agent conclude the contract 'in the name of' the principal leads one to infer that the principal acquires no rights and liabilities if the agent, though acting within the scope of the authorization, does not act in the name of the principal, i.e., he or she does not make it clear that the legal consequences are to be attached to him or her[11]. Indeed, the consequences of acting beyond mandate should not affect the legal sphere of the principal, unless the latter ratifies it.

Case 3

Conflict of interests

[11] See, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, cit., 433. The authors recognize that in the common law, if an agent makes a contract on behalf of his principal within the scope of his authority, it is the principal who acquires the rights and liabilities under the contract even if the agent concealed his very existence at the time of the contract and gave the impression that he was to be the other party.

Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Both Buyer and Seller gave informed consent to a joint representation by Lawyer to prepare a commercial contract. Lawyer's bill for legal services is paid by both clients and the transaction is concluded. Buyer then retains Lawyer to file a lawsuit against former Seller on the asserted ground that Seller breached the contract[12].

The DCFR contains a quite thorough regulation on conflict of interests between the principal and the representative. The DCFR describes the main sources of such conflict: first, the case of self-contracting (article IV.D-5:101), and second, the case of double mandate (IV.D-5:102). The solution in both cases is clear: The representative may not act in his or her own interest, or combining the interests of two different principals, unless the principal is made aware of the situation and agrees to it. In so holding, the DCFR employs to same solution found in some European jurisdictions, specifically Spanish and French law, in which the lack of discussion regarding such scenarios in their Civil Codes has been remedied by case law like in the DCFR: Self-contracting and double mandate as a rule are not permitted, unless the principal or principals agree expressly that the representative can act in such a way.

Otherwise, the main innovation in the DCFR is wide regulation of scenarios in which there are possible conflicts of interests between principal and representative and, at the same time, regulation of some circumstances in which the consent of the principal is implied or can be inferred from the circumstances. Again, the autonomy given to the representative by the DCFR recalls a strong fiduciary relationship between representative and principal, which is not so clearly present in other articles of the DCFR on mandate relationship.

Anyway, it is clear that in a case like the one proposed above, independent of deontological questions regarding the action of the lawyer which are beyond the scope of this comment, the action of the representative requires that both principals agree to the joint mandate. In the same way, Lawyer may purchase the property for himself only with the express consent of both principals. There are some problems that can be caused by the regulation proposed by the DCFR. Specifically, article IV.D-5:101, paragraph c, allows self-contracting by the representative if the principal could reasonably have known of the representative becoming the counterpart and the principal does not object within a reasonable time. It is foreseeable that in situations like the one

[12] The case is inspired in some Illustrations provided by the American Law Institute, *Restatement of the Law (Third): The Law Governing Lawyers* (St. Paul (Minn.), American Law Institute Publishers, 2000) Chapter 8. Conflict of interests.

in the illustration, neither of the parties will take into account the express prohibition on self-contracting by the representative. In fact, the general ban on self-contracting comes to the defense of the principals in such a scenario. Anyway, in our case, Lawyer may reasonably think that the best way to resolve the profound disagreement between Buyer and Seller is that the Lawyer purchase himself or herself the property, either to sell it thereafter to another client, or to enjoy it as a personal asset. In a matter potentially so dangerous for the principal's interests, it does seems unwise to provide a broad and subjectively defined way to elude the general prohibition of becoming the counterpart of the principal. The same exception is foreseen in article IV.D-5:102 regarding double mandate. Hence, the same considerations apply. In such cases, the DCFR should require absolute good faith on the part of the representative.

One of the criticisms of the regulation of the DCFR on conflict of interests is its generality. There are no nuances or directions according to which the potential conflict of interest in both its manifestations (self-contracting and double mandate) can be solved in a different way depending on the kind of mandate or the aims of the principal. Intuitively, we can surmise that the potential conflict of interest may be of a different character in, for example, a mandate for settling a dispute or a mandate for selling a property.

The distinction is made explicit in the regulation on mandate in some European jurisdictions. Specifically, the German Civil Code provides specific rules for mandate when the representative is a broker, or a realtor who receives the authorization for selling immovable property belonging to the principal. In such scenarios it is more likely that the professional receives the representation, and therefore the mandate, from several different principals, those who want to buy, and those who seek to buy.[13] Article 654 of the German Civil Code provides that if a broker acts for both parties to the contract he or she negotiates, he or she forfeits the right to any commission, although this is not a mandatory provision. In fact, when the parties authorize a double mandate, they allow the representative to recover double compensation, too. Whether double mandate is permitted depends on the content of the brokerage contract in question. If the broker only passes along information about persons who may be interested in contracting with the principal, he or she may, as a rule, act in a double capacity without an express grant of permission in the contract. Moreover, a negotiating broker may also receive a promise of compensation from the other party, especially in transactions involving land, where the ability to do so is an implied term of the brokerage contract or if trade custom permits.

[13] Here we follow the analysis of F. Staubach, *The German Law of Agency and Distributorship Agreements*, European Commercial Law Library no. 7 (London, Oyez Publishing, 1977) 215-216.

In such scenarios, however, German law does not permit double agency if the broker has an exclusive appointment and has entered into a long-term commitment to act for the principal. Such a broker is known as a confidential broker, and the representative cannot act on behalf of the third person whom he or she introduces to the principal, unless this is expressly permitted by the mandate. Furthermore, if a brokerage contract provides for the protection of special interests of the principal, the broker may not engage in double agency. This solution has been disregarded by the DCFR, which favors the opposite solution when double mandate or even self-contracting can be beneficial (from the point of view of the representative) for the principal.

Accordingly, articles 652 and ff. of the German Civil Code ban double mandate in cases in which the principal requires the realtor to obtain as high a price as possible on a sale, or as low a price as possible on a purchase. Here the broker would be involved in reconciling fundamentally conflicting interests, and the obligations to the principal would make it impossible for the representative at the same time to carry out some acts benefiting the other party.

Where double mandate is permitted, each principal must pay the broker the full commission which would be payable if the broker acted for the principal alone.

A representative who acts for both parties in negotiating a contract is under special duties to both principals. The representative must act impartially, and may not give preference to the interests of either principal.

In fact, a double representative acts as a mediator between the two parties, and his or her duty is to reconcile the interests of the principals in a fair and appropriate manner. In such scenario good faith duties are strong, and the lack of any reference to this kind of duties in the DCFR is surprising.

The rules provided by the PECL, specifically by article 3.205 regarding conflict of interests, are more similar to those traditionally employed by European jurisdictions. According to the PECL, the contract concluded by a representative involved in a conflict of interest can always be declared null and void by the principal.

Personal Security

DCFR, Book IV, Specific Contracts and rights and obligations arising from them;

Part G: Personal Security

by

Sophie Vigneron and Simone Wong

Summary: 1. Three Cases. – Case 1. – Case 2. – Case 3. – 2. Comparative Analysis.

1. Three Cases

Case 1

Dependent personal security in professional context

Mr and Mrs Smith are shareholders and directors of a limited company which runs an old persons' residential home at a property named 'La Jolie Maison' owned by the company. The business has recently run into difficulties and the bank has agreed to lend the sum of 1,000,000 to the company on condition that it provides a proprietary security (charge/ hypothèque) over the property, which Mr and Mrs Smith agree to. The bank further requires personal security for the 1,000,000 debt from Mr and Mrs Smith which they reluctantly accept. The bank sends them the terms and conditions for a personal security (joint and several liability) and a letter recommending that they obtain legal advice before signing the contract. The bank, however, fails to register the proprietary security executed by the company.

Mr Smith has an annual income of 50,000 and an estate worth 150,000. Mrs Smith's annual income is 60,000, with an estate worth 200,000. They jointly own their marital house, which is worth 200,000. In 2006, the Smiths divorce; after that, Mrs Smith sells her share and stops working in the business.

In 2008, the bank claims from the couple the sum of 800,000. What is the extent of their liability? Would the situation be different if the business is managed solely by Mr Smith, while Mrs Smith has no input or share in the business?

English Law

There is, in England, little statutory codification of the law on dependent securities.[1] The legal rules applicable to security providers of professional debts are mainly governed by common law principles.

1. Dependent Personal Security

The key issues in Case 1 are, first, whether the security providers may be deemed to be vulnerable and, second, whether their reluctance to provide security may be evidence of a vitiating factor. Following *Royal Bank of Scotland v Etridge (No. 2)*,[2] a security provider may be vulnerable where the relationship between the debtor and the security provider is non-commercial in nature, in which case a creditor is required to take reasonable steps to ensure the security provider's consent is properly obtained. The extent of the Smiths' involvement in the management of the company, and their drawing significant salaries from the business may thus be relevant. Given this nexus, the nature of the parties' relationship is commercial and the security providers are therefore not to be deemed vulnerable. Thus the bank would not be required to take reasonable steps as required by *Etridge (No. 2)*. On the other hand, where Mrs Smith is neither involved in the management of the business nor a shareholder of the company at the time of giving the security, she would be deemed to be vulnerable since her relationship with the debtor would be viewed as non-commercial in nature. In order for Mrs Smith's security to stand, the

[1] There is, e.g., the Consumer Credit Act 1974 (CCA) which applies to security provided in relation to a regulated consumer credit agreement.
[2] [2001] 4 All ER 449.

creditor must show that it has taken reasonable steps to rebut notice of any possible wrongdoing in procuring her consent, e.g. urging her to take independent legal advice.

There is no principle of proportionality that places the creditor under a duty (contractual or statutory) to ensure that the debtor's assets and income are adequate to meet his/her security obligations.[3] Equity will, however, set aside an agreement on the grounds of a vitiating factor such as undue influence or unconscionability. The Smiths' reluctance and subsequent capitulation raise the question of whether undue influence might have been exerted by the creditor in obtaining their consent. This argument may be problematic as a banker-customer relationship is not seen as one where the presumption of undue influence normally exists except in exceptional situations.[4] Any claim must thus require proof that there is a de facto relationship of trust and confidence between the parties. Moreover, the presumption may be rebutted by the creditor informing the security providers to seek legal advice and the security providers being legally represented. In *Credit Lyonnais Bank Nederland v Burch*,[5] Millet LJ, by way of obiter, suggests that a transaction may be set aside on the grounds of unconscionability if it "shocks the conscience of the court". Equity has traditionally permitted a transaction to be set aside where "one of the parties [to the contract] has imposed the objectionable terms in a morally reprehensible manner … which affects his conscience".[6] There must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, which does not appear to be the case here.[7]

Neither the sale of Mrs Smith's share in the business, nor the divorce, will affect her liability under the security provided. English law does not provide for an automatic discharge of the security provider in such circumstances and Mrs Smith's liability remains intact unless there is an agreement between the parties for her release.

2. Loss of Security and Subrogation

There is an issue in Case 1 regarding the effect of the non-registration of the proprietary security on the personal security. A security provider who pays the debt is normally entitled to be subrogated to all the rights of the creditor in respect of the debt, and thus has the right to the benefit of all the securities provided to the creditor by the debtor. The loss of or a failure to perfect a security without the security provider's consent may result in partial relief to the security

[3] See discussion below and comparison with French law.
[4] See *Lloyds Bank v Bundy* [1975] QB 326.
[5] [1997] 1 All ER 144.
[6] *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489 at 502, per Browne-Wilkinson J.
[7] *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 All ER 944.

provider to the extent of any resultant loss.[8] However, the non-registration of the proprietary security provided by a company may not discharge the security provider where she is a director of the debtor-company. Therefore, the legal obligation to register the proprietary security lies with the company and Mr and Mrs Smith will not be discharged of their obligations under the dependent security.

Under section 53 of the Law of Property Act 1925, no interest in land can be created or disposed of except in writing. Moreover, in order for the creditor to take priority as a secured creditor, the proprietary security (i.e. the charge) must be registered with the Land Registry.[9] Failure to do so does not mean that the security has absolutely no effect. It means that the creditor will at best only have rights of an equitable chargee since the unregistered security is treated in equity as an equitable charge. The remedies of an equitable chargee are limited to the security being satisfied by the sale of the property[10] or by the appointment of a receiver.[11] Moreover, a company that provides proprietary security is under a duty to register the security within 21 days after its creation, failing which it is void against the liquidator and other creditors of the debtor.[12]

3. Enforcement of Personal Security

Liability under a dependent security is subsidiary in nature, i.e. the security provider is liable only if the debtor has defaulted and is liable: the security provider's liability is co-extensive with the debtor's. Where there are two or more security providers, the nature of the security providers' liability inter se may be either joint or joint and several. In the former, the security providers owe a single obligation, both being liable for the whole amount secured: if one security provider does not enter the transaction or is released by the creditor without the consent of the other security providers, the others are discharged from their liability. In addition, the rule of survivorship applies in the case of joint liability but not joint and several liability.[13] The liability of a (joint) security provider ceases on his death, with liability for the debt passing to the surviving security providers. Where, as in our case, the security provides for joint and several liability, each security provider will owe independent obligations as well as be liable separately for the amount secured. A discharge of a joint and several security provider without the consent

[8] *Wulff v Jay* (1872) LR 7 QB 756. See also G. McCormack, *Protection of Surety Guarantors in England – Prophylactics and Procedure*, in A. Colombi Ciacchi (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity (Baden Baden, Nomos, 2007) 154.
[9] See Land Registration Act 2000, sections 48 and 51.
[10] LPA 1925, section 91, for an application to the court to order sale.
[11] Available only to an equitable charge that is by way of a deed: LPA 1925, section 101(1)(ii).
[12] See Companies Act 2006, sections 860, 870 and 874.
[13] *Beckett v Addyman* (1882) 9 QBD 783.

of the other security providers will also result in the latter's discharge unless the creditor reserves its remedies against the remaining security providers.[14]

Given the subsidiary nature of the security providers' liability, the creditor must first demand repayment of the debt of 800,000 from the debtor, before pursuing a claim against the security providers. As the Smiths' liability is joint and several, the creditor has the option of suing both of them for the 800,000 debt, or one of them, without foregoing a right to sue the other later.[15] As there is no community of property in English law, the principle of separate property means that the creditor may look to the assets owned by the couple jointly and separately for the repayment of the debt. This includes e.g. obtaining a charging order over the marital home, which will enable the creditor to sell the property and apply the sale proceeds towards the repayment of the outstanding debt.

French Law

1. Vulnerability of Security Providers

French law has developed extensive information duties on credit institutions in order to protect vulnerable security providers. Initially, the extent of the information provided was different according to the nature of the debt (consumer or professional). In 2003, the level of protection of security providers of consumer debts was extended to security providers of professional debts.[16] The Smiths are in equivalent positions regarding the debt as they are both shareholders and managers of the debtor. As a professional debt, the rules in sections L. 341-1 et seq. Consumer Code are applicable.

In Case 1, the security would be valid, provided that the Smiths have both signed the contract and written by hand the statement prescribed by section L. 341-2 which confirms the amount secured, both in letters and numbers.[17] Otherwise, the agreement is void. Where Mrs Smith is not a manager of the company, the rules are the same since French law looks at the natu-

[14] *Ward v National Bank of New Zealand Ltd* (1883) 8 App Cas 755; *Mercantile Bank of Sydney v Taylor* [1893] AC 317. For a fuller discussion of the English law, see e.g. McCormack, above n 8.
[15] Civil Liability (Contribution) Act 1978, section 3.
[16] Act 2003-721, 1st August 2003, JO 5 August 2003 13449, codified in sections L 341-1 et seq. C. Cons. The Act was called the Dutreuil Act.
[17] Section L 341-2 C. Cons. P. Simler and P. Delebecque, *Les sûretés, La publicité foncière* (Paris, Dalloz, 4th ed. 2004), at 45. M. Cabrillac and C. Mouly, *Droit des sûretés* (Paris, Litec, 7th ed. 2004) 98. The form is 'in standing surety for X, up to the sum of … covering payment of the principal, interest and, where appropriate, penalties or interest on arrears and for the duration of … I undertake to repay the creditor the sums owing on my income and property if X fails to satisfy the obligation himself.'

re of the debt guaranteed (consumer or professional), rather than the quality/vulnerability of the security provider.

There is no requirement under French law to obtain independent advice before signing the security contract. Instead, certain pre-contractual information must be provided by the creditor and a handwritten statement included in the contract. Formalism is thus a condition for the validity of the contract. It has, however, been held that the contract remains valid for the amount written notwithstanding minor omissions, like the word 'and'.[18] For securities provided before section L 341-2 C. Cons. came into force in February 2004, section 1326 of the Civil Code requires the secured amount, in words and in numbers, to be handwritten into the agreement by the security provider. In the event of any omissions, the extent of the security has to be proved by other means, in accordance with section 1347 of the Civil Code.[19] Moreover, the creditor has to prove that the security provider understood the nature and effect of his undertaking at the time of signing the contract.

During the performance of the contract, the Smiths must receive information about the first default of repayment of the company[20] and annual information about the debt due.[21] If they do not receive the relevant information, their obligation to pay interest and penalties due since the last receipt of the information is suspended until the moment the information is next received.

The Consumer Code provides that certain information should be given to the security provider during the currency of the contract. Of these, three types of information are particularly salient. First, according to section L 341-6 C. Cons., the creditor must inform the security provider of the debtor's first default of repayment which has not been adjusted within a month of its due date. Until the creditor does so, the security provider will not be liable for the payment of any penalties or interest on the arrears due between the date of the first repayment default and the date of notification of the default. Second, where the security is unlimited in time, section 2293 of the Civil Code requires information regarding the debt amount, any penalties and interest to be provided annually to the security provider, failing which the latter will not be liable for any interest and penalties due. The section raises the question of whether there is a time limit after which liability for penalties and interest will lapse. One possible construction is that interest should not

[18] Cass., 1st civ., 9 November 2004, Bull. I n. 254. Published and unpublished cases are available on line: www.legifrance.gouv.fr, see 'jurisprudence judiciaire'.
[19] Cass., 1st civ., 25 May 2005, Bull. I n. 228; Y. Dagorne-Labbe, *Cautionnement* (2005) 19 Defrénois 1489; V. Avena-Robardet, *Mention manuscrite: les lettres ne dispensent pas des chiffres* (2005) Dalloz AJ 1548.
[20] Section L 341-6 C. Cons.
[21] Section L 313-22 Monetary and Financial Code.

be paid either from the year the information was last given[22] or, alternatively, from the date the security agreement was signed – a solution preferred by Members of Parliament during the parliamentary debates but severe for a creditor who is not a professional.[23] However, section L 341-2 now requires a time limit for all securities and this question is only relevant for agreements entered into before 5 February 2004.

Third, section L. 313-22 of the Monetary and Financial Code provides that information about the debt amount, interest and the possibility of terminating the contract should be given annually to the security provider.[24] Non-compliance would suspend the security provider's liability for any interest and penalties (that were normally due) from the date the last information was received to the date the new notification is received. This sanction is effective because, since 1999, payments made by the debtor count towards the principal debt and not interest.[25] Courts have taken a broad interpretation of this section to protect security providers.[26]

2. Unconscionability and Proportionality

Section L. 341-4 C. Cons. creates a general principle of proportionality that applies to all security providers (natural persons). However, in terms of assessing the proportionality of the Smiths' financial resources and the debt secured, there is at present some uncertainty due to differences in judicial interpretation(s) about the method of calculating a security provider's income.

The principle of proportionality was first applied to security providers of consumer debts. It was then extended to professional debts by the *Cour de cassation* through the Macron and Nahoum cases.[27] The amount of damages was equal to the amount that was considered disproportionate.[28] Section L. 341-4 C. Cons. now recognises that the proportionality principle

[22] Similar to section L 313-22 of the Monetary and Financial Code: see below.
[23] If he is, section L 311-22 C. Cons. applies rather than section 2293 C. Civ.
[24] Court of Appeal of Grenoble, 4 January 2005, (2005) JCP IV, 3375.
[25] This rule is an exception to section 1252 C. Civ. which provides that payments count towards interest and not the principal.
[26] For example, the *Cour de cassation* applied it to a bank which had granted a loan to a company manager for non-professional purposes and who subsequently used the money to increase the company's assets: Cour de cassation, com., 27 February 2007: Bull. IV n. 64.
[27] Cass., com., 17 June 1997 (Macron), Bull. IV n. 188; Cass., com., 8 October 2002 (Nahoum), Bull. IV n. 136. S. Vigneron, *Protection of Non-Professional Sureties in France: "A trop embrassé, mal étreint"*, in A. Colombi Ciacchi (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparities (Baden Baden, Nomos, 2007) 103 ff.
[28] Cour de cassation, 1st civ., 20 December 2007 : Bull. I n. 393; S. Carval, *L'évaluation du dommage contractuel: le cas du cautionnement excessif* (2008) Revue des contrats 754-757; Cour de cassation, 1st civ., 9 July 2003, Bull. I n. 167; Y. Picod, *Sanction du principe de proportionnalité en droit commun du cautionnement* (2004) Dalloz Jurisprudence 204.

applies to both professional and consumer debts.[29] Most cases decided by the *Cour de cassation* on this article deal with its date of entry into force. Many courts of appeal have applied this section to agreements signed before 1 February 2004 but these decisions have consistently been quashed by the *Cour de cassation*.[30] A recent decision of the Court of Appeal of Lyon followed the position of the *Cour de cassation* and refused to apply section L. 341-4 to a suretyship agreement but, to the same effect, acknowledged the liability of the bank which should have known of the disproportion between the amount guaranteed and the surety's income.[31] There is further uncertainty about the method of calculating the security provider's income, i.e. whether this should be based on his present annual salary or the salary for the last three years. This uncertainty is reinforced by the fact that the *Cour de cassation* sometimes decides that the proportionality is a question of fact left to the discretion of the lower courts[32] but the *Cour* sometimes evaluates the disproportion.[33] For the sake of clarity, it is preferable for a statute or a decree to define identical criteria for the courts' use. For example, income tax from the last year or the last three years could be used as a basis for calculation rather than the basic salary because the former includes salary and property income.

3. Loss of Security and Subrogation

The non-registration of the security (*hypothèque)* releases the Smiths of their liability to the extent of the value of the house, i.e. 200,000. A security provider who pays off the debt is subrogated to the creditor's rights to any securities held[34] and does not bear the final cost of the debt.[35] If a creditor loses any security which a security provider would otherwise have benefited from upon repayment of the debt, the latter is discharged to the extent of the value of the lost security.[36]

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[29] C. Atias, *Propos sur l'article L. 341-4 du Code de la consommation, L'impossibilité de se prévaloir du bénéfice d'un engagement valable* (2003) Dalloz Chronique 2620. The Court of Appeal of Rennes recently decided that section L. 341-4 also applies to deeds. Court of Appeal of Rennes, 18 February 2005, (2005) Contrats, Conc. Cons., comm. n. 155.

[30] Cass., com., 13 February 2007: Bull. IV n. 31 ; Cass., mixte, 22 September 2006: Bull. mixte n. 7.

[31] Court of Appeal of Lyon, 22 February 2007: (15 June 2007) Bulletin d'information de la Cour de cassation p. 67 n. 1333.

[32] Cass., 1st civ., 27 May 2003: Bull I. n. 132 ; Cass., 1st civ., 9 November 2004: Bull. I n. 254.

[33] For a case where the *Cour de cassation* decided that the agreement was not disproportionate (308,000 euros) compared with the annual salary after tax (20,734) and the value of the marital home (259,164): Cour de cassation, com. 2 November 2005: unpublished (04-12279).

[34] Section 2306 C. Civ. (previously section 2029).

[35] Cass., 2d civ., 4 March 2004, Bull. II n. 89.

[36] Section 2314 C. Civ. (previously section 2037). Cass., 1st civ., 3 April 2007: Bull. I n. 138 ; Cass., mixte, 17 November 2006: Bull. mixte n. 10 ; Cass., mixte, 10 June 2005, Bull. mixte n. 5; S. Piedelièvre, *Cautionnement et renonciation au gage* (2005) Dalloz Jurisprudence 2020.

4. Enforcement of Security

The Smiths are jointly and severally liable with the debtor and other security providers. They could benefit from the *bénéfice de discussion*, i.e. the security provider is obliged to pay the debt only after the creditor has demanded fulfilment of the obligations from the debtor unless the statement prescribed by section L 341-3 C. Cons. is handwritten into the security agreement by the security provider. The principle is that the security provider's liability is subsidiary unless agreed otherwise in the contract. The sanction for non-compliance with this provision is that the security agreement is void. Therefore, the creditor can oblige the Smiths to pay the debt before demanding fulfilment of the obligations by the company only if section L341-3 is fully complied with.

5. Divorce

Section 1387-1 C. Civ. is applicable to Mrs Smith who, since her divorce, would be released from her liability for the secured debt. There is, however, some ambiguity about the wording of section 1387-1 C. Civ. as to whether Mrs Smith would remain liable for the extent of the debt due up to the time of the divorce and her withdrawal from management.

In July 2005, an Act which was proposed by a deputy, but opposed by the Government,[37] was passed by Parliament in favour of small and medium-sized companies (SMEs). It introduced a new section 1387-1 in the Civil Code that was aimed at protecting divorced spouses who secure professional debts[38] and provided that a court could release a former spouse from liability for the secured debt unless he retains the business assets or professional qualifications that served the basis for the business concern.

The provision is diametrically opposed to existing case law. Until then, courts had refused to enforce agreements between former spouses that provided for the release of one party who no longer participated in the business from debts arising from its management. In contrast, Parliament clearly wanted to protect a former spouse who had contracted for the interest of the business but no longer participated in its management. The provision creates an implied term in

[37] JO AN debate, 14 July 2005, at 4682; <http://www.assemblee-nationale.fr/12/pdf/cri/2004-2005-extra/20051017.pdf>. Y. Simon, JO AN debate, 7 July 2005, at 4378. <http://www.assemblee-nationale.fr/12/pdf/cri/2004-2005-extra/20051006.pdf>.

[38] Act 2005-882 2 August 2005 to promote small and medium size companies, JO 3 August 2005 12639.

the security agreement that maintains spouses' liability as long as they remain married and manage the business together.

6. Marital Home and Community of Property

If the judge has not yet divided the spouses' property pursuant to their divorce and section 1387-1 C. Civ. does not apply, the situation regarding the Smiths' house depends on their marital agreement. The marital house worth 200,000 is part of the creditor's lien only if both have agreed to be jointly liable for the debt and have fulfilled the formal requirement of section L 341-2 C. Cons. in respect of both agreements.

There are two categories of property: each spouse's separate property and the family's property. In order to protect the family's property, where a spouse provides personal security without his/her spouse's consent, the creditor can only recover the debt from the spouse's separate property, and not from assets falling within the family's patrimony.[39] If personal security is provided by one spouse with the other spouse's consent, the family's property stands as security but not the separate property of the spouse who is not the security provider. The spouse who provides security must give his/her consent in accordance with section L. 313-7 or 341-2 C. Cons.; the other spouse can sign the contract but his/her signature does not have to be proved according to either section 1326 C. Civ. or sections L. 313-7 or L. 341-2 C. Cons. In cases of professional debts, the written consent of the other spouse must be unambiguous. Each spouse can individually provide security for the same debt, which means that the income or property of each spouse can be seized by the creditor. If they have not expressly consented to the other's security agreement (and even if they knew about it), the property belonging to the family will be unavailable for the repayment of the debt.[40]

Where there is a 'division of patrimony' agreement (*séparation des bien),* each spouse has his/her own patrimony and there is no family patrimony. In that situation, each spouse can provide security only in relation to his/her income and property. The creditor's lien cannot extend to the other spouse's patrimony since it is independent of the spouse who gave security. In practice, creditors usually ask spouses to enter into separate security agreements where they each agree to be jointly liable for the debt.

[39] Section 1415 C. Civ. Act 85-1372 23 December 1985, JO 26 December 1985, 15111. The *Cour de cassation* decided in 2003 that a creditor had a lien on a spouse's income held in a current account but not in a savings account, as that formed an investment and, as such, formed part of the family's property: Cass, 1st civ., 14 January 2003: Bull. I n. 2. Before 1985, family property was protected by the *Cour de cassation* through the assimilation of security agreements and gifts, where consent had to given by a spouse for the transaction to be valid (section 1422 C. Civ).
[40] Cass., 1st civ., 8 May 2005, Bull. I n. 115.

Draft Common Frame of Reference (DFRC)

Following IV.G-1:101(a), the Smiths have provided a dependent personal security which secures the company's obligations, and performance is due only if, and to the extent that, the company cannot perform its obligations. The Smiths are not covered by the special rules in chapter 4 applicable to consumers since they are, under IV.G-4:101(2)(b), able to exercise substantial influence upon the company. Moreover, Mrs Smith's sale of her share does not affect her liability as a security provider. If the security is one without a time limit, she could limit the security by giving three months' notice to the creditor.[41]

The DCFR, like English law, is silent on the need for information to be given to a non-consumer security provider before she enters the contract: In particular, there is no mention of any requirement to provide information about the extent of the liability, both as to time and amount. Nor is a creditor required to ask a security provider to seek independent advice. The DCFR is also not concerned with evaluating the fairness of an agreement; there is no requirement either to assess the proportionality of the security or to set it aside on the ground of unconscionability.

During the currency of the agreement, the creditor generally owes no obligation to inform the security provider about the extent of the existing debt. In the event of non-performance or inability to pay the debt by the company, the DCFR does provide that notice must be given to the Smiths without undue delay. The issue of undue delay is a question of fact left to the court's determination. Notice of any new event of breach by the debtor, however, need not be given by the creditor before the expiry of three months of the previous notification.[42] IV.G-2:107(1) further requires notification only of breaches of the main contract and not ancillary obligations unless the total amount of the non-performed obligations is five per cent of the amount of the secured obligation, which in Case 1 would be 50,000. Rather, the burden lies on the Smiths as security providers to request from the debtor information about the outstanding amount and the existence of any defence or counterclaim that the debtor might have against the creditor.[43] With respect to the loss of the proprietary security, IV.G-2:110 acts as a safeguard, by reducing a creditor's rights against the security provider to the extent necessary to protect him from any resultant loss due to the creditor's conduct. The DCFR imposes a 'reasonable prudent' standard of care on a

[41] IV.G-2:109.
[42] IV.G-2:107.
[43] IV.G-2:112(1).

creditor.[44] For example, if the market value of 'La Jolie Maison' is 300,000, the Smiths' liability for the debt would be reduced by that amount which reflects the extent of the damage suffered as a result of the loss of that security.

The DCFR makes a distinction between solidary and subsidiary liability of a security provider. It takes, as its starting point, solidary liability which provides that the creditor has the choice to claim performance from the debtor or the security provider.[45] Parties can, however, agree on subsidiary liability, in which case the creditor must first demand performance from the debtor, unless it is obviously impossible to obtain satisfaction.[46] It follows that, unless subsidiary liability has been agreed to, the creditor can demand performance from either Mr or Mrs Smith, without first making a demand on the debtor. Moreover, the security is dependent on an obligation owed by the debtor to the creditor.[47] As with English and French law, the security provider's obligation is co-extensive with the debtor's,[48] and she can also invoke any defence available to the debtor.[49]

The DFCR also provides the security provider with the right to seek a contribution from other security providers[50] or to be indemnified by the debtor.[51] Thus, if Mr Smith pays the debt, he has recourse against Mrs Smith for a proportionate share of the payment made.[52] He also has recourse against the debtor, albeit hypothetically, since the security had to be realised to fulfil his obligations to pay the debt as a result of the debtor's inability to do so. A stark omission in the DCFR is the lack of provision for the protection of the marital home, or the impact of divorce.

Where Mrs Smith is neither a shareholder nor a director of the debtor, she will be viewed as a consumer under IV.G-4:101(2)(b) since she will be assumed not to have any influence on the debtor. The question though is whether the provision can apply retrospectively to render the agreement a consumer one as a result of the security provider's changed circumstances during the currency of the agreement. This is not made clear by the DCFR.[53] Where the security provider is a consumer, the key differences are that IV.G-4.103 imposes a duty on the creditor to provide the security provider with an explanation of the nature and effect of the security agreement, together with adequate information, and to make sure that she obtains independent legal advice at least five days before signing the agreement. Failure to do so within that period would entitle the secu-

[44] IV.G-2:110(2).
[45] IV.G-2:105.
[46] IV.G-2:106(1) and (2).
[47] IV.G-1:101.
[48] IV.G-2:102); it also covers all amounts owed by the debtor, e.g., contractual and default interest, damages, penalty (IV.G-2:104).
[49] IV.G-2:103. The debtor's insolvency, however, is not a defence for the security provider who must still fulfil his/her obligations: see IV.G-2:102.
[50] IV.G-1:108.
[51] IV.G-1:109.
[52] Unless otherwise agreed in the security contracts, i.e. one securing a higher amount that the other.
[53] Alternatively, Chapter 4 applies only to security providers who are consumers at the time of the contract.

rity provider to avoid the agreement within a reasonable time.[54] Where no information or independent advice is given, the agreement may be avoided at any time. There are also additional requirements, such as formalities[55] and the annual provision of information about the debt to the security provider.[56]

It is therefore difficult to resist the conclusion that, from the DCFR's perspective, a security provider is seen as a rational and well informed individual, particularly in a non-consumer security case, who is able to understand complex legal rules and technicalities. Thus, a lower level of governance is provided in the DCFR. It, however, begs the question of whether or not such an assumption is necessarily true of a shareholder, or even of a manager, of a SME.

Case 2

Dependent personal security in consumer context

In 2005, Miss Bond buys her dream car, a second-hand Aston Martin convertible, for 20,000 at an auction. No warranty is given for the car but the auctioneer expresses his opinion that the car has had only one previous owner and is almost brand new. Miss Bond earns an annual salary of 12,000 and her bank agrees to grant her a loan of 20,000, provided that personal security is provided by her father, Mr Bond, which he agrees to when informed by Miss Bond that the security is limited to 10,000 and to one year only. In 2007, the car breaks down; Miss Bond is told by her mechanic that the car is irreparable. During that time, Miss Bond also loses her job and remains unemployed. In 2008, the creditor serves a notice of demand on Mr Bond for the repayment of the outstanding debt of 15,000. He refuses to pay since he thought that the security expired in 2006 and was limited to 10,000. Mr Bond is retired and his only asset is his annual pension of 8,000.

English Law

1. The Consumer Credit Act 1974

[54] IV.G-4:103(3) provides that five days would be regarded as reasonable.
[55] IV.G-4:104. The agreement must be in textual form on a durable medium.
[56] IV.G-4:106.

The Consumer Credit Act 1974 (CCA) applies to an agreement between an individual (Miss Bond) and the creditor (the bank), whereby the creditor provides the debtor with credit of any amount. This statute lays down procedural requirements in order for the agreement to be enforceable by the creditor, such as signature by the debtor, legibility of the form, the prescribed terms and conditions,[57] provision of copies of the credit agreement and the relevant information in case of arrears.

With respect to the security provided by Mr Bond, section 105(1) of the CCA 1974 requires any security provided in relation to a regulated credit agreement to be in writing and properly executed. This means the agreement must be in the prescribed form, specifying the prescribed terms and giving full details (e.g. the name and address) of the creditor, the debtor and the security provider, as well as a description of the subject matter to which the security relates.[58] In addition, the security agreement must contain a statement of the security provider's rights and a signature box in the appropriate form.[59] It must contain all the terms of the security (except implied terms), be readily legible and signed by or on behalf of Mr Bond as the security provider. Mr Bond should also be provided with a copy of the regulated agreement, the security agreement and any other document referred to in it.[60] A security agreement which is not in writing or improperly executed can only be enforced by the creditor through a court order.[61]

The creditor, however, is not under any duty to provide periodic statements in relation to the fixed-sum agreement to Mr Bond. He may, however, make a written request to the creditor for information to be provided about the debt, and the amounts paid and/or unpaid, which the creditor is required to give on receipt of the prescribed fee of £1.[62] Where, however, a default notice has been served by the creditor on the debtor, section 111 of the CCA 1974 requires a copy of that default notice to be served on the security provider. Thus, in our case, service of the notice by the creditor on Mr Bond must be preceded by the service of such notice on Miss Bond. Failure to serve the relevant notices on either Miss Bond or Mr Bond means that the security is only enforceable against the latter by a court order,[63] which may only be made where the court considers it just to do so, having regard to the matters stated in paragraphs (i) and (ii) of section 127(1).

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[57] See also Consumer Credit (Agreements) Regulations 1983, para 2 and Schedule 1. The information that the credit agreement must provide include the amount of the credit, the duration of the credit, the total amount repayable and the timing and the amounts of each of the repayments.
[58] See Consumer Credit (Guarantees and Indemnities) Regulations 1983, Part II of Schedule 1.
[59] *Ibid.*, paras 3(1)(c) and (d), and Parts III and IV of Schedule 1.
[60] CCA 1974, section 105(3)-(5). The CCA, however, makes no provision for a cooling-off period in relation to the security agreement.
[61] CCA 1974, section 105(7).
[62] CCA 1974, section 107.
[63] CCA 1974, section 111(2).

2. Enforceability of the Security and the Doctrine of Notice

There may be some issue about the enforceability of the security agreement as well. This may be challenged by Mr Bond on two possible grounds. Firstly, Mr Bond may attempt to make a plea of non est factum, i.e. he was mistaken about the nature of the security agreement. However, *Saunders v Anglia Building Society*[64] held that the defence can only rarely be established by someone of full age and capacity, and that the burden of proof lies with the complainant to show that he had acted with reasonable care; carelessness on the complainant's part would preclude a non est factum defence. It is a subjective test[65] and does not rely on proof of any fraud.[66] This raises the question of whether Mr Bond, being someone of full age and capacity, had acted reasonably. Assuming that the creditor had complied with the provisions of the CCA 1974, any misunderstanding Mr Bond might have had about the actual amount of the credit provided and the duration of the facility and his liability would arguably have been dispelled by his reading through the copies of the credit agreement and the security agreement sent to him. It may thus be extremely difficult for Mr Bond to successfully plead non est factum if his misapprehension of the scope and extent of his liability is due to his failure to read the documents.

Alternatively, Mr Bond may argue that he has an action in equity to set aside the security agreement as against Miss Bond due to her misrepresentation. The question then is whether notice of his equity can be imputed to the creditor. In light of *Etridge (No. 2)*,[67] the court is likely to view the relationship between Miss Bond and Mr Bond as non-commercial. Consequently, notice of Miss Bond's wrongdoing may be imputed to the creditor and the security provided may be set aside unless the creditor shows that it has taken reasonable steps to rebut the presumption. *Etridge (No. 2)* makes it evident that there should be at least some contact between the creditor and Mr Bond, where the creditor informs him of the need to take independent legal advice. Where Mr Bond is legally represented, the creditor is entitled to assume that proper advice has been given and that his consent to the transaction has been properly obtained. The creditor is entitled to assume that the solicitor, when giving advice to Mr Bond, will regard himself as owing a duty to him, regardless of who introduced the solicitor to him, and that he will be sufficiently independent to give adequate advice. Where it can be demonstrated that the creditor has taken

[64] [1971] AC 1004.
[65] *Saunders v Anglia Building Society*, above n 62; *Union Dominions Trust v Western* [1975] 3 All ER 1017.
[66] *Mills v IRC* [1972] 3 All ER 977, CA; reversed on other grounds sub nom *IRC v Mills* [1974] 1 All ER 722, HL.
[67] As discussed in Case 1 above.

such reasonable steps, the security agreement will be enforceable even if the legal advice proves deficient, unless the creditor is aware of circumstances which may affect the solicitor's ability to give proper advice, e.g. material information has been withheld by the creditor.

A further issue that may arise is the debtor's and the security provider's available resources in assessing their respective (in)ability to repay the debt. Aside from her annual income, Miss Bond has no assets. Similarly, Mr Bond has no assets except his annual pension of 8,000. Under section 140A of the CCA 1974, an agreement may be deemed "unfair" because of any terms in the agreement or any related agreement, the way in which the creditor has exercised or enforced any of its rights and/or any other thing done, or not done, by the creditor before or after entering into the agreement. Given the available resources here, a key issue is whether the terms governing the provision of the credit (20,000) and its repayment are likely to be construed by the court as giving rise to an unfair relationship within the meaning of section 140A. The mere fact that the credit amount exceeds the value of Miss Bond's and Mr Bond's assets may not of itself render a transaction unfair. At 1.67 times Miss Bond's annual salary, the credit sum might arguably not be a high risk transaction. It might not be true that the repayment amount and schedule cannot reasonably be supported by her income. Nor is it necessarily the case that the value of the security is outrageously disproportionate to Mr Bond's resources or exorbitant. This may, relatedly, depend on the way in which the repayment schedule is structured (in terms of amounts and timing) as well as the creditor's charges, e.g. the rate of interest, default sums, etc. for making the credit available.

The application of section 140A and the doctrine of notice discussed above are, however, substantively distinct. Section 140A deals with the issue of the fairness of the agreement – that neither the terms of the agreement nor any conduct or omission by the creditor, whether before or after the formation of the agreement, should render the parties' relationship unfair. The doctrine of notice, on the other hand, does not address the issue of substantive fairness but rather procedural fairness, i.e. whether the creditor has taken reasonable steps to ensure that the security provider's informed consent is properly obtained. Should the transaction be deemed unfair by the court, the CCA 1974 does not render either the credit agreement or the security agreement void. The courts are given powers under section 140B to make a range of orders to address the unfairness of the relationship. For instance, an order may be made to vary the terms of the credit agreement or the security agreement,[68] or to reduce any sum payable under these agreements.[69] However, where the creditor has failed to rebut the presumption of notice, the transaction is

[68] CCA 1974, section140B(1)(f).
[69] CCA 1974, section 140B(1)(c).

voidable and may be set aside at the option of the security provider:[70] It is not open to the creditor to apply for an order for enforcement.

French Law

1. Misrepresentation (dol)

Misrepresentation in French law involves misstatements made by one party to the contract which induce another to enter into that contract with the former.[71] In rare cases, a creditor may misrepresent the creditworthiness of the debtor to a security provider.[72] In most cases, the creditor does not disclose the actual state of the debtor's indebtedness, but silence may equally amount to a misrepresentation (*réticence dolosive*). Under the good faith principle,[73] a duty to disclose exists when one party has information that the other could not know, and that information is essential to persuading that party to enter into the contract. The silence of a creditor about the real state of the debtor's affairs can amount to a misrepresentation in such situations. If the creditor is aware of the debtor's inability to repay his debts, its silence may be construed as a misrepresentation of the debtor's creditworthiness which serves to induce the security provider to enter into the agreement.[74] Section 1116 of the Civil Code reinforces the requirement that the misrepresentation must be made by a contractual party, e.g. the creditor. If, as in our case, the security provider relies on the debtor's misrepresentation of her own creditworthiness, there is no cause of action since the debtor is not a party to the security agreement.[75]

2. Informational Requirements for Consumer Security Agreements

Before a security agreement is signed, a copy of the credit agreement must be sent to the security provider where the duration of the facility exceeds three months and its amount does not

[70] See e.g. *Allied Irish Bank v Byrne* [1995] 2 FLR 325; *TSB Bank v Camfield* [1995] 1 All ER 951.
[71] For the definition of misrepresentation, see section 1116 C. Civ.
[72] See e.g. Cass., com., 7 February 1983, Bull. IV n. 50. In that case, the creditor had lied to the security provider about the debtor's financial status and closed the account a few days after the security agreement was signed.
[73] P. Simler, *Cautionnement et garanties autonomes* (Paris, Litec, 3d edn 2000) 139.
[74] Cass., 1st civ., 10 May 1989, Bull. I n. 187. Cass., 1st civ., 13 May 2003, Bull. I n. 114; R. Desgorces, *Annulation d'un cautionnement pour réticence dolosive du créancier: manquement à l'obligation de contracter de bonne foi* (2003) JCP II, 10144.
[75] Cass., com., 13 November 2002, Bull. IV n. 161; B. Roman, *Vers un rejet systématique du dol d'un tiers au contrat de cautionnement?* (2003) Dalloz Jurisprudence 684. Cass., 1st civ., 27 June 1973, Bull. I n. 219.

exceed 21,500 Euros, failing which the creditor loses his right to the interest owed by the debtor.[76] After receipt of the agreement, the security provider is given a cooling-off period of about seven days in which to decide whether or not to proceed with the transaction.[77] When the security agreement is signed, there is a mandatory requirement for information about the extent of the security provider's undertaking, to be inserted by way of two long and precise handwritten paragraphs:[78] one about the amount of the security and the other about the stringency of the undertaking. The purpose of having such handwritten paragraphs is to ensure that the seriousness of the undertaking is understood by the security provider. For the same reason, security agreements cannot be made via the Internet.[79] These requirements are strictly applied, and this means that a pre-printed contract containing such a clause, duly initialled by the security provider by way of acknowledgment, does not comply with section L 313-7 C. Cons. The only exceptions are where the agreement is by deed[80] or is signed before a solicitor (*notaire*) since it is assumed that the solicitor would have given an explanation to the security provider about the extent of his undertaking.

The security provider of a consumer credit facility must be informed of the first default in the repayment of instalments by the debtor.[81] The aim is to provide the security provider with the opportunity to persuade the debtor to pay. Non-compliance by the creditor will relieve the security provider of his liability for any penalty or interest on arrears due between the date of the first repayment default and the day on which he was informed of the default. Moreover, under section L 311-37 C. Cons., the creditor's claim is time barred two years after the first default in repayment, but the court may extend the limitation period on its own motion.[82]

3. Proportionality

Since 1989, courts assess the gross disproportion between a security provider's income or property and the security. Section L 313-10 C. Cons. bars the enforceability of a security agreement which, at the time of conclusion, is 'manifestly disproportionate to [the security provider's]

[76] Sections L. 313-3 and D. 311-1 C. Cons.
[77] Section L. 313-10 C. Cons. provides a cooling-off period of ten days where credit is for the purchase of a house. The Code makes no mention of a cooling-off period in relation to credit for the purchase of goods. However, drawing from section L. 311-15 C. Cons., it is a recognised banking practice to allow the security provider to withdraw within seven days. See also M. Grimaldi and P. Dupichot, *Durée et sûretés* (2004) 1 Revue des contrats 95.
[78] Section L 313-7 C. Cons.
[79] Section 1108-2 C. Civ. excludes security agreements from the scope of application of section 1108-1 which provides that electronic contracts concluded on the Internet are valid and can be proved by email or other electronic means.
[80] Cass., 1st civ., 24 February 2004, Bull. I n. 60.
[81] Section L 313-9 C. Cons.
[82] Cass., 1st civ., 18 October 2000, Bull I n. 254. Cass., Ass. Pl., 6 June 2003, Bull. A.P. n. 6.

property and income' unless the net value of the secured debt at the time of enforcement can be met with such income or property. The focus is on disproportionality between the income or property and the security which must be obvious or manifest at the time of making the contract or when the security provider is called upon to repay the debt. The test is an objective one,[83] namely, the disproportion must be so evident that a creditor should have reasonably known that the security provider would not be able to pay. It requires more than a mere difference of value between the amount secured and the value of the security provider's estate: Rather, it must manifestly be clear that, given her lack of resources to do so, the security provider could not possibly have assumed the obligation to repay the moneys owed by the debtor. There is no evaluation of good or bad faith, or misrepresentation (*dol*). The security provider must prove the disproportion according to the rules of evidence in section 1315 of the Civil Code, i.e. with written evidence, such as bank statements. Examples of evident disproportion are when the security provider is bankrupt[84] or unemployed[85] at the time of the contract. There is a disproportion where the debt is 21,342 Euros and neither of the two security providers has an estate and their monthly salaries are 1,000 Euros and 717 Euros respectively.[86] Similarly, there is a disproportion between a debt of 34,000 Euros and a monthly salary of 1,000 Euros.[87] The security agreement is unenforceable only to the extent of the disproportionality and the security provider is still required to repay the amount of the debt which is within his means.[88] The contract is not voidable because of the adage '*pas de nullité sans texte'* (no voidability without a text).[89] Finally, the two year period within which a security provider may challenge the proportionality of a transaction runs from the time of being called upon to make payment and not the day of the contract.[90] In light of Mr Bond's annual pension of 8,000 (or 667 per month), the security seems disproportionate since the debt of 20,000 is more than 30 times his monthly income. At the time he is called to repay, the outstanding debt of 15,000 might still be considered as disproportionate.

Draft Common Frame of Reference (DCFR)

[83] Y. Picod, *Proportionnalité et cautionnement, Le mythe de Sisyphe*, in Mélanges Calais-Auloy, Etudes de droit de la consommation (Paris, Dalloz, 2004) 849.
[84] Court of Appeal of Bordeaux, 26 August 1997, (1998) JCP E (13), at 486.
[85] Court of Appeal of Rennes, 19 December 2003, (2004) 10 Bulletin Joly Sociétés 1218.
[86] Cass., 1st civ., 22 October 1996, Bull. I n. 362; S. Piedelievre, *Cautionnement* (1997) JCP II, 22826.
[87] Court of Appeal of Rennes, 18 February 2005, (2005) Contrats, Conc. Cons., comm. n. 155.
[88] Court of Appeal of Rennes, 19 December 2003, (2004) 10 Bulletin Joly Sociétés 1218. Court of Appeal of Rennes, 18 February 2005, (2005) Contrats, Conc. Cons., comm. n. 155.
[89] M. Cabrillac and C. Mouly, *Droit des sûretés* (Paris, Litec, 7th edn 2004) 231.
[90] Cass., 1st civ., 23 May 2000, Bull. n. 155.

The DCFR imposes procedural requirements and formalities in relation to security agreements where the security provider is a consumer. These rules are mandatory and cannot be excluded by contract.[91] Interestingly, the application of the rules is determined by the security provider's status, i.e. he must be a *consumer*,[92] rather than the substantive nature of the underlying credit agreement. The special rules in DCFR thus have wider application in that they would apply to all security agreements, regardless of whether or not the debtor is a consumer, and only excluded where either the creditor is also a consumer or the security provider is able to exercise substantial influence over the debtor which is not a natural person.[93] Since, the creditor is a bank and the debtor a natural person, Mr Bond would fall within the definition of a 'consumer'.

The DCFR is silent on the applicability of the principle of proportionality with regard to the ability of the debtor or security provider to meet the repayment obligations. However, the DCFR does impose certain pre-contractual duties on the creditor in order for the security provided by a 'consumer' to be valid. These include a duty to explain to Mr Bond the legal effect of the security and, based on the information available to the creditor, any special risks that he might be exposed to in the light of the financial situation of the debtor. Where the creditor knows or has reason to know that the nature of the relationship between the debtor and the security provider is one based on trust and confidence, and that there is a significant risk that the latter is not acting of his free will or with adequate information, the creditor is further required to ensure that the security provider has received independent legal advice.[94] These requirements serve to address the potential risk of the security being tainted by vitiating factors, such as undue influence or misrepresentation. In this specific case, it raises the question of whether a relationship between parent and adult child is necessarily one where a parent reposes trust and confidence in the adult child in financial matters.[95] This is very much a question of fact and will depend on the extent to which evidence of a relationship of trust and confidence exists between Mr Bond and his daughter, so as to place the creditor under an obligation not only to explain the nature and effect of the transaction to him, but also to ensure he takes independent legal advice.

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[91] IV.G-4:102(2).

[92] One might read the choice of the word 'consumer' in the DCFR as deliberate, in that it serves to mark out cases where the security provider is giving security in his personal capacity and not in the course of carrying out any trade or business in connection with the creditor and/or the debtor.

[93] IV.G-4:101(2).

[94] IV.G-4:103(2). These requirements placed on the creditor have resonance with the English doctrine of notice as laid down in *Barclays Bank v O'Brien* and *Royal Bank of Scotland v Etridge (No. 2).*

[95] *Royal Bank of Scotland v Etridge (No. 2)* where the law lords, and more particularly, Lord Nicholls, moved away from the 'trust and confidence' requirement to imputing notice on the creditor in all situations where the relationship between the debtor and the security provider is non-commercial. It may be that the concept of the security provider as a 'consumer' within Chapter 4 of the DCFR may need re-thinking, and its meaning to stretch beyond being status-based, i.e. the security provider as a consumer, to closer consideration of the substantive nature of the relationship between the debtor and the security provider.

Such information or independent legal advice must be given to Mr Bond at least five days before the signing of the security offer or agreement. The DCFR, like English law but unlike French law, does not provide any cooling-off period. It does, however, provide that a failure to give the information or to ensure that independent legal advice is taken, gives the security provider the option to revoke the security offer or to set aside the agreement within a reasonable period[96] after receipt of the information or independent advice.[97] Where no information or independent legal advice has been given at all, Mr Bond may revoke the offer or avoid the contract at any time.[98]

There are also formalities requirements imposed on consumer personal security. Oral agreements are excluded as, pursuant to IV.G-4:104, the security agreement must be in "textual form on a durable medium". "Durable medium", however, implies that an agreement need not necessarily be in paper form and can be in electronic form, e.g. a security contract form completed online over the Internet. Moreover, the DCFR is silent on the need for the security provider to be given a copy of the credit agreement and the security agreement. Rather, the creditor's obligation is to provide, on an annual basis, information to the security provider about the secured sums, interest and any other ancillary obligations owed by the debtor.[99] The provision of information must be with the debtor's consent and this may arguably be a serious omission in the DCFR as it erodes the level of protection of a 'consumer'. Notwithstanding the disclosure and legal advice safeguards, the security provider may be left at a disadvantage since he will not have any record of his obligations until receipt of the annual statement(s) from the creditor. If the creditor has failed to provide Mr Bond with the requisite annual statements, then according to IV.G-2:107(4), the creditor's rights to the security will be reduced by the extent necessary to prevent Mr Bond from suffering loss as a result of its non-compliance. However, IV.G-2:107(3) provides that the information is not required when the security provider knows or can reasonably be expected to know the information. The sort of knowledge, formal or informal, that is required is however not specified. Would Mr Bond's knowledge of his daughter's unemployment be deemed "knowledge" (of her inability to repay the debt) for the purposes of IV.G-2:107(3)?

The next issue is the nature of Mr Bond's liability under the security provided. The type of security provided will fall within the definition of "dependent personal security" in IV.G-1:101(a) and the salient provisions are found in Chapter 2. Under IV.G-2:102(1), performance of the dependent security provider's obligation depends on whether and the extent to which perfor-

[96] The DCFR further provides that, under normal circumstances, a reasonable period is five days.
[97] IV.G-4:104(3).
[98] IV.G- 4:104(4).
[99] IV.G- 4:106(1). The DCFR does not, however, deal with the consequences of the debtor's refusal.

mance of that obligation is due. In this case, the nature of Mr Bond's obligation under the DCFR does not appear to differ from that under English and French law. The DCFR preserves freedom of the contracting parties to opt out of or vary the application of the DCFR by express agreement, except as otherwise provided in Chapter 4. As a dependent security provider, Mr Bond's obligation is to meet the repayment of the secured debt as well as any contractual and default interest, default payments for the debtor's non-performance and reasonable costs of any legal proceedings instituted to effect recovery of all or any of these amounts.[100] The DCFR further provides that a dependent security provider's liability is prima facie 'solidary' in nature, unless expressly modified in the agreement: This means that the creditor has the right to choose to claim from either the debtor or the security provider.[101] It further means that the creditor has the choice of seeking repayment from either the debtor or the security provider but within the limits of the security provided. However, where the security is provided by a consumer (as in Case 2), the DCFR goes on to provide that the security provider's liability is subsidiary in nature unless otherwise agreed by the parties.[102] Thus, the creditor is required first to take appropriate steps to obtain payment of the outstanding debt from Miss Bond, unless it is impossible or extremely difficult to do so (for instance she is already insolvent), before demanding payment from Mr Bond.[103]

The creditor is also required by IV.G- 2:107(1) to give notice "without undue delay" to Mr Bond of his daughter's default or inability to pay. Given that Miss Bond has been unemployed since 2007 and has not been making any repayment since then, there is the question of whether the service of a demand notice on Mr Bond in 2008 may be construed as an undue delay. This depends of the steps taken by the creditor in the interim period to obtain repayment of the debt from Miss Bond prior to service of the requisite notice.[104] If the delay is undue, Mr Bond's liability may accordingly be reduced pursuant to IV.G-2:07(4).

Where a time limit has been agreed for resort to a security agreement that establishes subsidiary liability, IV.G-2.108(2) provides that the security provider will be released from his liability at the expiry of the agreed time limit. This provision might be particularly salient if, as understood by Mr Bond, the agreement limited his liability to one year from the date of the ag-

[100] IV.G-2:104(1) and (2). The security provider will be liable for the costs of legal proceedings where he is informed of the creditor's intention to institute such proceedings.
[101] IV.G-2:105. The term 'solidary liability' is not of common usage in English legal terminology but appears to be conceptually close to the notion of joint and several liability (of the debtor and the security provider) in English law, which permits the creditor to pursue legal action against either of the parties. For the UK, see section 3 of the Civil Liability (Contribution) Act 1978. When one looks at various provisions in the DCFR, there appears to be conceptual distinctions though, in that solidary liability is distinguished from subsidiary liability – that a security provider's liability is one or the other.
[102] IV.G- 4:105(b).
[103] IV.G- 2:106.
[104] IV.G- 2:106(2).

reement. In that situation, Mr Bond may still be liable if the creditor, before the expiry of the time limit, informs him of its intention to demand performance from the security and of commencement of appropriate attempts to recover the outstanding debt from his daughter, and keeps him informed on a semiannual basis of the status of such attempts. However, in the absence of any agreed time limit, Mr Bond is unlikely to successfully argue a discharge of his liability pursuant to IV.G-2:108(2).

Where no time limit has been agreed for the performance of the obligations secured, IV.G-2:109(1) allows the scope of a security to be limited (e.g. restricting the duration of the security to one year from the date of the agreement) by one party (say Mr Bond) serving a minimum three months' notice on the other party (the creditor) to that effect, provided the security is not restricted to cover specific obligations or obligations arising from specific contracts. Moreover, IV.G-4:107 provides that, even where the scope of the security is limited to obligations that are required to be performed within an agreed time limit, the security provider may, three years after the security becoming effective, limit the effects of the security by providing the requisite three months' notice, unless the security covers specific obligations or obligations that arise from specific contracts. The DCFR is, however, silent on the exact meaning of 'specific' obligations or contracts. Where the security agreement is made pursuant to a credit agreement between the creditor and Miss Bond, a possible interpretation is that the obligations do arise from a 'specific' contract, namely the credit agreement, and thus fall outside the scope of IV.G-2:109(1) and IV.G-4:107(1). It therefore seems unlikely that Mr Bond would be released from his liability under IV.G-2:108(2), IV.G-2:109(1) or IV.G-4:107(1).

The DCFR provides that, before performance to the creditor, Mr Bond as the security provider is required to give notice to his daughter and request information about the outstanding debt and any defences or counterclaims that she may have against it.[105] Failure to serve the requisite notice will lead to Mr Bond's right of recovery under IV.G-2:113 being reduced by the extent necessary to prevent loss to the debtor by such non-compliance.[106] On repayment of the debt, Mr Bond is entitled to reimbursement from Miss Bond under IV.G–2:.113(1) and to be subrogated to the rights of the creditor against her.

[105] IV.G-2:112(1). There is no equivalent requirement under English law for service of such a notice by the security provider on the debtor.
[106] IV.G–2:112(2).

Case 3

Independent personal security in consumer context

Mr Brown and his brother are shareholders of a removal company. He is the company's managing director. The company wants to buy a new truck with state-of-the-art technology for 90,000. The bank agrees to lend the money to the company on the condition that Mr Brown's wife provides an independent personal security. Mrs Brown agrees to provide the security in the belief that she would only be liable to the creditor in the event of the company's default and inability to repay the loan.

A few years later, a downturn in business leads to a less optimistic future for the company, even though it has not yet fallen into arrears in the loan repayments. The creditor, fearing that the company may do so and that other creditors will take precedence, sends a letter to Mrs Brown requesting payment of the outstanding balance of the debt.

English Law

A dependent security is distinguished from an independent security under English law.[107] The liability of an independent security provider is primary in nature and is not dependent on the debtor's liability or on the debtor's default. Furthermore, as the debtor is a corporate body, the credit agreement falls outside the scope of the CCA 1974: Common law principles thus apply to the transaction. In the light of the facts, the first issue is whether, given that the debtor has not fallen in arrears in the loan repayments, the creditor is entitled to demand repayment of the debt from Mrs Brown. Would the service of the notice of demand be premature and constitute a breach of contract by the creditor? Much depends on the way in which the credit agreement is drafted. It is common for clauses to be inserted into a non-consumer credit agreement which reserve to the creditor its right to terminate or vary the agreement, e.g. the credit amount and/or the rate of interest. The creditor's right to recall the loan may also be further supported by an acceleration of liability clause.[108] The effect of such a clause is to accelerate the debtor's, as well as the security provider's, liability to repay the debt upon the occurrence of certain events

[107] *Davys v Buswell* [1913] 2 KB 47.
[108] This is often inserted in the agreement as an "Events of Default" clause.

stipulated in the clause, other than a breach of contract by the debtor.[109] With appropriate drafting, there is certainly scope for a creditor to determine the facility and serve a notice of demand on either the debtor or the security provider, or both, for the repayment of the outstanding indebtedness.

A second issue is Mrs Brown's mistaken understanding of the nature and effect of an independent security: to what extent will she be able to raise the plea of non est factum to set aside the transaction? As discussed in Case 2 above, the test is whether the agreement is fundamentally different in nature, character or effect from that which the party had intended to sign. In addition, the complainant must show that she has not acted negligently. It is usually difficult for a person of full age and capacity, and who is literate, to establish the plea unless there is also evidence of some fraud or other vitiating factor, such as misrepresentation or undue influence. Thus, the extent to which Mrs Brown can successfully raise a non est factum plea may be limited where the misunderstanding was hers alone. As in Case 2, she may, however, escape liability if she is able to argue that her lack of involvement in the management of and decision-making in the company makes her relationship with the company non-commercial in nature, and that the creditor has not taken adequate reasonable steps to rebut the presumption of notice. As discussed in Case 2 above, where such steps are taken by the creditor and Mrs Brown is legally represented, the creditor is entitled to assume that she has received proper and independent legal advice from her solicitor. Her misunderstanding of the true nature and effect of the independent security provided cannot be attributed to the creditor and the security provided will be enforceable by the creditor.

French Law

Under French law, a distinction was initially drawn between independent and dependent securities. However, with the greater protection now offered in the Commerce Code which duplicates the protection given to dependent securities, that distinction tends to disappear.[110] The nature of an independent security under section 2321 of the Civil Code[111] renders the security provider liable to pay the secured debt "either on first demand or subject to terms agreed upon".

[109] An acceleration of liability clause is often drafted quite widely in order to entitle a creditor to treat an event as being a breach. The right to recall the loan may be triggered by, for instance, the debtor's or the independent security provider's inability to repay its or his debts to other creditors, or legal proceedings being instituted against either of them, which the creditor believes will materially and adversely affect each parties' ability to perform the obligations under the credit and the security agreements respectively.

[110] D. Houtcieff, *La garantie à première demande s'apparente à un cautionnement, commentaire Cass. Civ. 1re 20 juin 2006* (2006) 4 Revue des contrats 1193.

[111] 2006 Act.

Hence, if the payment of the independent security depends, in fact, on the debtor's non-performance, the agreement will be qualified as a dependent security.[112] Section 2321 further provides that an independent security provider is discharged where there is patently an abuse or (a commission of) fraud by the creditor, or collusion by the latter with the debtor. The defences available to an independent security provider may also be limited, depending on the security obligation. The Consumer Code excludes the provision of independent security for consumer credit.[113] The legal protection offered under French law to spouses who act as independent security providers is similar to that of a dependent security provider.[114]

As to the issue of the debtor's potential insolvency in Case 3, French law provides that insolvency measures favourable to the debtor are also available to the independent security provider during the phase that assesses the company's chances of survival (*sauvegarde and redressement*).[115] Hence, an independent security provider may avail himself of the provisions made in favour of the debtor. Once the company is declared insolvent, the independent security provider must fulfil his obligations.[116] The court may, however, grant a moratorium or a deferred payment period for a maximum of two years.[117]

Draft Common Frame of Reference (DCFR)

Under the DCFR, an independent security is one given by a security provider in favour of a creditor for the purpose of securing an obligation. As with English law, performance of the security provider's obligation is not dependent on the debtor's obligation owed to the creditor.[118] The agreement may refer to the secured obligation but its performance is independent from it.[119] It is possible for the creditor to assign the security agreement to another creditor unless it is a first demand independent security,[120] in which case the right to assign must be provided for in the security agreement. Otherwise, the request for performance can be made only by the original creditor.[121] In addition, following IV.G-4:102, the rules governing consumer personal securities discussed above do not apply to independent securities: consumer personal securities are

[112] Cass., 1st civ., 18 September 2008: unpublished (07-17990).
[113] Section L313-10-1 C. Cons.
[114] Section 1415 C. Civ. See also Cass. 1st civ., 20 June 2006; (2006) Revue des contrats 1193.
[115] Sections L 611-10(3) and L. 626-11 Commercial Code.
[116] Section L631-20 Commercial Code.
[117] Section L622-28 Commercial Code
[118] IV.G-1:101(b).
[119] IV.G-3:101.
[120] IV.G-3:108.
[121] IV.G-3:108(2).

governed instead by the rules in Chapters 1 and 2 and not Chapter 3. However, section IV.G-4:105(c) confusingly qualifies an independent security as a dependent security when the requirements of the latter are met. This suggests that an independent security provided by a consumer could nevertheless be qualified as a dependent security.

IV.G-3:103 requires the creditor to demand performance from Mrs Brown under the independent security in textual form (including an email), a demand which must comply with the terms of the agreement. If the security provided in Case 3 is a "first demand" security, Mrs Brown is precluded from invoking defences that she, as a security provider, may have against the creditor.[122] She is also required by IV.G-3:102 to notify the debtor of her receipt of the creditor's demand for performance, failing which her rights against the debtor will be reduced by the extent necessary to prevent loss to the debtor.

Given that performance of an independent security is independent of the debtor's obligations, Mrs Brown must perform her agreement despite the company not falling into arrears yet. It could, however, be argued that the creditor's demand may be manifestly abusive, in which case the debtor may prohibit performance by the security provider.[123] The meaning of 'manifestly abusive' is unclear in the DCFR: will demand based on the fear of a debtor's inability to pay be deemed 'abusive'? If the demand is manifestly abusive, Mrs Brown will be entitled to reclaim any benefits received by the creditor on restitutionary grounds.[124] Upon performance, Mrs Brown is entitled to reimbursement from the debtor.[125] She is further subrogated to the creditor's rights. The issue though is, given that the debtor has not fallen into arrears, what rights will she be subrogated to?

The discussion above leads one to conclude that the DCFR appears to treat independent security more stringently than dependent security: No protection seems to be offered since Chapter 4 does not apply and such securities are seen as professional securities, thus not provided by weaker parties.

[122] IV.G-3:104(3).
[123] IV.G-3:105. This section also covers demands that are fraudulent but this does not seem to be the case here; it would depend on the definition of 'fraudulent'.
[124] IV.G-3:106.
[125] IV.G-3:109, cross-referencing IV.G-2:113.

2. Comparative Analysis

Although the mechanism of a personal security is similar in England and France and under the DCFR, [126] there are differences. For instance, the DCFR is less formal than French law; it includes electronic contracts, does not take into consideration the proportionality of the undertaking by the security provider and offers less protection to directors of SMEs. Subsidiary liability of a dependent security provider must be expressly agreed to under the DCFR, whereas such a security is necessarily subsidiary in nature under English law, unless the agreement provides otherwise. For the purposes of this paper, we have focussed on some of the main differences between the DCFR and English and French law which we summarise below.

First, there are definitional issues.[127] The DCFR has a broader definition of personal security as a binding comfort letter is presumed to give rise to a dependent security (IV.G-2:101) unlike in France[128] and England. The definition of subsidiarity in IV.G-2:106 is difficult to follow. Furthermore, the definition of a consumer is not based on the nature of the secured debt but rather the control that the security provider has over the debtor, which certainly aims at including within the scope of protection vulnerable security providers of professional debts (spouses, partners).[129] The protection afforded to consumers under the DCFR is minimal, e.g.: annual information about the amount due (IV.G-4:106)); formal requirements (IV.G-4:104); the security is in principle subsidiary unless expressly agreed otherwise (IV.G.4:105); time limits (IV.G-4.107). But the range of information is broader, e.g. explaining the effects and the risk of the security agreement (IV.G-4:103). The protection of consumers against more stringent independent security is very weak, since they are not forbidden in principle, but can be qualified as dependent securities if the requirements of such a security are met. This sanction is not a strong disincentive for using independent guarantees since the agreement is valid and, at worse, will be qualified as a dependent security.

Second, the protection offered to directors of SMEs is lower under the DCFR than in French law but seems similar to English law. In French law, directors of SMEs are given similar protection as consumers. A distinction was drawn between security providers of professional and

[126] A. Carrasco, *The DCFR - Guarantee and Personal Security Contracts* (3/2008) 4 ERCL 389.
[127] R. Sefton-Green, *Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality* (3/2008) 4 ERCL 281.
[128] Carrasco, *The DCFR - Guarantee and Personal Security Contracts*, 391; P. Malaurie, et al., *Les Obligations* (Paris, LGDJ, 3d edn, 2007), para. 948.
[129] IV.G-4:103(1).

non-professional debts until 2003, when the Dutreuil Act[130] was enacted and subsequently integrated into sections L 341-1 to 341-6 C. Cons. The Act provides similar protection to professional and non-professional debts and to all natural persons, including spouses, partners or relatives of business managers, as well as business managers. In the DCFR, directors of SMEs will not be protected because they will be deemed to exercise a significant influence on the debtor. This raises two unresolved issues. First, there are different ways of exercising control over the debtor: The control can be legal (the designated director of the company) without real managerial powers, or it can be over the management of the company, such as the possibility of increasing its debts. Which form of control will matter more to the courts? The other unresolved issue of the DCFR is when such influence is deemed to have ceased. As illustrated in Case 1, it appears that Mrs Smith will remain liable for the debt even though she no longer has any control of the debtor.

Third, the extent and the nature of the information given are different. The creditor is required to provide information under French and English law and the DCFR. However, French law emphasises the formality of the information because the amount of the security provided must be handwritten by the security provider and the use of electronic contracts for securities is forbidden. If the formality requirement is not fulfilled the security is void. In both English law and the DCFR, there is an obligation to inform the security provider and notwithstanding procedural safeguards (e.g. the independent legal advice requirement in Chapter 4 of the DCFR and in English law pursuant to *Etridge (No. 2)*), there is no duty to ensure that the security provider actually understands the information. Information is dealt with under the general doctrine of unfair agreement:[131] The formality of the agreement is seen as an adequate method of protection against bullying by a family member. Furthermore, the creditor's obligation to provide information annually to the security provider about the amount owed by the debtor must be with the debtor's consent. This is a serious omission in the DCFR as it erodes the level of protection of a consumer since the security provider may be left without a record of his obligations until receipt of the annual statements from the creditor.

Fourth, an important difference between the three systems is the appreciation of the fairness of the agreement, in the sense that French law controls the proportionality of the security to the income or property of the security provider. In England, the law of equity can void a contract that

[130] Act 2003-721, 1st August 2003, JO 5 August 2003, 13449. This Act was a Member of Parliament's bill (M. Dutreuil) and came into force on 5 February 2004. See also V. Avena-Robardet, *Réforme inopinée du cautionnement* (2003) Dalloz Chronique 2083; D. Fenouillet, *Le code de la consommation ou pourquoi et comment protéger la caution* (2004) 2 Revue des contrats 304; D. Houtcieff, *Les dispositions applicables au cautionnement issues de la loi pour l'initiative économique* (2003) JCP I, 161; F. Pasqualini, *L'imparfait nouveau droit du cautionnement* (2004) 24 Les Petites Affiches 3.

[131] M. Kenny, *The Uncommon Core of European Suretyship Law*, in A. Colombi Ciacchi (ed), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity (Baden Baden, Nomos, 2007) 361 ff, 373.

is unconscionable (because of the extent of the undertaking). The DCFR has no similar mechanisms. The absence of a requirement for proportionality, or an understanding of the information by the security provider, reduces the level of protection to consumers under the DCFR.

The comparison at the level of meta-legal formants leads to the conclusions below. First, the problem of the functional method is that it defines legal rules out of a legal context and function of securities. For example, personal securities are commonly used in France, for which there is a high level of protection. Conversely, proprietary securities such as mortgages are just as widely used as personal securities in England which may account for a lower level of protection being given to personal securities. This difference in legal attitudes may also be linked with the greater trend of owner occupation in England[132] and for house properties to be viewed as economic value which can be used to raise capital as well as be easily repossessed by a creditor. In contrast, it is the home, and not just the economic value of a house, that is prioritised and protected by the law in France, thus making repossessions difficult.

Second, securities have become unicontextualised.[133] The first is that many protective rules are excluded from the scope of the DCFR. For example, the most protective rules in French law are not in the Civil Code but rather in the Consumer Code and in family law. In many countries, rules concerning personal securities are found in different areas of law, e.g.: suretyship law, contract law, procedural protection (information as in England), consumer law, unfair term protection, family law (divorce,[134] protection of the marital home (formal agreement)), insolvency law, constitutional law, and property law. The rules in the DCFR are contained in the securities section, without reference to, say, family law or property law. This change is particularly obvious in family relationships, where rules on the protection of family property are found in the family law heading of national laws of some EU member states. States offer different levels of protection to the income or property of the spouses but there is some protection. For example, the *Cour de cassation*'s case law shows that the 'express consent' requirement to the other spouse's security undertaking serves to protect family property.[135] The DCFR completely omits this aspect of securities; nor does it make clear whether national laws will supersede it in such situations.

Third, the main problem concerns the definition of a policy for personal securities. The DCFR's choice is for minimum intervention (para 28 DCFR), based on the principle of freedom

[132] In 2000, owner occupation in the UK is 71%; cf. France, where the rate is 63%. See Office of National Statistics at: http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=7326&More=Y.
[133] Kenny, *The Uncommon Core of European Suretyship Law*, 365.
[134] See above, section 1387-1 C. Civ.
[135] J.-L. Puygauthier, *Cautionnement ou emprunt souscrit par un époux commun en biens: une jurisprudence bienveillante* (2005) Defrénois 1393.

of contract – on principles drafted by well informed and well educated lawyers.[136] The freedom of contract and the interest of the market seem more important than the protection of consumers and weaker parties (including directors of SMEs[137]). This attitude is in opposition to the view of most French Members of Parliament who invoked the personal difficulties of divorced women during the discussion of section 1387-1 of the Civil Code,[138] and the judicial adoption of more consumer-friendly statutory rules.[139] Furthermore, in France the burden lies on the creditor both to inform the security provider and to avoid disproportionate agreements. The DCFR assumes a social context that is laissez faire and non-state interventionist – similar to the English model. Courts are less keen to intervene, due to an elitist rather than social attitude.[140] The consequence of formulating policy along such liberal lines is that the need for information is minimal, and cooperation as well as good faith have limited place within such a legal landscape.[141] It excludes reference to transactional fairness either in the form of proportionality or unconscionability, which deals more efficiently with the vulnerability of security providers.

[136] O. Lando, *The Structure and the Legal Values of the Common Frame of Reference (CFR)* (3/2007) 3 ERCL 245, 256.
[137] M. Hesselink, *Common Frame of Reference & Social Justice* (3/2008) 4 ERCL 248, 264.
[138] Y. Simon, JO AN déb. 7 July 2005, 4378.
[139] See above, e.g. protection of the marital home, transactional fairness of the security agreement.
[140] M. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System* (1995) 104 Yale LJ 1325.
[141] Lando, above n 136.

Non-contractual Liability Arising Out of Damage Caused to Another

DCFR, Book VI, Non-contractual liability arising out of damage caused to another

by

Mónika Józon

Summary: 1. Introduction. – 1.1. Preliminary Remarks. – 1.2. The Two-track Structure of Tort Law in Europe. – 2. Three Cases. – Case 1. – Case 2. – Case 3. – 3. Conclusion. – 3.1. Findings of the Research under the Hypotheticals. – 3.2. Critical Remarks on the Integrative Effects of the DCFR on Non-contractual Liability.

1. Introduction

1.1. Preliminary Remarks

This is an evaluation carried out within the framework of the Joint Network on European Private Law (CoPECL) on BOOK VI (non-contractual liability) of the DCFR, according to the methodology of the Common Core Group. The main aim of the comparative study is to assess the regulatory approach and selected individual solutions of the DCFR to evaluate its potential integrative function on European case law on non-contractual liability.

The hypotheticals focus on liability for damage caused by immovable, prevention and mitigation of damages, pure economic loss and loss of a chance. Through the hypotheticals it is assessed how the future European principles can balance traditional social justice considerations of continental tort law with market values-led developments in regulatory needs and preferences at the European level. We also look at the effects of the doctrinal structure of tort law envisaged by the DCFR on the two-track divide of tort law, i.e. fault-based and strict liability.

For the purposes of the comparative study, those Western European jurisdictions were chosen that have a leading role in framing the judicial development of tort law in continental Europe, such as the German, French, Italian, Austrian, Swiss, as well as some Central-Eastern European (Hungarian, Czech, Romanian) jurisdictions where tort law reform is underway. In addition, we

included in our comparative study a recently reformed jurisdiction, Estonia (which has a new law of obligations as of 2002), to see how a tort law system recently realigned to European trends conforms to the solutions of the DCFR. Besides the Central-Eastern European reform projects, with a focus on the recently enacted Hungarian[1] and new[2] Romanian[3] Civil Codes and the Czech draft, the French, Austrian and Swiss projects were also considered for assessing the integrative function of the DCFR from the point of view of present and future assimilative capacity of the jurisdictions under analysis.

Throughout the comparative study the common core approach is applied[4]. In part (A) the hypotheticals will be analyzed by applying the DCFR and national laws at level of operative formants, descriptive formants and meta-legal formants[5]. Part B contains a critical evaluation of the DCFR's approach and proposals.

Before the three-level analysis, we consider it necessary to discuss some aspects of statutory law and legal doctrine, which reveal the essential characteristics of the legal environment in which the DCFR will be applied and define the effects of these new rules on national private law cultures.

1.2. The Two-track Structure of Tort Law in Europe

The comparative study of the structure of tort law reveals a great deal of similarities and common features in the Romanic family, based on the French Civil Code. Case law shows convergence in these countries, characterized by a trend towards objectivization of tort law. While traditionally tort law primarily had a preventive function, nowadays violation of an objective standard of conduct is the prerequisite of liability. The main function of tort law is compensation, based on full reparation and allocation of costs to the tortfeasor. In these jurisdictions there is no

[1] The New Hungarian Civil Code was adopted by the Hungarian Parliament in November 2009, published as Law no. 250 of 2009 in Magyar Közlöny (Hungarian Official Journal) no. 165 of November 20, 2009. The entering into force of the New Code is still debated. It is envisaged for the New Code a gradual and fragmented implementation. The implementing law, enacted by the Hungarian Parliament on December 15, 2009 (not yet published in the Official Journal) stipulates that the general provisions and Book II will enter into force by May 1, 2010, whereas the rest of provisions, including those on non-contractual liability will only be applied from January 2011(http://jogiforum.hu/hirek/2230).

[2] Considering that neither of the two codes has entered into force yet, both the currently applicable and the new Codes will be presented throughout this Report.

[3] The Romanian Parliament enacted a New Civil Code in summer 2009, known as Law. 287/2009, published in Monitorul Oficial (Romanian Official Journal) no. 511 of July 24, 2009. However, the entering into force of the new code requires the adoption of an additional implementing law. Law 287/2009 provides for a 12 months deadline for the adoption of this legal act.

[4] On the Common Core Method see: M. Bussani and U. Mattei (eds), *Making European Law: Essays on the Common Core Project* (Trento, Dipartimento di Scienze Giuridiche, 2000).

[5] On this divide see: R. Sacco, *Legal Formants*: *A Dynamic Approach to Comparative Law* (1991) 39 Am. J. Comp. L. 1.

model for transferring the costs of liability through the state: replacement of tort law with social insurance schemes has not taken place; it has been introduced as a supplementary remedy, but has not replaced individual liability[6]. The main rule is fault-based liability, strict liability being the exception. However, exceptions are so many that they have become a set of general rules coexisting with fault-based liability[7]. The courts increasingly apply strict liability and presumption of fault[8]. However, in legal doctrine the prevailing approach is that fault is the general rule, whereas strict liability is a special type of liability, based on the civil code's provisions[9]. There is no general rule on presumed fault in these systems, except in Italian law under Article 2084 Civil Code. Italian legal scholars debate whether Articles 2050 and 2051 Civil Code on liability for things are an instance of strict liability, or fault-based liability under presumed fault[10]. Whereas Italian doctrine considers that it is a case of strict liability, courts argue that in such case fault is presumed, although this is criticized by most scholars[11].

In France the general rule on strict liability is based on the thing or the activity, rather than on presumption of fault[12] and it does not distinguish (unlike German law) between dangerous things and harmless things[13]. Besides this general provision, there are special forms of strict liability governed by the Civil Code (such as Article 1385 Civil Code on liability for damage caused by falling ruins of buildings, and Article 1386) and by special statutes. The case of damages caused by goods is governed by the general rule based on Article 1384 (1). This rule applies for all things, except those regulated by specific rules in the Code (ruins, animals) or statutes[14]. There is no need under the general regime for the plaintiff to prove defectiveness. It is enough to prove that the person causing the damage was the keeper of the thing[15].

Defenses range significantly, depending on the form of strict liability. Under the general strict liability regime *force majeure* offers complete exoneration from liability. Under French law *force majeure* is defined as a natural event or an act of either the victim or a third party, which was external to the defendant i.e. out of his sphere of activity, unforeseeable and unavoidable[16].

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[6] S. Troiano, *EC Tort Law and the Romanic Legal Family*, in H. Koziol and R. Schulze (eds), Tort Law of the European Community (Vienna/New York, Springer, 2008) 397.
[7] S. Troiano, *op. cit.*, 398.
[8] *Ibidem*.
[9] S. Troiano, *op. cit.*, 399 (Article 1383 of the French Civil Code states fault as a general principle and then continues with the provisions on no fault-based liability in Articles 1384-1386). Tort liability is clearly based on fault in Italian law, as stated by Article 2034 of the Civil Code.
[10] S. Troiano, *op. cit.*, 401.
[11] S. Troiano, *op. cit.*, 405.
[12] S. Galand-Carval, in B.A. Koch and H. Koziol (eds), *Unification of Tort Law. Strict Liability* (The Hague, Kluwer, 2002) 138.
[13] S. Galand-Carval, *op. cit.*, 135.
[14] S. Galand-Carval, *op. cit.*, 133.
[15] S. Galand-Carval, *op. cit.*, 132.
[16] *Ibidem*.

The Avant-projet defines *force majeure* in Article 1349 as a defense for liability in general, as an unavoidable event, not foreseeable by the defendant, whose effects cannot be avoided by reasonable measures of the tortfeasor. This definition is a step backwards from absolute impossibility of preventing the damage.

In addition to these provisions on strict liability, French courts have achieved functional equivalence to strict liability by alternative solutions: increased duty of care, reversal of burden of proof, wrongful behavior without fault based on an objective concept of wrongfulness, liability without fault with far-reaching excuses (such as for product liability)[17]. Therefore, nowadays in French law it is difficult to draw a clear borderline between fault-based liability and strict liability. Thus, in line with many other European jurisdictions, French law does not have a homogenous category of strict liability. In many instances the link with negligence is not completely missing. Liability for things under the French law is a typical example of this interplay between elements of fault and strict liability[18]. However, unlike in Germany**,** in France courts have developed new types of strict liability by analogy[19].

Italian law does not have a general regime of strict liability, but various forms of strict liability governed by the Code or statutes. However, the same result as under strict liability has been achieved by courts by applying a presumption of liability, without replacing the principle of fault-based liability[20]. There are many grey areas between fault-based and strict liability, through an increased level of liability or reversal of the burden of proof[21]. Italian judges extensively interpret statutes and precedent on strict liability[22], thus strict liability gains new ground in areas traditionally governed by fault-based liability. According to legal doctrine sometimes the excessively strict burden of proof would require its reversal, but this it does not necessarily support the shift from fault-based to strict liability[23].

Tort liability within the German legal family is not based on a general rule of liability like the French system, but on the theory of protected rights. Negligence is governed by Article 823 (1) BGB, 41 OR, 1295 (1) ABGB. In German law, fault liability requires an unlawful willful or negligent injury that affects an absolute right, i.e. life, bodily integrity, health, freedom of speech, property and other rights. German law does not contain an exhaustive list of protected rights. Swiss tort law is based on wrongfulness defined by courts and doctrine as the violation of a duty

[17] S. Galand-Carval, *op. cit.*, 128.
[18] S. Galand-Carval, *op. cit.*, 129.
[19] S. Galand-Carval, *op. cit.*, 131.
[20] F.D. Busnelli, G. Comandé, *Italy*, in B.A.Koch, H. Koziol (eds), Unification of Tort Law. Strict Liability, 208.
[21] F.D. Busnelli, G. Comandé, *op. cit.*, 216.
[22] F.D. Busnelli, G. Comandé, *op .cit.*, 218.
[23] F.D. Busnelli, G. Comandé, *op. cit.*, 224.

to respect others[24]. The same is true for Austrian law under Articles 1295 and 1294 ABGB: wrongfulness is defined as conduct that violates the legal order or public order. In addition, rights protected by special laws are also considered absolute rights both under the German and Austrian law[25]. Under German law, the degree of fault is not relevant and does not in principle influence the amount of damages. However, under Swiss law damages are awarded in relation to the degree of fault (Art. 43 (1) Code of Obligations). Under Austrian law**,** in the case of negligence the tortfeasor has to pay only for *damnum emergens,* whereas in the case of intent for both *damnum emergens* and *lucrum cessans*.

Whereas in Swiss and German law the yardstick of negligence is an objective standard**,** which does not take into account the subjective attitude of the tortfeasor and its personal capacities, under Austrian law the standard of care is subjective. However, even in Austria, an objective standard is used in cases where conducting a specific activity requires special expertise, or where damage is caused by dangerous things[26].

The outcome of both the objective standards in Germany and the subjective standards in Austria may be challenged by the rules on burden of proof applied by the courts. Under German law, reversal of the burden of proof applies to liability of the keeper of a building, under Articles 836-838 BGB or under the Road Traffic Act, Section 18(1). In Austria, the burden or proof is reversed if the source of a danger is in the sphere of the defendant. Thus, the keeper of a building is liable for the harm caused by its collapse or by parts of it falling off under Section 1319 ABGB. He can only avoid liability if he can prove that he exercised reasonable due care, in order to prevent any harm under the circumstances of the case[27]. In this case liability is objective.

There is no coherent strict liability system in the jurisdictions analyzed, as far as the German legal family is concerned. In these countries strict liability is regulated mainly outside the Codes, in special statutes. These laws diverge as to the requirements of liability and the defenses available and there is no coordination among the different forms of strict liability[28]. Both in Germany and Switzerland, courts do not expand by analogy liability to cases not covered by the special statutes. The situation differs in Austria, where courts are more flexible and apply strict liability by analogy[29]. There is, however, no clear-cut distinction between fault-based liability and strict liability. Traditionally, in Germany and Austria tort liability is divided into liability for fault

[24] Th. Kadner Graziano and Ch. Ortel, *German Legal Family*, in H. Koziol and R. Schulze (eds), Tort Taw of the European Community (Vienna/New York, Springer, 2008) 443.
[25] ABGB Section 1311 and BGB Section 823 (2) Schutzgesetze.
[26] Th. Kadner Graziano and Ch. Oertel, *op. cit.*, 453.
[27] Th. Kadner Graziano and Ch. Oertel, *op. cit.*, 455.
[28] Th. Kadner Graziano and Ch. Oertel, *op cit.*, 457.
[29] B.A. Koch and H. Koziol, *Country Report Austria*, in B.A. Koch and H. Koziol (eds), Unification of Tort Law. Strict Liability, 7.

(Verschuldenshaftung) and liability for risk (*Gefährdungshaftung).* Case law does not make any difference between the two, because by shifting the burden of proof and increasing the standard of care the borderline between the two is blurred[30]. The defenses available in different countries present an even more diversified picture. Under Austrian law, an unavoidable event is an accepted defense[31]. In Germany, the tortfeasor may escape liability if he can prove that the damage was caused by an external influence which could not be avoided even with utmost care[32]. In Switzerland the defense of *höhere Gewalt* is built on causation: it means an unforeseeable event, extraordinary and unavoidable, external to the sphere of risk of the tortfeasor. The Austrian Reform Project (draft of 2007) considers compensation the primary function of Austrian law[33], however *de jure* the draft strengthens the preventive side of tort law when setting the standard of reasonable care. According to Article 1296 (1), the standard to be applied is that which is to be expected of a reasonable person having regard to the interests of others under the circumstances given (rank and value of the interest endangered and the interest pursued, hazardousness of the situation, proximity between the parties involved, possibility of averting the danger and the costs associated). This formulation is very similar to the approach of the DCFR. The Austrian Draft contains in Article 1304 a general clause on strict liability for highly dangerous sources. Its field of application is described in general terms alongside a list of examples of dangerous activities. According to this provision, a source of high danger exists when a thing either in itself or in the course of its ordinary use or an activity involves a risk of frequent and serious damage, in spite of the exercise of due care. Liability may be excluded for *force majeure* and unavoidable events. This provision also provides for reversal of the burden of proof.

Today Swiss Law is based on an objective standard of liability. However, the Reform Project of Swiss Tort Law envisages a general return to a subjective standard of liability for negligence. Article 48a SP establishes in paragraph (1) that "a person is deemed to have acted negligently, if he/she breaches a duty of care imposed by the circumstances and by his/her personal situation". It further provides that the existence and extent of the duty of care are determined by taking into consideration the age, level of education, knowledge and experience of the tortfeasor's, as well as other abilities and qualities (paragraph 2)[34]. This innovation may influence the way in which strict liability is defined. Surprisingly, the tortfeasor may raise defenses related to

[30] Th. Kadner Graziano and Ch. Oertel, *op. cit.*, 458.
[31] *Ibidem*.
[32] StVG, Section 7.
[33] H. Koziol, *Der österreichische Entwurf eines neuen Schadenserzastzrecht*, in H. Tiberg (ed.), Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa, Vol. II (Stockholm, Jure, 2006) 653.
[34] F. Werro, *The Swiss Tort Law Reform: a Possible Model for Europe*? in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives (Berne, Staempfli; Munich, Sellier a. o., 2007) 85.

his/her conduct. Furthermore, in the Reform Project only those damages are compensable, which are connected to the infringement of protected rights.

Czech Law is the only one among the jurisdictions compared for the purposes of this comparative study where strict liability under Article 421a of the Civil Code is an alternative to fault-based liability, although this idea is abandoned by the reform project[35]. Fault-liability is based on wrongfulness, whereas for strict liability it is enough that the event caused the harm. In the Czech Republic, however, reversal of the burden of proof is frequently used[36]. Strict liability is based on an event and not on wrongfulness, as for fault-based liability[37]. An event qualified by law that causes the damage is sufficient[38]. Article 421a of the Civil Code uses the term "entrepreneurial activity"[39]. However, the concept of strict liability is very broad under Czech law, since it covers liability for dangerous things or conducting specific activities. Czech law on general strict liability channels liability toward one person, the operator of a risky business[40]. It defines *force majeure* as an unavoidable event resulting from the conducting of an activity[41].

Hungarian tort law is traditionally built on fault-based liability. However, the extent of compensation in general does not depend on the subjective attitude of the tortfeasor, but on the extent of the harm[42]. Hungarian tort law does not use the traditional concepts of fault or negligence; liability is built on wrongfulness, both for fault-based (Article 339 on general tort liability) and strict liability (Article 345 on special cases of liability: damage caused by dangerous business undertakings). The two differ only as to available defenses. In the case of general tort liability, the tortfeasor can avoid liability if he proves that he behaved in a reasonable manner under the specific circumstances. The standard of assessment of reasonable care is not based on objective criteria, but on subjective elements connected to the person of the tortfeasor[43], whereas in case of liability for a dangerous business undertaking, the tortfeasor may only escape liability if he can prove that the damage was caused by an unavoidable event, which falls outside the sphere of his activity[44]. Despite this significant difference in defenses, it is emphasized by the legal doctrine that objective liability (the term used by the commentators of the Code) is not opposed to subjective liability: objective liability is qualified rather as a borderline case of subjective liability[45].

[35] L. Tichy, *op. cit.*,74.
[36] L. Tichy, *Czech Republic*, in B.A. Koch and H. Koziol (eds), Unification of Tort Law. Strict Liability, 52.
[37] L. Tichy, *op. cit*., 75.
[38] *Ibidem*.
[39] L. Tichy, *op. cit.*, 80.
[40] L. Tichy, *op. cit*., 88.
[41] L. Tichy, *op. cit*., 89.
[42] *A Polgári Törvénykönyv Magyarázata* (KJK Kerszöv Joig és Üzleti Könyvkiadó, Budapest, 2004) 1211.
[43] *Idem*, 1231.
[44] Article 345 (1) PTK (PTK is the abbreviation for Polgári Törvénykönyv/ Civil Code).
[45] *A Polgári Törvénykönyv Magyarázata*, p. 1241.

The burden of proof lies on the plaintiff, but the tortfeasor has to prove the lack of wrongfulness[46]. In case of strict liability, in the context of a lack of wrongfulness, liability can still be imposed only if it is foreseen by specific statutes[47]. There is an accelerating trend of finding liability without wrongfulness under Hungarian law. However, the Hungarian Civil Code mentions only one case of strict liability, that of dangerous undertakings. The Code does not contain a list of dangerous activities. Two categories of cases can be deduced from case law: activities based on high-tech, and activities performed under rudimentary conditions, such as digging works, pipeline-works, plumbing, cutting out trees, and so on[48]. In case law, strict liability for dangerous activities is far from having developed into a general rule on strict liability.

The New Civil Code, enacted in November 2009, does not introduce novelties in approach compared to the Old Civil Code. The main rule is fault liability (Section 5: 497). The tortfeasor may escape liability if it proves that has 'acted as it was expected under the given circumstances'.

However, the New Code integrates, i.e. into a higher level source of law, the specific forms of liability governed up to its adoption in special laws. Strict liability is provided for cases of dangerous activities (Section 5: 515-5:5121), product liability (Section 5: 529- 5:537) environmental liability (5:538-5:542) and liability for nuclear accidents (Section 5: 543-5:47). The inclusion into the body of Civil Code of the liability for damages caused during the exercise of public authority [including the acts of public administration and the judiciary] is a welcome development. However, from the wording of Section 5:556-5:557 is not clear whether this will be fault-based or strict liability. Furthermore, it is worth noting that tort liability for damage caused by the acts or omissions of public authorities will only apply, as an exception, when no remedy was possible under the 'common procedure'. Also unclear are the basis of tort liability of employers for the acts of employees, of undertakings for acts of its members and representatives, and of the principals for the acts of agents (Sections: 5:553-5:555). Liability for damages caused by animals (wild and house-kept) is rather a form of objective liability, without any possibility for exoneration.

The Romanian Civil Code does not have a general regime of strict liability as it does for fault-based liability. As a general rule, the requirement for liability is the fault of the tortfeasor, who is liable not only in case of willful causation of the damage (Article 998 Civil Code), but also in case of slight negligence or lack of due care (Article 999 Civil Code). However, both case law and legal doctrine interpret fault according to an objective standard, that of a *bonus pater*

[46] *Ibidem*, 1231.
[47] *Ibidem*, 1232.
[48] G. Török, in *A Polgári Törvénykönyv Magyarázata* (Közlöny és Lap Kiadó, Budapest, 2007), 790.

familias[49]. Forms of objective liability (this is the Romanian term used by legal doctrine for strict liability, which is almost unknown in Romanian legal language) are to be found in the Code for damages caused by things, buildings and animals under care (Articles 1000, paragraph 1, 1001 and 1002 Civil Code); liability of parents for the acts of their children (Article 1000, paragraph 2 Civil Code); liability of masters for the torts committed by their students and of the principals for their agents (Article 1000, paragraphs 3 and 4 Civil Code). Modern forms of economic torts are governed by statutes outside the Civil Code, such as for aircraft accidents, nuclear accidents, product liability, and liability for damage caused to the environment.

Article 1000 (1) Civil Code establishes a general regime of liability for damage caused by things, while liability of the owner of constructions is a special form of liability[50]. It applies both to movables and immovables, regardless of their nature, i.e. whether they are dangerous or not, or (unlike French law) they cause a damage due to their dynamism or not[51]. Thus, Article 1000(1) Civil Code applies for road accidents, accidents caused by electricity supply, explosion of gas and water pipelines, collapse of a coast, falling trees and snow falling from a roof[52]. The rule developed by the courts can be qualified as a general rule on strict liability under the Romanian law.

The New Civil Code, enacted in summer 2009, mainly preserves the concept of the Napoleonic Code on non-contractual liability, the main rule being fault liability (Article 1.357), whereas the cases of strict liability (such as product liability, environmental liability) were left outside the Civil Code. Liability of tortfeasor will apply for slight negligence as well. The only novelty on fault liability is that of Article 1.358, which introduces 'specific criteria for the assessment of fault': the circumstances of the harm, when these are outside the control of the tortfeasor, and, if applicable, the person of the tortfeasor, i.e. whether the harm was caused or not within the exercise of a professional activity.

Under Estonian law, assessment of fault is based on the circumstances of the case: the age of the tortfeasor, education, knowledge, abilities and personal qualities[53]. Thus, the standard of care is subjective. This return to subjective liability is to some extent surprising for so new law of obligations as the Estonian one, enacted in 2002. Strict liability is applicable only in the case of an extraordinarily dangerous activity or a significant source of danger[54]. The first is the consequence of the nature or composition or means used in connection with a certain thing or activity. Thus, it is possible that damages will be awarded, although the activity or the thing is managed or

[49] C. Stătescu and C. Bîrsan, *Drept Civil. Teoria Generală a Obligațiilor* (Bucure□i, C.H.Beck, 2008) 202.
[50] C. Stătescu and C. Bîrsan, *op. cit.*, 287.
[51] T.R. Popescu and P. Anca, *Teoria Generală a Obligațiilor*, 1968, 234-235, referred to in C. Stătescu, C Bîrsan (eds), *Drept Civil. Teoria Generală a Obligațiilor*, 287.
[52] C. Stătescu, C. Bîrsan, *op. cit.*, 288-299.
[53] Section 1050, para. 2 LOA.
[54] Section 1052 LOA.

carried out with due care by a specialized operator[55]. Unlawfulness as a requirement of tort liability supposes, under the theory of wrongfulness, that an absolute right has been infringed[56]. Absolute rights are listed in LOA Section 1045 1-3 and 5: right to life, body, health, freedom and property. However, in Estonia courts extend the application of tort law to other interests worthy of protection[57]. According to LOA Section 1050 (1), the burden of proof lies on the tortfeasor, who has to prove his/her lack of fault. However, Section 1050 (2) allows the tortfeasor to invoke *subjective circumstances* for being released from liability. Section 1043 LOA states that a person who unlawfully causes damage to another person must compensate for the damage if he is culpable for that damage or is liable for causing the damage pursuant to the law[58].

The involvement in the comparative study of the legal systems of some new Member States of the EU reveals that the development of case law and the reform projects of these countries converge, in response with the new regulatory needs that have emerged under the influence of European integration at an even higher speed than they have in some of their Western European neighbors. The comparative study of these countries also shows that there is no Central-Eastern European legal family. They were subject to various Western European influences during the pre-accession period to the EU and they have chosen their own ways of reform. In the subject matters compared in this Report, but also in the concept and structure of tort law in general, the traditional strong liaisons within the same legal families are no longer to be found. Whereas Czech and Estonian law are deeply rooted in German private law culture, they now have their own ways and have not followed German developments in all aspects. However, it seems that Hungarian law, historically and geographically close to the Austrian approach, is conservative and mainly bound to Austrian developments, as also happens for Romanian tort law in relation with French law. In addition, it is worth mentioning that whereas in Western Europe the reform projects are rather restatements of case law developed in domestic tort law, without significant novelties, in the new Member States studied in this Report, we can observe a tendency to transplant system-neutral legal policy solutions, instead of internally developed rules. On sensitive issues, codification projects in these countries are mostly silent, not tackling issues that are handled by courts rather than by statutory law. We cannot discuss here the factors framing the assimilative capacity of the legal systems of these countries towards European developments, such as the DCFR[59]. However,

[55] L. Tichy, *Eastern European Legal Family*, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 531.
[56] J. Lahe, *Forms of Liability in the Law of Delict*: *Fault-Based Liability and Liability without Fault* (X/2005) Juridica International 60 ff.
[57] J. Lahe, *op. cit.*, 63.
[58] J. Lahe, *op. cit.*, 61.
[59] For Romanian law see: M. Józon, *Integration of the European Developments in Private Law into Domestic Civil Law: Factors Framing the Reception of the DCFR in Romania* (XIV/2008) Juridica International 156-166.

our general finding is that the new civil code projects of these countries are mainly in line with the approach of the DCFR. Neither the reform projects of the civil codes nor case law in these countries will act as a counter-force to European developments.

2. Three Cases

Case 1

Fault-based versus strict liability, on legal categories

While driving on a national road that was partially covered with ice, Mr. Smidt hit the guardrail and crashed into a tree, which under the impact could not hold the ice deposited on its branches and damaged the car. Mr. Smidt suffered pecuniary damages for 2000 EUR (the cost for the repair of his car). Can Mr. Smidt claim compensation (and if so, under which liability rules)?

DCFR

According to Section VI.-3:202 DCFR the plaintiff could sue the person who exercises independent control over the road and thus has a duty to prevent legally relevant damage. This person could be the owner or administrator of the road. In case we assume that the tree was situated in a place that belongs to the safety zone of the road, then the person who exercises control over the road would be held liable for both the lack of maintenance of the road and the lack of maintenance of the neighborhood of the road, where the tree that caused the damage was situated. Balancing the circumstances that define the safety of the road (including the nature of the immovable, access to the immovable and the costs avoiding the immovable being in that state) it could be established that it would have been cheaper to avoid the damage by removing trees from the safety zone of the road than to allocate the costs of such damage to car drivers. However, since the DCFR is silent on the issue of causation, it would be difficult in practice for the injured person to prove the chain of causation.

Case law on liability for damages caused by immovables including roads is a typical example of the overlap of fault and strict liability, with different degree of strictness. Thus, the devel-

opment of a uniform rule is a challenging task for any codification attempt, since the outcome of cases under the future rule may significantly differ from the conceptual, structural aspects and tools of domestic tort laws. Therefore, Section VI.-3:202 should be viewed in the context of the factors framing the predominantly judge-made case law on damage caused by the unsafe condition of an immovable.

The first remark to be made on Section VI.-3:202 is that liability for damage caused by the unsafe state of an immovable is inserted in the DCFR under the heading "accountability without intention or negligence". With this label, the drafters of the DCFR clearly aimed at promoting strict liability for damages caused by an immovable. This is an important step toward unification. However, a closer look at the content of the liability shows that this attempt has not been fully successful.

In line with the general approach of EC law on strict liability, and similarly, for example, to the standard of liability for defective products, liability for damages caused by an immovable is based on the reasonable safety expectations of the injured person, instead of a standard of conduct of the tortfeasor, defined in either an objective or subjective way, as is usual under continental tort law. The standard of reasonable expectations is defined by reference to three elements: the characteristics of the immovable, access to the immovable, but also by the economic affordability of safety by those who control the risks related to the immovable. The regulatory policy beyond Section VI.-3:202 becomes clearer when the second element is interpreted together with the third one. The second element is about the reasonable expectations of the owners towards the behavior of potential injured persons. Since the liability of the person having control of the immovable is limited by his/her reasonable expectations concerning the use of the immoveable, the risk is no longer allocated to the owner of the immovable as under the objective standard of fault-based liability, but shared between the person exercising control over the immovable and the potential victim. The third element refines the standard of liability and shifts the focus from the victim's expectations on safety to the social affordability of liability under a cost-benefit approach to liability.

The standard and strictness of liability is further refined by the general rule on defense of the DCFR, applicable both for fault-based and strict liability. According to Section VI.-5:302 on *force majeure*, the administrator of the road in our hypothetical would be held strictly liable, unless he can successfully prove that the damage is the result of an abnormal event beyond his control, which cannot be averted by any reasonable measure and which is not to be regarded as that persons' risk. Under this definition, no absolute impossibility is required for the defense, but a lighter standard, related to the tortfeasor's own sphere of risk. Thus, in addition to the cost-

benefit element, which is a novelty introduced by the DCFR, strict liability is further weakened by the rule on defense, that brings liability for the unsafe state of an immovable closer to fault-based liability.

The three elements listed in paragraph (1) are meant by the drafters of Section VI.-3:202 to assist judges when defining the circumstantial standard of the liability. However, it is not clear that these elements lead to greater legal certainty than the standards currently applied by courts: the burden of proof is not defined, which may lead to different outcomes in national jurisdictions. Under the general rule on causation, under Section VI.-4:101 the victim would have to prove that the person exercising control over the immovable is the source of the danger. Whereas this is the general rule on causation in case of no-fault liability, Section VI.-3:202 does not found liability on the same basis, but uses a less strict standard of liability. In addition, the cost-benefit approach may be in practice an instrument not easy to handle by continental judges and may not serve the best interests of the injured person, because of the constraints of judicial culture in continental legal systems.

We may conclude that despite the label of Section VI.-3:202 as no-fault liability, the requirements of liability for damage caused by the unsafe state of an immovable are mixed. Thus, this provision does not really bring more clarity into the European context, which is deeply rooted in the architecture of tort law in each country.

National Laws

I. Operative Formants

French courts consider, in cases similar to the hypothetical, the reasonable expectations of car drivers regarding the safety of the construction[60]. In France, Article 1386 Code Civil applies to defective maintenance of the road, whereas damage caused by a falling tree is dealt by Article 1384 and not by Article 1386 Civil Code[61]. Article 1384 (1) establishes a general regime of strict liability for the acts of things (*responsibilité du fait des choses*). Under Article 1386 the damage must have been caused either by a defect or lack of maintenance, which needs to be proved by the

[60] Cour d'Appel Argens 4 November 1971, D. 1972, 169 comm. J.L. RTD civ. 1972, 787 (an 18th century bridge collapsed under the weight of a 1,5 tonne vehicle. The Court of Appeal in Argens established the liability of the owner of the bridge for defective construction, although it was not designed for 20th century cars).
[61] C. van Dam, *European Tort Law*, (Oxford, OUP, 2006) 1502.

injured person. If the plaintiff cannot prove this, he may still invoke Article 1384 Civil Code. The only defenses under French tort law are *force majeure* and contributory negligence.

According to Article 2053 of the Italian Civil Code, the owner of the immovable is strictly liable for damage caused by buildings[62]. For trees, liability falls under guardian liability on the basis of Article 2051 Italian Civil Code.

Romanian law belongs to the group of jurisdictions which apply strict liability for roads, thus the guardian of the road will be strictly liable under Article 1000 (1) [63]. He may escape liability only if he proves the existence of *force majeure.*

The Land Road Act of the Czech Republic (Act no. 13/1997) would also impose strict liability [64] in the case under the hypothetical.

Under German law, liability of the owner/possessor of the immovable would be fault-based according to Article 823, as well as liability for damage caused by trees[65]. This rule applies also when the owner/possessor of the road is a public law entity[66]. If, the liability to road maintenance is a legal or statutory obligation of a public entity, then the provisions of Article 839 BGB will be applicable[67]. The state of the road must be regularly controlled; the modality and intensity of control depend on the importance and use of the road[68]. The liability for the security of roads under Article 823 also implies the protection of road users against the risks related to trees alongside the roads (including falling branches or entire trees)[69]. According to the current case law, the risk related to trees bordering roads arise when these are not sufficiently stable or safe and consequently there is a risk that branches or trees will fall[70].

In Austria the keeper of the roads, regardless of whether it is a public or private entity, is liable under Article 1319 ABGB in case of intentional or gross negligence. Austrian courts apply this rule by analogy to trees as well[71]. The injured person must prove the fault of the tortfeasor, the status of the tortfeasor as administrator and the defect of the road[72].

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[62] Trib. of Turin, 30 June 1997, (1998) Resp. civ. prev. 735, referred to by F.D. Busnelli and G. Comandé, *Italy*, in B.A. Koch and H. Koziol (eds), Unification of Tort Law. Strict Liability, 221.
[63] C.S.J. (Supreme Court of Justice) Secția civilă, decizia nr. 2725 din iunie 2003, în Buletinul Jurisprudenței 1990-2003, p. 302. In a relative recently case the Local Council of Bucharest was held liable as the guardian of public roads in Bucharest for damages caused to cars because of the state of the roads.
[64] Nejvyssi soud Ceske republiky, 27 September 2007, 25 Cdo 2142/2005. Case presented and commented by J. Hradek, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2007* (Wien/NewYork, Springer, 2008) 221-225.
[65] LG Frankfurt 12 Nov. 1986, NJW-RR, 1987, 795.
[66] BGHZ 86, 152, 153, NJW 1983, 2313; OLG Frankfurt Vers 1993, 988, 989, in Band 2, 2008, p. 1299.
[67] BGH OLG Hamm NJW 1995, 353 in G. Spindler, *op. cit.*, 1299.
[68] *Ibidem*.
[69] BGHZ 123, 102, 103, NJW 1993, 2612, in G. Spindler, *op. cit.*, 1301.
[70] OLG Barndenburg Vers 2002, 504, MDR 2002, 93, in G. Spindler, *op. cit.*, 1301.
[71] OGH, 8 July, 1986, SZ 59/121, 616-620.
[72] 2 Ob 509/92 JBL 1993, 315.

Similar to the Germanic approach is Hungarian case law, which is based on fault liability, under Article 339(1) Civil Code.[73] The Hungarian Supreme Court ruled in a recent case on a motorway accident, where car drivers asked compensation for the damage caused to cars by lack of maintenance of the motorways, that the operation of a motorway not be considered a hazardous activity[74].

Liability of the road owner would be fault based according to Estonian law as well, if the conditions of Article 1059 of LOA are fulfilled. The Supreme Court decided in a recent case that snowfall is not *force majeure* and the defendant could have foreseen it and should have taken the necessary measures to prevent the damage[75].

II. Descriptive Formants

In Germany, liability for damages caused by roads does not fall under Articles 836-838 BGB, which provide the legal basis for damage caused by the collapse of a building or a work connected to the ground or the breaking of parts of a building or a work. However, Articles 836-838 BGB provides for a general duty of safety (*Verkehrspflicht*) in cases of direct or indirect consequences of gravitation[76]. Courts shift the burden of proof under Articles 836-838 BGB: if the applicant can prove that the collapse or the breaking down is due to a construction failure (*fehlerhafte Einrichtung*) or a lack of maintenance (*objektive mangelhafter Unterhaltung*), the possessor of the work is liable. He may escape liability if he can prove that has taken all possible measures to avert the risk. Legal doctrine considers that such a shift of the burden of proof is justified, because the possessor of the work is better informed than the damaged party. The same is true under Article 823 BGB, which applies to the hypothetical case and which defines a general standard of "*Verkehrspflicht*". The rule implies that the possessor needs to inspect the work and check if it meets the safety standards required. The standard of inspection is dependent on the nature and condition of the work, particularly its use and the risk related to it[77]. The nature of the premises may influence the safety measures required[78]. In Germany, liability under Article 823 BGB is limited to the reasonable expectations of private use of the immovable[79]. The owner or user of the ground must exclude in an objective reasonable manner all risks, which for a cautious person are

[73] EBH 2005 no. 1207 (Supreme Court). Case presented by A. Menyhárd, in *European Tort Law* 2005, 334-335.
[74] A. Menyhárd., *op. cit.*, 335.
[75] Rigikohus, 20 June 2006, 3-2-1-64-06, RT III. 26, 241, case presented by J. Lahe and I. Kuhl, in H. Koziol and B. C. Steininger (eds), *European Tort Law* 2006, 186.
[76] G. Wagner, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5. Auflage (2009), Article 836, 2362 ff.
[77] C. van Dam, *European Tort Law*, 1503.
[78] BGH 7 November 1967, Vers, 1968, 68.
[79] BGH VersR, 79, 1055, in H. Sprau, in Paland, *Bürgerlishes Gesetzbuch*, Band 7, 2010, Article 823, Rn. 221, 1252.

not or not immediately recognizable, even when the public would be informed about it, it could not or not immediately react[80]. The *Verkehrspflichtige* (Article 823 BGB) is the person who opens to use and supervises the public premises and works. He is liable for personal injury or property loss caused by insufficient maintenance of the premises, by failure to remove obstacles and to keep the premises in a sufficiently safe condition. He may escape liability if he proves that he has taken all measures required to avoid the risk related to the ground; thus, the owner or the user of the ground must supervise the state of the trees, according to the state of knowledge in the field of forestry[81]. According to the Supreme Court, this obligation includes any maintenance measure that ensures the stability of trees and their connection with the ground[82].

In Austria we find a special provision in the Civil Code for liability of the road administrator, beside the general provision on liability for immovables stipulated in Article 1318 BGB. Article 1319a ABGB establishes the liability of a person or body who has control over the road (*Halter eines Weg)* and bears the costs of the road. Article 1319a ABGB paragraph 2 states that "defectiveness of the road is to be established taking into consideration what is reasonable according to its nature, and especially its intended use, situation and maintenance". The standard of liability is objective, coupled with a reversal of the burden of proof[83]. The person who controls the road has to take all measures which are necessary for a safe use of the road under the specific circumstances[84]. To these obligations belong, among others, the equipment of the road with the necessary safety tools and warning about dangers[85]. The obligations of the road administrator are strongly connected to the geographical situation of the road[86]. Safety measures may imply more than the used part of the road or the site of the road[87]. The obligations of the road administrator in winter time are determined by the requirement of reasonable expectations. Thus, the mere existence of ice on the road is not in itself an indication that the road administrator did not comply with his duty to ensure the safety of the road[88]. According to Austrian law, the road administrator may avoid liability if he proves that he has taken all reasonable safety measures. This will not be the case if the administrator of the road acted intentionally or under gross negligence. According to case law, there is a case of gross negligence "when the obligation, according to the given cir-

[80] BGH VersR 79, 1055.
[81] G. Spindler, *op. cit.*, 1290.
[82] BGH BauR 2005, 444; AUR 2005, 410.
[83] H.-K. Danzl, in H. Koziol, P. Bidlinski and R. Bollenberger (eds) *Kurzkommentar ABGB*, 2007, p. 1496.
[84] F. Harrer, in M. Schwimman, *Praxiskommentar ABGB*, Band 6, (LexisNexis Orac, Wien, 2006) 355.
[85] *Ibidem*.
[86] *Ibidem*.
[87] Bydlinski, ZVR 1998, 328 ff.
[88] ZVR, 1991/48.

cumstances, is infringed in an unusual measure and the occurrence of the damage is not only possible, but is expected to happen"[89].

There is a disagreement in Austria between the case law, which holds that Article 1319 ABGB imposes fault liability with a shift of the burden of proof[90], and legal doctrine, which considers liability as strict. The injured person has to prove that damage is the result of a defect of the ground or the work, whereas the owner can avoid liability by proving that he took all the necessary measures that could reasonably be expected of him[91], which include safety and control measures[92]. Courts apply an objective standard of fault by reference to how a *bonus pater familias* would have behaved under similar circumstances. Some authors are inclined to consider it strict liability[93]; however, liability presupposes the knowledge of the risk[94]. If strict liability applies, the responsible person may escape liability only if he can prove *force majeure* or contributory negligence. If fault applies, then it is for the claimant to prove that the defendant knew or ought to have known the danger or the defect. Courts presume negligence and give a chance to the defendant to show that he fulfilled his duties. For damage caused by trees (fallen branches and fallen trees) Article 1319 ABGB applies by analogy[95].

In Hungary the general provision on tort liability (fault liability) of Article 339 of the Civil Code applies for damages caused by roads. For liability to arise under this provision, the claimant must prove that the defendant committed an unlawful act. Hungarian courts under the current practice still interpret the concept of unlawfulness in a restrictive way, meaning as a requirement that a specific legal norm must be infringed. Damage is deemed unlawful, unless it is explicitly provided otherwise by the law[96]. As Menyhárd stresses, this approach has often been criticized as being incorrect and inconsistent with the underlying concept of unlawfulness. According to Menyhárd, unlawfulness should be treated flexibly as either fault or causation to allow the courts greater discretion in allocating and spreading risk[97].

In the approach of the New Civil Code, lliability for damage (Chapter IX, Section 5:558 -5: 559-liability for constructions) caused by constructions continues to be fault based. However, this type of liability is limited to damage caused by buildings. The owner may be exonerated of liability if he proves that during construction and maintenance he has acted as expected under the specific circumstances for the prevention and mitigation of damage. Thus, the New Code will not

[89] ZVR 2001/60.
[90] JBL 70/623.
[91] Von Cammerer, in M. Schwimman, *Praxiskommentar ABGB*, Band 6, Article 1319, Rn. 15.
[92] ZVR 97/24, SZ 25/86.
[93] Von Cammerer, in M. Schwimman, *Praxiskommentar ABGB*, Band 6, Article 1319, Rn. 15.
[94] SZ 24/76; EvBl, 1983/63, in *Praxiskommentar ABGB*, Band 6, Article 1319 Rn. 10.
[95] ZVR 1972/98, EvBl 1970/294.
[96] Gy. Eörsi, *A polgárijogi kártérítési felelősség kézikönyve*, (Budapest, Közgazdasági és Jogi Kiadó, 1966) 5.
[97] A. Menyhárd, in H. Koziol and B. C. Steininger (eds), *European Tort Law 2005*, 338.

bring significant changes to the current case law in situations similar to the hypothetical: the general rules on fault liability will apply.

Under Czech law, road accidents caused by the state of the road fall under the Road Act, which imposes strict liability (Act 13/1997 on Land Road). In a relatively recent case the Czech Supreme Court decided that if the conditions of strict liability are not fulfilled under the circumstances of the case, the plaintiff may claim damages under the general rules on fault liability on the basis of Article 240 of the Civil Code. The requirements for liability are the defect in practicability, the occurrence of a damage and the causal relationship between the damage and the impracticability of the road/pavement, regardless of the fault of the administrator of the road. Under the strict liability regime the owner's liability is assessed by taking into consideration the road's condition at the time and place of the accident and the nature of the defect that led to the accident. The owner of the road has to prove that it was neither feasible for him to remove the defect, nor to draw public attention to such a defect**.** However, delegation of the maintenance to another entity does not exclude liability of the owner under his general duty to maintain the road in winter, through the conclusion of an agreement with an administrator, which should have had ensured the practicability of the road on his behalf[98]. The same applies for owners, administrators or users of an immovable which is in the vicinity of a construction area or a road[99].

In Romania, damages caused by road are regulated by the rules on damage caused by things under Article 1000 (1) of the Civil Code and not the rules on damages caused by immovables (Article 1002 Civil Code). Courts reverse the burden of proof in establishing liability on the basis of Article 1000 (1) Civil Code: the guardian of the thing has to prove the existence of reasons that exonerate him from liability, i.e. only *force majeure*. This is defined as an external event that is unavoidable and external to the thing that caused the damage or its characteristics[100]. The external event must be absolutely unavoidable and absolutely unforeseeable according to the current state of science, and uncontrollable by anyone, not only by the guardian of the thing[101]. Not surprisingly, Romanian case law follows the French approach: liability for roads is not governed by the provisions on liability for constructions, which is no-fault based under Article 1002 Civil Code. The New Civil Code did not break with the old concept and old wording of liability for damage caused by the building and other constructions (Article 1.379). This liability only applies for damage caused by construction defects or lack of maintenance.

[98] Nejvyssi soud Ceske republiky, 27 September 2007, 25 Cdo 2142/2005. Case presented and commented by J. Hradek, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2007*, 221-225.
[99] *Ibidem*.
[100] Curtea de Apel Bucureşti, Secția a IV-a civilă, decizia nr. 1660 din 4 iulie 2002, în C.A. Bucuresti, *Culegere de Decizii 2001-2002*, 282.
[101] C. Stătescu and C. Bîrsan, *op. cit*., 305.

Under the current law (Article 1001 para. 1 Civil Code), applicable to the hypothetical, in order to establish liability of the tortfeasor it is enough to prove the damage, the causal relationship between the damage and the lack of maintenance or construction defect[102]. Liability of Article 1002 Civil Code applies to any immovable attached to the soil and built by man, including houses, gardens, walls attached to the soil, barrages, bridges and underground works. Article 1002 does not apply to provisional works and things that are not the result of man's work, such as trees or stones[103]. Under this rule, the owner is the liable person, not the user of the construction[104]. The only defense for the owner is proof that the damage was caused by an external condition, such as the act of the victim, the act of a third person, or *force majeure*[105].

The review of the national solutions reveals that, whereas in some countries the general rules on liability for immovables apply for damages caused by roads (Germany, Hungary), in others rules on liability for things apply (Romania, France); a third category of jurisdictions have special provisions, either in the Civil Code (Austria) or in special statutes (Estonia). However, these differences do not really matter in practice.

The basis of liability for damages caused by roads is fault (with a reversal of the burden of proof) in Austria, Germany, Estonia, Hungary, whereas liability is no-fault in France, Italy, Switzerland, Czech Republic and Romania. However, it is not always clear what is the basis of such categorization, as the case of the Austrian debate on the nature of liability shows. The reason for the difficulty of placing liability in one or another category despite its label under statutory law is to be found in defenses, which bring liability close to fault or no-fault. Defenses range from absolute impossibility to exclude or prevent the risk related to the use of the road, to proof that reasonable measures were taken by the administrator or owner, according to the reasonable expectations of the users. Even under a strict liability regime, such as in the Czech Republic, the personal attitude of the defendant (the feasibility for him to remove the danger or to alert the public), will be considered. From the point of view of causation, the picture becomes more diversified: the act of the thing is the source of liability under the no–fault based regimes, but surprisingly this is also the case for fault-based liability in some countries, where the state of the thing (the road) is the standard according to which the duty of care of the owner/administrator is assessed. It seems that the focus of the courts on the reasonable expectations of the users of roads and the state of the road is a factor of convergence in case law, regardless of the label applied in statutory law and the type of liability employed, since fault-based liability is established according to objective stan-

[102] Î.C.C.J (High Court of Cassation and Justice), Secția civilă şi de proprietate intelectuală, decizia nr. 5636 din 27 iunie 2005, în Dreptul nr. 6/2006, 243.
[103] C. Stătescu and C. Bîrsan, *Drept Civil. Teoria Generală a Obligațiilor*, 281.
[104] C. Stătescu and C. Bîrsan, *op. cit.*, 282.
[105] C. Stătescu and C. Bîrsan, *op. cit.*, 284.

dards. The focus on the thing (the road) and the elements applied by the courts in defining the defectiveness of the road, largely converge with the regulatory approach of the DCFR. These elements are: nature, purpose, state of maintenance, geographical situation, use and risk. We do not find a cost-benefit analysis in arguments of the courts, as proposed by the DCFR, except in the Austrian reform project (2005), but in some jurisdictions there are signs of an approach based on information and choice of the user of the immovable (Czech and Austrian case law).

III. Meta-legal Formants

It is very difficult to find a common framework explaining the reasons behind strict liability versus fault-based liability in continental Europe on the basis of the arguments elaborated by the courts. Courts in continental Europe do not generally discuss theoretical aspects of the nature of liability, or social justice considerations. Therefore, we can only look at the opinions developed by legal doctrine on the outcomes of case law. There are various theories advanced pro and contra strict liability for damages caused by things in general. Italian scholars suggest the idea of risk, the protection of persons more exposed to dangers, and the idea of balancing burdens and gains of an activity[106]. In the Czech Republic, strict liability if founded on the idea of a high degree of risk of damage, associated with a source of danger or a special activity[107]. In Romania, there are two competing arguments for strict liability: the concept of liability as a guarantee for activities associated with risks, and the idea of risk allocation[108]. In Austria the prevailing argument is risk sharing[109]. Others correctly challenge the theory that strict liability is based on risk allocation or risk sharing, since strict liability applies in an increasing number of activities which are not associated with risks[110].

However, all these theories converge in setting a balance between the capacity to control risks and affordability of the costs associated with the risk. This would suggest that legal doctrine is converging in line with the idea that the costs of the damage should be allocated to the party that is in a better position from an economic point of view to repair the damage. This person is usually the owner/administrator of the immovable. These theories are based on the idea of risk allocation. On the contrary, a close look at case law on compensation awarded for damages caused by the unsafe state of roads shows that courts tend to spread/share the risk between clai-

[106] For a summary of these arguments see: F.D. Busnelli and G. Comandé, *Italy*, in B.A. Koch and H. Koziol (eds),Unification of Tort Law. Strict Liability, 208.
[107] L. Tichy, in B.A. Koch and H. Koziol (eds),Unification of Tort Law. Strict Liability, 82.
[108] C. Stătescu and C. Bîrsan, *Drept Civil. Teoria Generală a Obligatiilor*, 300-301.
[109] B.A. Koch and H. Koziol, *Austria*, in B.A.Koch and H. Koziol (eds), Unification of Tort Law. Strict Liability, 35.
[110] R. Schulze and H. Koziol (eds), *Tort Law of the European Community*, 594-595.

mant and defendant differently in the case of fault-based and strict liability. The DCFR seems to support and strengthen this line of reasoning, by inserting the costs for avoiding the risk for the owner/administrator among the elements for the assessment of reasonable user expectations. Thus, on one hand the DCFR tends to offer a better protection of the injured person, by stipulating strict liability, while on the other hand it introduces a cost-benefit test. This, however, does not significantly challenge the current state of case law in continental Europe.

Case 2

Pure economic loss and loss of a chance

Due to a motorway accident of case 1, Mr. Smidt could not attend an important business meeting to which he was travelling and missed the chance to conclude a contract worth 30 million EUR. Can he claim compensation for the economic loss caused by the loss of the chance to conclude the contract?

DCFR

The plaintiff in our hypothetical could not ask compensation for pure economic loss or loss of chance, since the DCFR does not regulate both terms and remains neutral at the level of taxonomy on the current debate of case law and doctrine on pure economic loss and loss of chance. Pure economic loss and loss of a chance are not mentioned among the relevant damages considered by the drafters of the DCFR in Section 2. Thus, the complaints for such damages under the DCFR must be based on the general rule on legally relevant damage, according to Section VI.-2:101. This provision stipulates, in addition to the requirement of infringement of an absolute right or legitime interest (paragraph 1), the "fairness and reasonableness" of compensation, (paragraph 2). The DCFR conditions the award of compensation to these requirements by using the phrase "only if". We will come back to the consequences of this requirement later in this Report. In considering whether compensation would be fair and reasonable, account is taken of: accountability, nature and proximity of the damage or pending damage, reasonable expectations of the person who suffers or would suffer the damage, and considerations of public policy (paragraph 3). The provision makes some room for pure economic loss and loss of chance by implicitly admit-

ting the possibility of compensation for future damage. However, compensation is linked to the infringement of protected rights and interests and has to stand the hard test of causation.

National Laws

I. Operative Formants

Although the courts are frequently confronted with complaints similar to our hypothetical, actions for pure economic loss and loss of chance would fail under most jurisdictions included in this comparative study. This is because the majority of courts in Europe treat pure economic loss and loss of chance as a causation issue, and under national judge-made rules on causation, the causal relation is extremely difficult to prove in cases of future damage. This is the case in Estonia, Hungary and Romania. In other countries, like Germany, Austria, Italy, the problem is that pure economic loss and loss of a chance are not among the absolute rights protected in the Civil Codes and compensation would fail for this reason. The third category of countries (such as France), opt for an intermediate solution, since they admit such a possibility, but condition the compensation of loss of chance to the certainty of the future damage. A further ground for not awarding compensation for pure economic loss is the impossibility to assess such a damage, as stated by the Estonian Supreme Court. In countries such as Hungary, the Czech Republic and to a certain extent Romania, case law has not yet tackled the doctrinal aspects or the search for statutory law solutions for such damages, but they treat such claims under the traditional categories of damages, often as a simple loss of profit. Nevertheless, the situation of the plaintiff is not better off in these countries compared to the German legal family, because in spite of the general rule that would allow room for compensation, the burden of proof of causation is extremely high.

Czech lower courts tend to qualify a case similar to our hypothetical as a property loss and award damages on the basis of the general rules on tort liability of Article 442 of the Civil Code (on property loss), if the requirements of liability stipulated in Article 420 are fulfilled. However, this view is not shared by the Supreme Court, which in a recent case rejected such a claim due to lack of causation[111]. In the case, which was similar to our hypothetical, it considered that the cause of the loss of profit was the lack of agreement between the plaintiff and the third party and that the damage caused to the plaintiff's car was not an event that "would enter the mechanism of

[111] Cdo 1946/2000. Case presented by J. Hradek, in H. Koziol and B. C. Steininger (eds), *European Tort Law 2004*, 208-209.

causes and effects independently of the defendant's action". Therefore, it established that the object (the car) could not be used as intended by the plaintiff (to drive to the place of conclusion of the contract), i.e. it was put out of operation, and could not serve the purpose for which the plaintiff was using it at that time and intended to use it in the foreseeable future. This effect of the damage was qualified by the Court as being the cause of the loss of benefits which the injured person would otherwise have obtained under normal circumstances.

In Austria, the OGH dealt with this issue as one of likelihood of causation, in a case when it was not possible to establish the balance between the causation of the damage by the tortfeasor and the circumstances which are in the victim's control, but it did not award damages[112]. In other cases the OGH refused to award such damages because of uncertain causation. Pure economic loss can be awarded under Article 1330 (2) ABGB for protection of professional reputation, under the heading of personality right[113].

Italian courts would condition compensation to a causal relationship between the loss of chance and the good damaged or the right infringed[114]. Italian law allows the recovery of pure economic loss of a protected interest (like German law), but compensation is restricted to the infringement of subjective absolute right or interest[115]. Concerning loss of a chance, an all-or-nothing principle prevails under Italian law: compensation will be awarded only if the plaintiff proves the fault of the defendant for the damage caused[116]. Although Italian legal doctrine supports the award of damages for pure economic loss, the courts remain reluctant to apply the rule, deeming that it would clash with the rules on evidence and on the burden of proof[117].

In France, compensation for pure economic loss depends on whether there is a sufficient causal link and the loss is sufficiently direct[118]. However, French judges apply the causal requirements in a restrictive way, in order to limit the award of pure economic loss[119]. Pure eco-

[112] OGH, 7 November 1995, Juristische Blätter 1996, 181.
[113] W. Posch and B. Schilcher, in V.V. Palmer and M. Bussani (eds), *Pure Economic Loss in Europe* (Cambridge, CUP, 2003) 484.
[114] Cass. 19 November 1983, no. 6909, G, civ. 1984, I, 1841, cited by S. Troiano, *op. cit.*, 429; Cass., Sezioni Unite, 19.12.1985, no. 6506, Foro Italiano (1986) I, 385, case presented by Monateri and Musy, in V.V. Palmer and M. Bussani (eds), *Pure Economic Loss in Europe*, 475, (in *Baroncini v. Enel* the Italian Supreme Court held that compensation could be awarded for loss of a chance in a case where the plaintiff was prevented from applying for two different positions under a competitive procedure. After getting the first position he was not allowed to participate in the final exam for the second position.)
[115] N. Jansen, *The State of the Art of European Tort Law*, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 19.
[116] H.B. Schäfer and C. Ott, *The Economic Analysis of Civil Law* (Northampton, US, Edward Elgar Publishing, 2004) 210.
[117] *Ibidem*.
[118] V.V. Palmer and Ch. De Noblet, in V.V. Palmer and M. Bussani (eds), *Pure Economic Loss in Europe*, 172.
[119] P. G. Monateri and A. Musy, in V.V. Palmer, M. Bussani (eds), *Pure Economic Loss in Europe*, 457.

nomic loss is admitted by French courts for cases of strict liability for damages caused by defective things on the basis of Article 1384 (1) Civil Code[120].

In France, case law allows for the award of compensation for loss of chance (*perte d'une chance*) under Section 1382 Civil Code[121].

Under Romanian law, compensation for loss of chance is increasingly awarded for infringements of personality rights and in personal injury cases. There is case law on damages for loss of chance to candidates in the Parliament elections and for loss of the chance to obtain a fidelity increase of salary, which were awarded in a recent case when the plaintiff lost his job and his reputation was damaged in a defamation case[122]. However, in a recent case concerning the occurrence of future economic loss (pure economic loss) because of the unilateral increase of tariffs for interconnection of telephony services, the High Court of Cassation and Justice handled pure economic loss as hypothetical damage for which the test of causation cannot be established and rejected the claim of the plaintiff[123].

Estonian courts are rather reluctant to award compensation for pure economic loss. Courts in general refuse such claims, reasoning that in these cases it is impossible to establish the damage[124]. Moreover, the additional question of causation would persuade the courts not to award compensation[125]. In a case concerning the refusal to issue a fishing permit, the Republic of Estonia was sued for pure economic loss; the Supreme Court found that the fact that the plaintiff could not have a right to fish commercially was not a sufficient ground for the existence of a causal relationship between the refusal to issue the permit and the loss[126]. However, the court awarded compensation in a claim where, because of a theft of goods from his shop, the plaintiff suffered a decrease of his sales since he was not able to buy new goods due to the loss caused by the theft[127].

Hungarian courts limit compensation on the basis of liability and causation[128]. Hungarian law does not condition compensation on foreseeability, but interestingly courts apply this test[129].

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[120] Civ. 2, 19 March 1980 in (1992) D., 409, case presented by S. Galand-Carval, *France*, in B.A. Koch and H. Koziol (eds), Unification of Tort Law: Strict Liability, 139.
[121] Cour d'Appel, 20 avril 1955, *Football Club de Metz v. Wiroth*, presented by P.G. Monateri and A. Musy, in V.V. Palmer and M. Bussani (eds), *Pure Economic Loss in Europe*, 241.
[122] Î.C.C.J. Secția civilă şi de proprietate intelectuală, decizia nr. 4031 of 17 mai 2005.
[123] Î.C.C.J. Secția de contencios administrastiv şi fiscal, decizia nr. 4421 din 7 decembrie 2006.
[124] Supreme Court Civil Chamber, 21 June 2001, 3-2-1-70-01. RiigiTeataja (Gazette) III 2001, 23, 256; Supreme Court Civil Chamber, 20 June 2001, 3-2-1-86-01. Riigi Teataja (Gazette) III 2001, 22, 246, (in M. Kingisepp, *Scope of Claims for Consequential Damages in Delict Law* (2003) Juridica International, 5.
[125] Supreme Court, Civil Chamber, 19 October 1999, 3-2-1-90-99. Riigi Teataja (Gazette) 1999, 28, 270.
[126] *Ibidem*.
[127] Judgment of the Tallin Circuit Court, 9 November, 2001, II-2/1710/01.
[128] A. Menyhárd, *Pure Economic Loss in the Hungarian Tort Law*, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 330.
[129] A. Menyhárd, *op. cit.*, 227.

Hungarian courts tend to question the causation link and use the concept of accountability to reduce the tortfeasor's liability to foreseeable losses, or solve the problem with the burden of proof on the causal link and the amount of damages[130]. However, damages functionally equivalent to pure economic loss were awarded in Hungary by the Supreme Court in a relatively recent case, in which a sales representative, who suffered a car accident caused by another driver on the way to sign a contract prepared in the name of his employer, could not conclude that contract. In this case the Supreme Court admitted that the employer of the plaintiff suffered a net income loss, that is an economic loss, and awarded compensation for it[131].

II. Descriptive Formants

We consider pure economic loss and loss of chance under the same hypothetical, since in some jurisdictions the two forms of compensations are treated under the same heading. For example, courts and legal doctrine use pure economic loss and loss of a chance as functional equivalents in Hungary, whereas in France a clear distinction is made between the two and different standards apply.

The comparative analysis shows that there are mainly two approaches to pure economic loss in continental Europe: there are systems which employ the general rule (French legal family) on compensation, without distinguishing between the different types of damage, but which condition the award of damages for pure economic loss to stricter criteria than for other types of damages; and others which employ the protected rights approach (German legal family). However, concerning the outcome of the cases, as shown above, there are no significant differences in case law: Courts are not yet prepared for a more liberal approach to this legal issue.

Czech law does not employ the concept of pure economic loss, but legal doctrine considers that the general rule on loss of profit may be applicable to pure economic loss[132]. Czech legal doctrine includes pure economic loss under the label of loss of profit[133]. Czech legal doctrine and courts, however, stress the difficulty of awarding pure economic loss in relation to causation[134]. Thus, in a case where the plaintiff had a loss due to failure to conclude an agreement because his vehicle was damaged by a tractor on his way to the meeting, the Czech Supreme Court held that there was no causal connection between the loss and the accident. The court held that "a distinc-

[130] A. Menyhárd, *op. cit.*, 330.
[131] Bírósági Határozatok (BH) 2001 no. 273 (Supreme Court).
[132] For Czech law, see L. Tichy, in B. A. Koch, H. Koziol (eds), *Unification of Tort Law: Strict Liability*, 93.
[133] L. Tichy, *op. cit*, 82.
[134] L. Tichy, *Pure Economic Loss Compensation from the Czech Republic*, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 317-318.

tion should be made between the effect consisting in a physical damage to an object (…) from the effect deriving from the fact that the object was not functioning and could not be used for the purpose for which the plaintiff was using it at the time, or possibly intended to use in the foreseeable future"[135]. Another obstacle for the award of pure economic loss under Czech law is the requirement of foreseeability as a condition for the award of compensation. Thus, if the damage which occurred was not entirely foreseeable by the tortfeasor at the moment of causation of the harm, no obligation to compensate will arise[136]. It seems that Czech case law follows the German and Austrian approach on pure economic loss for cases of loss of a chance.

In Germany and Switzerland, compensation for loss of a chance is almost unknown. Under German law, pure economic loss can be compensated according to Article 823 (1) BGB only if it derives from an injury related to an absolute right specified in that provision. If the economic damage is unrelated to one of those absolute rights, no damage can be awarded[137], although theoretically pure economic loss could be claimed under Articles 823(1), 824 and 826 BGB. In Swiss law, pure economic loss falls mainly outside tort law, in the absence of special rules aimed at protecting it: pure economic loss can be awarded only when the tortfeasor has caused harm intentionally in a manner contrary to public morals. Case law has recognized pure economic loss for false advice, information or expertise, on which the victim has relied and thereby suffered a damage[138]. The Swiss reform project, which returns to subjective liability, keeps the current approach of conditioning the compensation of pure economic loss to the infringement of an absolute right, which is interpreted restrictively and therefore offers little room[139].

The recovery of pure economic loss is significantly limited under the Austrian ABGB as well: Pure economic loss is dealt as a problem of unlawfulness. Purely financial interest is not included in the categories of absolute rights protected by Austrian law and, due to the definition of compensatory damages under Article 1295 ABGB, the concept is almost unknown in Austrian law[140]. Courts rather employ other concepts, such as "indirect damage" or "damage to third persons", when awarding damages which are functionally equivalent to pure economic loss[141]. It is widely admitted under Austrian law that infringement of an economic interest can only be regarded as unlawful if the interest of the tortfeasor has to be evaluated as essentially inferior to

[135] Judgment of Supreme Court, May 21, 2001, case presented by L. Tichy, *Pure Economic Loss Compensation from the Czech Republic*, in M. Bussani (ed.), *op. cit.*, 318.
[136] L. Tichy, *op. cit*., 370.
[137] Th. Kadner Graziano, Ch. Oertel, *German Legal Family*, in H. Koziol and R. Schulze (eds), Tort Law of the European Communities (Vienna/New York, Springer, 2008) 445.
[138] Th Kadner, Ch. Oertel, *op cit.*, 446.
[139] F. Werro, *The Swiss Tort Law Reform: A Possible Model for Europe?* in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 85.
[140] W. Posch, *Recoverability of Pure Economic Loss in Austria*, in M. Bussani (ed.), European Tort Law. Eastern and Western Perspectives, 301.
[141] W. Posch, *op. cit*., 301.

that of the injured party[142]. Thus, under Austrian law pure economic loss is excluded in cases of negligent causation of harm. The Proposal for a new Austrian law of obligation (Revised Working Group Draft of 2007) provides in the general part, under the heading on protected interests, that pure economic loss outside contractual relations is only protected by Article 1293 ABGB. Article 1298 ABGB further specifies what is meant under protection of pure economic interest: "Duties of care to protect pure economic interest consist particularly in a contractual relationship, in case of non–contractual liability, of declarations on which the contractual guarantee is recognizably dependent, and which are directed at arising the trust of the guarantee, as well as in the case of rules of conduct for the protection of patrimony"[143]. Therefore, it seems that in the German legal family pure economic loss is not as addressed via the rubric of absolute rights protected under the codes.

Pure economic loss is generally unknown in the French legal family. However, this does not mean that no compensation can be obtained for such damages under different headings.

In Italy**,** this issue is dealt with by courts admitting the extra-contractual protection of relative rights or claims under specific conditions[144]. According to Article 1223 Civil Code, compensation may be awarded for consequential damage and lost profit, if they are a direct and immediate consequence of the violation of an obligation[145]. For instance, there is case law awarding damages to investors relying on false advice (false accounts)[146].

French law, too, does not recognize a concept of pure economic loss. However, Articles 1382 and 1383 of the Civil Code are applicable to pure economic loss, since French tort law, with its general clause approach on damages, equates pure economic loss with property damage and personal injury. However, this is only a first sight impression: Despite the general rule on compensation for damages, French courts achieve different outcomes depending on the type of the harm by employing different concepts of fault for personal injury and property damage on one hand, and for pure economic loss on the other[147]. In cases of strict liability, it is not assumed that the tortfeasor has not taken all appropriate measures to avoid the harm, whereas in cases of other type of damages the standard of general duty of care is applied[148].

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[142] W. Posch, *op cit.*, 303.
[143] Translation provided by B.C. Steininger, *European Tort Law 2007*, 160.
[144] S. Troiano, *op. cit.*, 428.
[145] Cass. 24.6.1972, no. 2135, F I, 1973, I, 99., Cass. 15.5.1999, in RD 2000, 2, 167; both cases concern economic loss caused by the interruption of electricity supply (cases referred to by P.G. Monateri and A. Musy, in V.V. Palmer and M. Bussani (eds), *Pure Economic Loss in Europe*, 156-176).
[146] *IFC v. KPMG*, Trib. Torino, 18.9.1993, Giurisprudenza Italiana (1994), I, 2, 665 (case presented by P.G. Monateri and A. Musy, *op.cit.*, 458).
[147] G. Wagner, *Comparative Tort Law*, in M. Reimann and R. Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford, OUP, 2008) 1015.
[148] G. Wagner, *op. cit.*, 1016.

French legal doctrine accepts the *perte d'une chance* rule established in the *Lamoriciere* case in 1951[149]. However, the loss of chance is only compensated if the plaintiff proves that there was a serious and real chance for him/her to obtain a profit[150]. The Avant Project provides for compensation of future damage only when this is certain and is a direct consequence of the current state of the damaged thing (Article 1345)[151]. In the case of future damage, both French and Italian law require proof that the damage will occur with reasonable certainty in the future[152]. However, both systems recognize the possibility of compensation for loss of chance, as the probability of a favorable event[153]. This may be a present or future damage, but in the latter case the defendant must prove that the event would have occurred with reasonable certainty[154]. According to Article 1346 of the French Avant-projet, loss of a chance is a compensable damage.

Under Estonian law, property damage is divided into actual damage and loss of profit. The loss of profit 'is represented by the loss of an accrual that could probably have been achieved under the circumstances, especially as the result of the preparations carried out by the injured party and a loss of opportunity to make a profit'[155]. In Estonia, loss of income is not a direct damage, except if the entitlement to damages actually existed[156]. Under Estonian law[157], damages for loss of an economic opportunity are awarded under the heading of consequential economic loss[158]. Loss of income is defined by LOA (Law of Obligation Act, entered into force on July 1, 2002) Section 128 (4), as an income that a person would have probably received as a result of his or her acts if the damaging circumstances had not occurred[159]. However, in Estonian law some authors question whether it is correct to identify pure economic loss with loss of income[160]. Thus, in Estonia there is no agreement on the correct label for this legal category.

Hungarian civil law, as well, does not have a concept of pure economic loss, and therefore courts often refuse to award compensation for such damages[161]. However, under Hungarian law,

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[149] H.B. Schäfer and C. Ott, *The Economic Analysis of Civil Law*, p. 210.
[150] *Ibidem*.
[151] Translation of the *Avant Project* provided in German by Hans J. Sonnenberger, *Vorentwurf einer Reform des Schuldrechts und Verjahrungsrecht* (2/2007) 15 ZEuP, 633- 688.
[152] S. Troiano, *op. cit.*, 427.
[153] S. Troiano, *op. cit.*, 429.
[154] S. Troiano, *op. cit.*, 429.
[155] L. Tichy, *EC Tort Law and Eastern-European Legal Family*, in H. Koziol and R. Schulze (eds), Tort Law of the European Community, 533.
[156] M. Kingisepp, *Scope of Claim for Consequential Damage in Delict Law* (VIII/2003) Juridica International 203 ff.
[157] LOA Section 127 (2): "Damage shall not be compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose"(translation provided by Kingisepp, *op. loc. cit.*).
[158] M. Kingisepp, *op. cit.*, 203-204.
[159] Translation by M. Kingisepp, *op. cit.*, 204.
[160] *Ibidem*.
[161] Bírósági Határozatok (BH) 2000 no. 409 (Supreme Court): refusal to award compensation in case of acquisition of a mobile phone by the plaintiff, because the fixed line telephone service provider had often interrupted service supply, i.e. lack of continuity of service supply).

Article 359 (1) Civil Code could offer the legal framework for compensation in case of loss of a chance[162]. Interestingly, the Expert Proposal on the New Civil Code does not introduce a more pro-plaintiff approach on compensation for pure economic loss. On the contrary, it introduces the requirement of foreseeability, which will significantly restrict liability for consequential losses[163]. In line with this, the New Civil Code, enacted in November 2009, makes no mention of pure economic loss and loss of a chance. From the provisions on the extent of compensation (Section 5:502) and elements of harm (Section 5:503), it follows that under the new civil liability regime it will be difficult to obtain compensation for such damage. This is so because the tortfeasor is exonerated from compensation for the damage that was not foreseeable at the moment of the tortious action (Section 5:502 para. 2). As a consequence, it is expected that courts will have a restrictive interpretation of para. b of Section 5:503, which defines the unrealized patrimonial advantage (as element of harm) as consisting of: income, earnings and profit.

Neither the Romanian Civil Code nor legal doctrine deal with the issue of pure economic loss. However, the award of such compensation is not excluded, since compensation of damage is based on the principle of full reparation, regardless of whether or not the tortfeasor has foreseen the damage at the moment of the tortious behavior[164]. Damages cover both the effective loss (*damnum emergens*) and lost benefits (*lucrum cessans*)[165]. The subjective attitude of the tortfeasor does not matter. Liability to compensate damages is imposed in case of slight negligence as well.

Despite its structural conservatism, the New Civil Code is receptive towards the new regulatory needs of modern torts and thus has a liberal view on the extent of compensation for damage, which may offer proper ground for an evolving new body of case law on pure economic loss and loss of chance. Article 1.385 paras. 2-3 pleads for full compensation even for future damage, provided that its materialization is certain. Furthermore, compensation may cover also the income that could have been earned, but which the applicant could not obtain because of the tort. Para. 4 of Article 1.385 explicitly stipulates the right for damages in case of loss of chance to obtain an advantage. In this case, reparation will be proportional to the probability of obtaining the advantage, taking into account the circumstances of the case and the 'situation of the victim'.

The comparative assessment of the national systems shows that at the domestic level neither the doctrinal foundation nor the legal policy background of pure economic loss are suffi-

[162] Article 359 (1): "If the amount of damage cannot be - even partially - established, the court may oblige the tortfeasor to pay such damages which can ensure to the injured person full material compensation".
[163] Article 5: 516 (2) stipulates that "the tortfeasor does not have to compensate for the harm, in case he can prove that the occurrence of the damage was not foreseeable at the time of the tort. However, this rule does not apply in case of damages caused intentionally or by gross negligence".
[164] C. Stătescu and C. Bîrsan, *Drept Civil, Teoria Generală a Obligațiilor*, 160.
[165] Decizia nr. 417/1990, în Dreptul nr. 9-12/1990, 243.

ciently developed. We can state that under the jurisdictions analyzed pure economic loss and loss of a chance are not treated as independent civil law concepts and the courts do not qualify these losses as a compensable damage. The award of compensation for pure economic loss and for loss of a chance is justiciable by courts and the application of the causation rule is decisive for the outcome of the case. Therefore, in our opinion the DCFR should help legal-doctrinal clarification and offer new tools to the courts to overcome the obstacles of causation. As it stands today, the DCFR does not make any contribution in this regard, because it does not include pure economic loss and loss of a chance in the category of legally relevant damages and thus does not encourage the courts to recognize the loss of future income as a compensable damage. The DCFR does not acknowledge the concept of pure economic loss as such, and limits the possibility of award of compensation for pure economic loss to particular instances, such as: communication of incorrect information (Section VI.-2:204), breach of confidence (Section VI.-2: 205), dissemination of incorrect advice (Section VI.-2:207), unlawful impairment of business (Section VI.-2:208), restoring impaired natural resources (Section VI.2:209), fraudulent misinterpretation (Section VI.-2:210) and wrongful inducement of breach of contract (Section VI.-2:211). This piece meal approach is rather counterproductive for the process of achieving more uniformity in regulation and case law on pure economic loss in Europe. It rather discourages the Member States to open towards a general rule.

Taking into account the increasing number of cases where torts cause loss of a chance and pure economic losses, we think that their inclusion in the category of relevant legal damages would be justified from the point of view of regulatory needs, clearly specifying the requirements for such a damage.

However, the general approach of the DCFR to draft such rules that are mainly based on common core solutions derived from national tort laws may explain the silence of the DCFR on pure economic loss, because one cannot find a common denominator in Europe in favour of such damages. Thus, on the one hand one may consider the DCFR's approach a step backwards when compared with most reform projects that contain specific provisions on pure economic loss, such as the French, Romanian and Austrian (even if the latter has a restrictive approach[166]); on the other hand, one should not ignore that there is another group of countries, including Estonia (with its 2002 LOA), the Hungarian and Swiss draft codes, which do not acknowledge pure economic loss. The comparative study shows that continental Europe is (and is probably going to remain) divided on this issue.

[166] Article 1346 of the French Project; Article 3584 of the Project of the New Romanian Civil Code; Articles 1293 and 1298 of the Austrian reform project.

III. Meta-legal Formants

Law and economics argues that the problem with compensation of pure economic loss is not that it may become too onerous for the tortfeasor, but rather the high social costs that may exceed individual costs[167]. It is further argued that on the other hand an excessively restrictive approach would have low deterrent effect and generate inefficiencies[168]. The cases studied for the purposes of this comparative study reveals that it is the lack of tools for courts to handle such cases, rather than social justice considerations, the real cause of the refusal to award compensation for pure economic loss or loss of a chance. The specific causation tests developed by the courts do not allow for compensation in most of cases.

Case 3

Prevention and mitigation of damage

Mr. van Boorh built a 12.000 EUR protective wall around his property for protection against future flooding after experiencing two floods in previous years resulting from the construction works of his neighbour. He decided to build the protective wall after having his claim for full compensation of damage he suffered in the previous years rejected due to lack of mitigation of the damage caused by the flood. Upon completion of the wall, he sent the bill to his neighbour asking the costs of the protective wall. The neighbour refused to pay the bill, arguing that he did not cause any damage to Mr. Boorh's property.

DCFR

Under the hypothetical, the plaintiff would have to prove that the protective wall is an adequate alternative remedy for the prevention of damage that is impending and that it is reasonable for him to act accordingly. Sections VI.-6:301 and VI.-6:302 provide the legal framework of compensation for such costs. In addition, Section VI. 5:102 on contributory fault and accountability, read together with Section VI.-6:301 and VI.-3:302, offers a further tool to courts to bal-

[167] H.B. Schäfer and C. Ott, *The Economic Analysis of Civil Law*, 112.
[168] *Ibidem*.

ance the interests of the parties. Expenditures and other losses fall in the category of recoverable damage (Section VI.-6:302). In case of materialized damage, compensation applies for limitation of the extent or severity of damage (Section VI.-6:302). However, under the national legal systems the plaintiff would encounter difficulties in being awarded compensation in cases similar to our hypothetical, since continental Europe is sharply divided on the equitability of awarding compensation for such costs. The comparative analysis below assesses the potential of continental case law to require an active role for the injured person in cost-sharing, by promoting responsibility on the part of potential victims of torts.

National Laws

I. Operative Formants

It would be impossible to obtain compensation for prevention of damages or mitigation by a French court under Article 1386 Civil Code. According to the current case law, French courts do not award compensation for preventive damages[169]. In a recent case of 2006, the French Cassation Court took a firm position, based on social justice considerations, against the award of preventive damages[170]. In that case, a patient who had a pace-maker implanted in his heart underwent new surgery, and at the same time also had the device removed because the manufacturer had stopped marketing the pace-maker after the appearance of reports of cases of death and severe injuries due to the wire connection problem in the particular model. Cardiologists were informed thereon and more frequent check ups were recommended for the patient. Upon removal, it was established that the pace-maker was not defective, but the patient sued the producer for non-pecuniary damages for the stress suffered when the risk was discovered. The court of first instance held that the producer was liable for design defects, on the basis of the EC Directive on product liability. This was overruled by the Lyon Court of Appeal, in line with other case law and legal doctrine[171]. Subsequently, the Court of Cassation decided that since the damage was only hypothetical (*prejudice eventuel*), it provided no ground for action to the plaintiff. The Court held that the patient had to undergo surgery anyhow and the device was not defective, thus neither product liability law nor the general rules on civil liability applied (Article 1386 Civil Code).

[169] O. Moretau, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2007*, 283.
[170] Cass 1st Civ. 19 Dec 2006, Jp C2007, II, 100052 (2007) RTDCiv 351, case presented by O. Moretau, in H. Koziol and B.C. Steininger (eds), European Tort Law 2007, 282 ff.
[171] J.G. Viney and P. Jourdain, *Les conditions de la responsibilité*, 3r edn (Paris, LGDJ, 2006) 276.

This decision is not surprising: In 2003 the French Court of Cassation rejected claims for compensation for mitigation of damages in two cases[172] where it held that the tortfeasor has to compensate for all the losses and made clear that the damage must be measured solely by reference to the entire objective loss of the victim and should be equivalent to the entire loss suffered, but not hypothetical damage[173]. However, in our opinion the recent judgments of the Cassation Court do not mean that these issues could not be considered in the future under other rules, either as a causation issue, or as a matter of good faith (the notion of good faith was employed for similar purposes under French law by the Court of Appeal of Paris[174]).

In Germany, in a case concerning pollution by chemicals negligently released by a factory, the plaintiff, who lived in the immediate vicinity of the factory, worried about the risk of new incidents and built a gas-proof door into his house. The German Supreme Court (BGH) held that "infringements, which are merely anticipated (…) can only be contemplated as providing the legal basis for claim of damages, if the anticipated event is immediately imminent and if therefore, the precautionary measures can be regarded as an act aimed at averting an already existing damage"[175]. The BGH further distinguished between expenses incurred with regard to the specific event, which is expected to cause damage in the future, and measures taken to prevent the damage in general[176]. Costs incurred in the latter case are considered to fall outside causation. However, under German law the mitigation of damage is acknowledged under Section 254(2) BGB.

In Austria, damages for preventive expenses may be claimed under Article 1293 ff. ABGB if the measures are taken against specific tortfeasors[177], but not for general security measures or monitoring equipment installed to prevent future losses (for example, the costs for security measures/equipments in supermarkets[178]). The Austrian Supreme Court (OGH) established that the "costs of avoidance of an imminent, possible direct interference with a protected right, are compensable"[179]. The OGH rejected in the specific case the award of damages to the plaintiff, despite the fact that the preventive measures were taken as result of a previous criminal act committed in the past by the tortfeasor. The plaintiff installed an alarm device in response to earlier anonymous

[172] Cass 2ème civ (19 June 2003), No 931 FS-PRBI, *Dibaoui c/Flamans*, Bull Civ. II No. 203, Cass. 2 ème civ. (19 June 2003), No 930 FS-PBRI, Xhauflaire c/Decrept, D 2003 Jur 2396.
[173] S. Le Pautremant, *Mitigation of Damage: A French Perspective* (Jan. 2006) 55 ICLQ 299.
[174] Court of Appeal Paris (22 June 2001) D. 2002, 843, case presented by S. Le Pautremant, *Mitigation of Damage: A French Perspective* (2006) ICLQ, 207.
[175] Translation of the case provided by R. Zimmermann and J. Kleinschmidt, in B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds), *Digest of European Tort Law, Vol. 1, Essential Cases on Natural Causation* (Wien/New York, Springer, 2007) 173.
[176] R. Zimmermann and J. Kleinschmidt, *op. cit.*, 173.
[177] H. Stoll, *FS Lange*, 729.
[178] F. Harrer, in M. Schwimmann, *Praxiskommentar ABGB*, pp. 28-29.
[179] OGH JBL 1999, 49.

threatening phone calls, but the Court rejected the claim for lack of causation between anonymous phone calls and the acquisition of the alarm device by the plaintiff.

In Switzerland, courts award compensation for preventive expenses independently of fault[180]: on the basis of Article 679 Civil Code, the Swiss Federal Court awarded damages in a water pollution case, where it decided that, since water pollution was dangerous for the walls, the tortfeasor was obliged to provide for protective measures for the houses affected by water pollution[181].

In Hungary, preventive damages were awarded in a case for the construction of a side road in order to prevent the loss of value of houses in a touristic area, due to the acoustic pollution of the intense traffic in the city[182].

The Estonian Supreme Court rejected a claim for compensation for preventive expenses consisting in the cost of an insurance contract that the plaintiff concluded upon being threatened with murder by the defendant[183]. The Estonian Supreme Court based its decision on the analysis of the causal link between the criminal act of threatening one's life and the cost incurred because of the conclusion of an insurance contract and established that these costs are not a damage, but an investment for a future benefit, and that the threat of murder was not a necessary precondition for the conclusion of the insurance contract[184].

II. Descriptive Formants

Whereas Hungarian and Swiss law have specific provisions on mitigation and prevention of damages, and thus courts award compensation on the basis of the rules of Codes, in other countries case law either rejects such claims on the basis of the requirement of full compensation, such as in France, or because of the causation test, as in Estonia.

In French legal doctrine various arguments are employed against mitigation of damage. It is considered that justice and fundamental values should not be subordinated to the economic interests of the defendant[185], and that the fault of the tortfeasor entitles the victim to remain passive

[180] Tribunal Federal Suisse, 22 December, 1993. ATF 119 II 411. Case presented by B. Winiger and K. Krell in B. Winiger, H. Koziol and B.A. Koch, R. Zimmermann (eds), *Digest of European Tort Law, Vol. 1, Natural Causation*, 176-177.
[181] ATF 81 II 439/449, case presented by B. Winiger and K. Krell, in B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds), *Digest of European Tort Law, Vol.1, Natural Causation*, 177.
[182] Bírósági Határozatok (BH) 2000 no. 358 (Supreme Court).
[183] Criminal Chamber of the Supreme Court, 21 November 1995, no. III-1-75/95 (case presented and commented by J. Lahe and T. Tampuu, in B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds), *Digest of European Tort Law,Vol. 1, Natural Causation*, 241-242).
[184] J. Lahe and T. Tampuu, *op. cit.*, 241.
[185] G. Viney, *Rapport de Synthèse*, in *Faut –il moraliser le droit français de la réparation de dommage?* Centre de Droit des Affaires et Gestion, Faculté de Droit de Paris, V (21 Mar 2002) Petites Affiches No. 32.

and be compensated for the aggravation of the damage subsequent to the tort[186]. However, French law as well employs the concept of remoteness and contributory negligence and thus the requirement of full compensation is not an absolute obstacle for the award of compensation for prevention and mitigation costs[187]. The Catala Project provides for both mitigation of damage[188] and preventive compensation for loss[189]. However, prevention is not considered in the Catala Project as a function of civil liability[190].

Within the German legal family it is rather difficult to recover preventive damage, but not impossible. Such damages are regarded as a pure economic loss and these legal systems are reluctant to allow the recovery of preventive costs. However, in isolated cases the same result was achieved under the rules on unrequested intervention in other's affairs (Geschäftsführung ohne Auftrag, Article 419 BGB[191], Article 419 OR, Article 1035 ABGB) if the case stands the specific causation test applied. Therefore, it is difficult to obtain compensation for such damages in these systems if immediate interference with a legally protected object cannot be proven[192]. For this reason, preventive damages in cases similar to the hypothetical were not awarded in Germany. The Austrian Project on Tort Law only deals with the issue of mitigation of damage under the rule on 'contributory conduct and activity' and not with prevention in general: Article 1313 (1) provides for the right of the tortfeasor to obtain a reduction of the compensation to be paid if the victim fails to mitigate the damage[193].

The Swiss approach is very liberal in comparison to the German and Austrian ones: Article 679 of the Civil Code explicitly provides for the possibility of compensation for preventive measures against damage to property.

Hungarian tort law as well contains specific provisions on prevention and mitigation of damages, the two institutions being regulated within the same provision and under the same con-

[186] H. Muir-Watt, *La Modération des Dommages en droit Anglo-américain: Colloque, Faut –il moraliser le droit français de la réparation du dommage?* Centre de Droit des Affaires et de Gestion, Faculté de droit de Paris V (21 Mar 2002) Petites Affiches No 232, 45.
[187] Article 1150-1155 Civil Code.
[188] Article 1373: "When the victim through sure, reasonable, and proportionate means might have reduced the extent or the aggravation of the injury suffered, his failure to do so will result in a reduction of his award, unless it would be such as to violate his physical integrity".
[189] Article 1344: „Expenditure incurred for the prevention of imminent occurrence of some harm or aggravation of its effects constitute a compensable injury provided they have been reasonable committed".
[190] O. Moreteau, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2005* (Wien/NewYork, Springer, 2006) 274.
[191] BGH, 10 May 1960, VI ZR 35/59, BGHZ 32, 280; BGH, November 1979, VI ZR 254/77, BGHZ 75, 230. In both cases the issue of compensation was analyzed under *negotiorum gestio*, but rejected for lack of causation.
[192] BGH 14 January 1992, NJW 1992, 1043; BG 22 December 1993, BGE 119 II, 411.
[193] Text of the Proposal presented by B.C. Steininger, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2007*, 164.

ditions in Article 340 Civil Code[194]. However, Hungarian law established under this provision an obligation for the injured person to mitigate the damage and not a right for compensation in such cases. The New Hungarian Civil Code to the main extent follows the regulatory philosophy of the current law. Nevertheless, it does explicitly acknowledge the right of potential defendants to obtain compensation for costs involved with the prevention of damage (Section 5:503 included such damage under the heading 'elements of harm') in case of a pending danger of damage. Section 5:498 only stipulates for the possibility of a court order that prohibits the actions of the person causing the risk or obliges him to take measures in order to prevent the damage or to provide a guarantee in this respect. Furthermore, Section 5:500 provides an obligation for the damaged person to act as it would be expected under the given circumstance to prevent or mitigate the damage. If the plaintiff did not complain regarding this obligation, the tortfeasor will not have to compensate for the damage caused as result of such omission. Thus, the wording of the New Civil Code does not establish a clear right for compensation for costs involved with mitigation of damage. The provisions of the Code rather aim the risk-sharing between the tortfeasor and victim, and the responsibilization of the latter.

Today, Romanian tort law does not allow compensation for prevention and mitigation of damage. However, the same result may be achieved by application of the rules on contributory negligence or *negotiorum gestio*, but also under the heading of good faith, or unjust enrichment. Although under these rules a right to compensation could be established, it would be difficult for the plaintiff to fulfill the burden of proof.

The New Civil Code makes a significant step when acknowledging within the general provisions and on an equal footing with other elements of damages the right of the plaintiff to obtain compensation for the costs of prevention of damage and mitigation of damage (Article 1.385 para. 3). However, in case the victim contributed wilfully or by negligence to the causation or aggravation of the damage or did not prevent the damage, completely or partially, although it could have, the tortfeasor will not be held liable for such damage (Article 1.371 para.1). The same rule will apply also when the damage was caused by both the tortfeasor and the plaintiff and *force meajur*e or the acts of a third person for which the tortfeasor is not liable.

The solution of the Czech Civil Code is in line with the legal systems which allow compensation for prevention and mitigation of damage. Article 417 Civil Code provides for the obligation of the threatened person to take measures to avert the occurrence of the damage in a manner appropriate to the circumstances of the threat. The requirements of the right to compensation for

[194]Article 340: „The injured person is obliged for the purpose of prevention or mitigation of damages as it is expected under the specific circumstances. It is not compensable the damage that results from the non performance of this obligation" (translation by B.C. Steininger, in H. Koziol and B.C. Steininger (eds), *European Tort Law 2007*, 164).

preventive costs are enlisted in Article 419 Civil Code: The expenses must be reasonable and shall not exceed the total sum of the averted damage.

The comparative study shows that the main rule in continental Europe is that awards of damages for prevention and mitigation are limited, although the same result may be achieved under unjustified enrichment, or the rules on unrequested intervention in others' affairs. Therefore, the DCFR takes a significant step in including a right and obligation for prevention and mitigation of damage and provides further guidance when making the right to prevention subject to an affordability test common to both the injured person and the potential tortfeasor. With this approach, the DCFR goes a step further even in comparison to the national reform projects that acknowledge the right of the plaintiff to ask for preventive damages, but do not specify the requirements for the award of such damages. It is worth noting that the DCFR does not provide an obligation of the injured plaintiff to prevent and mitigate, but only a right to compensation for preventive costs and mitigation costs. Thus, the way this remedy is structured is compatible even with those national approaches (specifically the French one) which are reluctant to admit an obligation of prevention or mitigation of damage. This can be qualified as a successful compromise. However, the liberal approach of the DCFR is to some extent softened in Section VI-2:101 on legally relevant damage, which defines fairness and reasonableness of damage in a restrictive way: "for there to be a right for reparation or prevention, regard is to be had to (…) the proximity of damage or impending damage". Thus, despite the clear rules of the DCFR, it seems that the causation test to be applied by the national courts will continue to determine the outcome of the case on compensation for prevention and mitigation costs.

III. Meta-legal Formants

As the cases suggest, there is no settled case law in the legal systems compared on the award of preventive damages. Acceptance or rejection of compensation depends on the option for full compensation as opposed to deterrence. Arguments that focus on unjustified enrichment of the injured person, as under the Estonian case; supremacy of the traditional social justice considerations of tort law *versus* economic interests; fault of the injurer, which would justify the victim's passivity; consideration that 'it would be burdensome or unjust to someone to require him to advance money for mitigation of his loss when he cannot be certain whether he will be compensated"[195], as under French case law; these are some of the obstacles to recognition of prevention and mitigation of damages as legally protected damages. However, there are signs of a newer,

[195] Argument invoked under the French law by Rosenfeld and Bouchez, *Répertoire Defrénois,* 2003, No. 23, p. 1566, referred to by S. Le Pautremant, *Mitigation of Damage: A French Perspective*, 209.

more open policy towards the admissibility of the preventive expenses and mitigation costs, as can be seen in the reform projects. Last but not least, it is worth paying attention to one of the arguments in favor of mitigation of damages for non-contractual liability: Since the interests of the injured part cannot be isolated from the interests of society as whole and of the insurance industry, mitigation creates pressure on insurance premiums, which is bad for everyone[196].

We think that an obligation to prevent and mitigate damages would increase the deterrent effect of tort law and contribute to a more efficient allocation of resources in society.

3. Conclusion

3.1. Findings of the Research under the Hypotheticals

The categories of torts analyzed under the three hypotheticals face modern tort law with demanding questions. The hypotheticals are a testing ground for i) how the standard of liability in case of a classical tort (liability for immovables), which is perhaps one of the most developed liability rules of tort law, is continuously refined by the new regulatory needs framed by modern risk society, and how legal certainty can be developed in this field, either by statutory law or by case law; ii) how new categories of damages, such as pure economic loss and loss of a chance, have found their place in the settled system of protected rights and interest in continental tort law; and iii) how far regulation can foster '*responsibilization*' of the victim under a risk-sharing approach to tort law. These questions are closely interrelated and their interaction reveals the potential of judge-made law, which continues to be the engine of continental tort law, despite the ongoing efforts to modernize statutory law (Civil Code projects). The assessment of the various national approaches under the common core method reveals the constants and variables of the regulatory needs of these torts, and highlight the extent to which uniforms rules, such as the DCFR, can perform a gap-filing function for the case law.

The central finding of the comparative study under *Hypothetical no. 1* is that the classical divide among the legal families does not really matter in case law. National courts apply similar criteria of liability, regardless of the basis of liability, fault-based (Austria, Germany, Hungary, Estonia) or strict (France, Italy, Czech Republic, Switzerland, Romania). In almost all jurisdictions one may notice a clear tendency to shift the focus from the person of the tortfeasor to the thing that caused the damage. The courts converge with regard to the elements they consider for the definition of the defectiveness of the immovable (the road): the nature and purpose of the

[196] In this regard see: S. Le Pautremant referring to Chazal, *op. cit.*, and Aufert in (45/2003) *Droit et Patrimoine* 1933.

immovable, the state of its maintenance, its geographical location, its use and its risks. The DCFR is in line with this approach. The standard of liability employed by the DCFR reinforces existing trends in case law. This is mostly accomplished by the clear position taken by the DCFR in the qualification of the basis of liability as no fault. However, the requirements of liability are weakened by the cost-benefit test, although this is mentioned as only one of the criteria that should be employed when establishing the reasonable safety expectations of the injured persons. One may conclude that the provisions of the DCFR, although meant to be more plaintiff-oriented by opting for no fault-based liability, and to employ the cost-benefit test as a tool for greater legal certainty, may not be easy to handle by the continental judges and may not enhance legal certainty in this field.

Hypothetical no. 2 demonstrates the main difficulties the victims of torts may have in continental Europe in obtaining compensation for pure economic loss and loss of a chance. These are to be found in the extremely high burden of proof on causation, in those jurisdictions where courts qualify such cases as causation issues (Austria, Hungary, Romania, Estonia, Czech Republic, Italy); in the requirement to prove the certainty of damage that is almost impossible (France, Italy), or the lack of tools in the hands of the courts to assess such damages (France, Estonia). Moreover, the approach of the civil codes (Germany, Austria, Switzerland), which do not recognize the right to compensation for such damages as protected rights, is one reason why judicial actions for compensation of pure economic loss and loss of chance would fail in Europe. There are mainly two approaches in case law: that applied in the French legal family, under the general rules on compensation, with stricter standards than for other types of damages, and that in the German legal family, which employs the protected rights approach. Under both approaches the courts are reluctant to award compensation for such damages. However, in isolated cases the same outcome is achieved under different headings: loss of profit (Czech Republic), indirect damage as a problem of unlawfulness (Austria), consequential damage and lost profit (Italy), future damage whose occurrence is certain (France), loss of income (Estonia, Hungary).

The finding of the comparative study is that neither the doctrinal foundation nor the legal policy background of these two legal concepts is sufficiently developed at the national level in order to work as a suitable basis for new uniform rules, whether hard law or soft law such as the DCFR. For the reasons mentioned above, the national courts remain surprisingly reluctant to adopt a law-framing role, unlike in other areas of torts. It should be a signal for unification projects to assume a more effective role in this field, if legal convergence is the aim. The increasing number of cases stresses the existence of a strong regulatory need for these categories of damages. The lack of pro-active approach of the DCFR, under the shadow of keeping in line with

the converging approach of national laws that mainly reject the award of such damages, will foster neither legal certainty, nor legal progress. A general rule on pure economic loss is desirable, instead of the current approach under the DCFR of opening up the possibility of compensation for pure economic loss in particular cases, however without acknowledging the concept as such.

Hypothetical no. 3 raises the question of whether Europe is prepared for a stronger risk-sharing approach on tort law, instead of a risk-allocation approach, according to which the consequences of the infringement of a protected right or interest must be fully paid by the tortfeasor. The finding of the analysis is that case law is sharply divided on the matter of whether or not the victim should have any responsibility to act in order to prevent or diminish the consequences of the tortfeasor's act. There are courts which clearly reject such an obligation, by considering the costs incurred for prevention and mitigation as hypothetical damage for which no compensation can be granted (France), and those which admit it, but limited to immediately imminent damage that averts an already existing harm and direct interference with a protected right (Austria, Germany). There are also some jurisdictions where statutory law establishes clear rules on this matter (Hungary and Switzerland, Czech Republic) and fosters the development of a settled case law.

In such a regulatory environment, the drafters of DCFR opted for a pro - compensation compromise, which is compatible even with the French approach that strongly pleads for full compensation of the victim. The DCFR only regulates prevention of damages as a right and not as an obligation of the injured person. In addition, it gives room to the courts to refine the rule through the causation test to be applied at national level. Thus, the DCFR remain less ambitious than most of the Civil Code projects (Romanian, Hungarian, Austrian, and even the French Avant-projet) that regulate preventive damage and mitigation of damage both as an obligation of the victim to act and as right to obtain compensation. Therefore, although it is a significant step, the codification approach of the DCFR constitutes only a cautious starting stage of a process.

3.2. Critical Remarks on the Integrative Effects of the DCFR on Non-contractual Liability

The drafters of the DCFR aimed at developing rules with a triple function: (i) model rules for legislators; (ii) tools for private parties to use as soft law in developing the legal framework for their transactions, (iii) guidance for the courts. It seems that in the field of non-contractual liability the third function will be of major relevance and therefore the value and potential of the DCFR should in our opinion be assessed according to this function. This is so mainly for two reasons: First, tort law is a field where the parties cannot choose the law they wish to apply; secondly, the reform projects in Europe may soon become law (adoption of the new civil codes in

Hungary and Romania in 2009) and by the time the DCFR will develop into a policy or legal instrument at the European level the reform wave of tort law in Europe may be completed. The DCFR will not influence the future Civil Codes, but these will test its solutions. For this reason, although this report focuses on the compatibility and gap-filling capacity of the DCFR with national case law, the codification projects were analyzed as well.

An evaluation of the optimal regulatory level and the regulatory approach of the DCFR must necessarily consider the current divide between statutory law and judge-made law under the national codification approaches. The reform projects seem to keep the existing balance between statutory law and judge-made law in shaping tort law for the future. The architecture of the evolving new tort law as framed at the national level will continue to be judge-led. Therefore, the DCFR should carefully develop additional criteria to fill the gaps between case law and future statutory law, through tools that can be easily used by judges. Tort law needs system-neutral, reliable guidance, rather than principles and declarations. Our emphasis on the need for an instrumental role of the DCFR in assisting courts is based on our findings on the current state of judge-made law, not only on the evaluation of the future statutory law in Europe. Our assessment of the factors framing the divergent development of case law in the jurisdictions compared reveals that judicial culture and procedural tools in hands of the judges are the engine of development in tort law that confer dynamism on the law and ensure its adaptation to changing needs. A significant part of contemporary tort law in continental Europe is judge-made and will remain so in the future.

We would like to emphasize that the function of unified rules as an integrative instrument depends on the interplay of multiple factors framing tort law in continental Europe; thus, the value of the DCFR depends on how far it considers or avoids the main internal conflicts of tort law. There is a general tendency in European codification processes to re-subjectivize tort law in two ways: (i) through a return or preservation of the subjective standard of liability, or (ii) through the strengthening of the function of fault-based liability as a general rule, stressing the ancillary function of strict liability, limited to dangerous activities. This is true for the Central-Eastern European projects, such as the Czech, Romanian and Hungarian projects, but also for the Austrian, French, and Swiss ones, which are often used as models for the new codes. Contrary to these developments, case law on the issues analyzed in the comparative report shows a tendency to objectivisation of liability by the courts. The future function of the DCFR must be viewed considering these two diametrically opposed tendencies of codifications and judge-made law in Europe. The DCFR, as it stands now, is in line with the codification process and less with case law, and even when it does consider case law developments, it remains at the level of principles rather than

operative rules. Therefore, in light of the argument presented above, any future revision of the DCFR should perhaps consider a stronger function of the uniform rules as tools for judges. However, it would exceed the purposes of this report to evaluate how a set of general rules or principles could assist courts and what would be the ideal level of regulation. Current tort law, as developed by the courts, where liability ranges from no liability without fault to different degrees of strictness, does not provide legal certainty neither for the weak party, nor for the market. Therefore, solutions need to be found by unification projects in order to ensure a higher level of legal certainty in tort law.

The DCFR is a genuine attempt to find a new balance between the compensatory and preventive function of tort law. Yet, it seems that the DCFR does not restore the balance set by judge made-law between the increasingly market values-led approach of case law and social justice considerations.

The DCFR is based on risk sharing between the parties and social affordability. However, this weakens the primarily compensatory function of tort law that still dominates continental private law in legal doctrine and statutory law, whereas in case law we find a shift towards deterrence. Thus, we may conclude that the trends in case law and the DCFR converge, even though on the basis of different legal policy approaches. The DCFR reflects a much more neo-liberal regulatory approach that is increasingly influencing EU regulatory policy, rather than national case law. The DCFR envisages an active role for the individual in the market and in society, far from the paternalistic approach of the continental codes, whereas case law in Europe is still focused on social justice and is skeptical of a cost-sharing approach, especially in the French legal family. On the other hand, one should not ignore the fact that the provisions of the DCFR protect the individual in a risk-society (alternative causation, multiple tortfeasors, mass claims, right to prevent the damage and to obtain compensation). Also, the particular types of legally relevant damages (loss due to communication and reliance on incorrect information or advice, loss for breach of confidence, unlawful impairment of business, loss for fraudulent misinterpretation, loss due to inducement to non-performance of an obligation) significantly improve the position of individuals. A closer look at the regulatory approach of the DCFR shows that these novelties are not purely focused on the individual. The drafters were also careful not to jeopardize entrepreneurial freedom, which should be part of any regulatory policy of modern tort law. However, this should be done after an assessment of the economic and social conditionality of tort law in continental Europe (meaning the economic, social and cultural conditions, which strongly define the national legal cultures), in order to ensure social affordability of the risk-sharing approach of lia-

bility rules in a social environment characterized by increasing economic instability in which the neoliberal regulatory approach is challenged world-wide.

These findings do not diminish the merits of the DCFR and its shift of the conceptual focus from the tortfeasor to the victim of torts: Modern tort law should focus more on the victim and on compensation and less on the wrongdoer.

Comparing the values protected by the DCFR and the various reform projects in Europe, it is clear that the DCFR integrates the prevailing approaches and thus it is a significant step towards the enlargement of the scope of protected rights in continental tort law. However, a closer look at how these values are protected shows that the DCFR is more conservative than most continental case law and reform projects. It does not reflect the substance of existing case law, but provides guidance at the level of principles and values that should be protected by non-contractual liability. Codification of new values supports the development of tort law in those jurisdictions where compensation is limited to the infringement of an absolute right specifically enlisted in the Civil codes, but does not help in the other countries. A values-based approach should be formulated in general, abstract terms. An approach built on exemplifications would quickly become outdated in relation to evolving regulatory needs. Even today, the list does not consider important regulatory needs such as those related to private enforcement of competition law.

In addition, the DCFR does not offer further tools to courts to deal with the new rights and thus there is a risk that evaluation according to causation and accountability under domestic rules will lead to different outcomes. Furthermore, clarification of the legal-doctrinal foundations of the rules introduced by the DCFR would help the courts.

Thus, it remains to be seen whether the integration of almost all values protected in current case law and codes in Europe will be sufficient to approximate the differences in case law, even among legal systems belonging to the same legal family.

The findings of the comparative study on case law emphasize how important causation is in the application by courts of the same provisions, or different but functionally equivalent statutory rules. The most striking examples are those presented in the comparative study on pure economic loss, loss of a chance and compensation for preventive damages. The definition on causation proposed in Section VI.-4:101 will not approximate the national approaches on causation, because it does not touch upon the test of causation like existing EC law and other academic projects. Therefore, this definition it will not be a tool useful for courts.

National codification projects also do not contain rules on the causation test. It seems that causation remains a strong law-framing tool in the hands of judges, under which tort law will

continue to develop, related to more or less conservative national private law culture. However, continental case law shows that causation is far from working as an integrating factor within domestic law or even among jurisdictions belonging to the same legal family. For this reason, European initiatives for unification of private law should perhaps pay more attention to the effects of the specific causation rules. This does not mean that the time when causation will enter the domain of statutory law will come soon. Although the ground for this is not yet ready in Europe, uniform rules on causation may be a major integrating factor of tort law in the future. The attempt of the DCFR to deliver a normative concept on causation is welcome, but not satisfactory.

The conceptual structure of the DCFR brings little that is novel to European tort law culture. It could rather be considered as a restatement of existing case law under a minimal common denominator. The main rule remains liability for fault according to a reasonable care standard. This seems to be at first sight in line with the traditional concept of an objective standard of care. However, this standard is softened by a cost-benefit analysis and by a new concept of responsibilization on the individual, based on cost-sharing. The DCFR does not remedy the amorphous shape of strict liability and the lack of a unitary approach even within the same legal system or within legal families. The drafters of the DCFR opted for a neutral position on this matter, while regulating strict liability in a manner close to that of the German approach. The DCFR contains an exhaustive list of no-fault based liability cases, instead of a general rule that would work as an integrating element approximating national approaches. The DCFR preserves the current structure of tort law developed by case law, and thus would not cause systemic difficulties to the jurisdictions compared in this report. Unlike the *acquis communautaire*, the DCFR does not have a significant disintegrative effect on the structure and concept of continental tort law.

The rules on strict liability are heterogeneous in Europe, ranging from a general clause on liability for things to liability for dangerous activities. The differences reflect different policy approaches on individual and social responsibility. Therefore, attempts to unify strict liability are difficult. The comparative study on case law shows that strict liability is not necessarily stricter than fault-based liability. Therefore, the tendency towards a future re-subjectivisation of fault-based liability, backed by a restrictive approach on strict liability limited to dangerous activities, would definitely change the continental landscape of tort liability and could be a step backwards compared to the achievements of modern tort law as developed by the domestic case law of the Member States, on one hand, and by developments in European tort law framed by the *acquis communautaire*, on the other.

Strict liability mainly remains connected only to dangerous activities, whereas any activity that creates a risk should be assessed under strict criteria. The DCFR does not introduce any new

concept and gives room for "other types of strict liability" according to national choices. The standards set for harm-generating activities of the globalized economy are rather conservative. It seems that no agreement could be found on modernizing strict liability and this is a major gap of the DCFR, despite its achievements. Further action would preliminarily require clarification on certain major regulatory policy issues, such as: (i) should private law be primarily about individual responsibility, regardless of fault or non-fault liability?, and (ii) is still desirable to attach different values to fault-based and strict liability now that the development of domestic case law in Europe shows that there is no clear cut distinction between them, but rather there is one tort liability with different degrees of strictness?

From the point of view of terminology, the DCFR remains mainly within the traditional conceptual framework of domestic tort laws. This is not a positive development, since in the field of non-contractual liability, as we have seen, judge-made law has overcome the barriers imposed by the conceptual requirements of the codes and increasingly adopts a functional approach. This determines convergence of case law, reaching the same functional outcome under different legal rules in response to the same requirements of justice. This process would be more efficiently assisted by European initiatives if system-neutral concepts would be employed. Case law shows that the label of the legal rules does not really matter, since national solutions diverge or converge along criteria related to the functional prerequisites of tort law. The projects on unification of tort law in Europe should focus more on these prerequisites, since they remain the engine of development in tort law. The DCFR was not successful in this respect.

There is no doubt of the value of the extensive comparative law work undertaken by the drafters of the DCFR. Both national case law and statutory law are in a different degree in line with the rules codified in the DCFR, which reinforces new trends. The provisions assessed in this report may be implemented in the tort law culture of national jurisdictions with some difficulties, while the general principles of tort liability, as developed by case law, provide room even for those solutions which were not specifically accepted so far in the Codes or in case law, such as prevention of damages, mitigation of damage, pure economic loss, and loss of a chance.

Unjustified Enrichment

DCFR, Book VII, Unjustified enrichment

by

Jan Smits and **Vanessa Mak**

Summary: 1. Introduction. – 2. Three Cases. – Case 1. – Case 2. – Case 3. – 3. Critical Evaluation. – 3.1. The Taxonomy of Book VII Draft CFR. – 3.2. The Function of Unjustified Enrichment Law. – 3.3. The Function of the DCFR.

1. Introduction

The following contains an evaluation of Book VII (Unjustified enrichment) of the Draft Common Frame of Reference (DCFR).[1] It was written as part of the evaluation carried out by the Common Core of European Private Law group in the context of the *Joint Network on European Private Law* (CoPECL). The explicit aim of this evaluation is to put the black letter rules of the DCFR to the test by applying them to a set of three hypothetical cases. This case law-assessment should focus on the 'applicability and practicability' of the draft-rules proposed by the *Study Group on a European Civil Code* and laid down in the DCFR.

In the following, the uniform structure used for the work of the Common Core group is followed.[2] This structure consists of two parts. In part A, the three cases will be analysed by applying the DCFR at the level of the so-called operative formants (I), descriptive formants (II) and (where possible) meta-legal formants (III).[3] When it comes to the descriptive formants, we should be aware of the fact that it is difficult to give an overview of conflicting opinions as one can in national law: the rules of the DCFR were of course not yet put into effect, nor has there

[1] Ch. von Bar, E. Clive and H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition* (Munich, Sellier, 2008). The text is also available at <http://www.law-net.eu>.
[2] See for this method e.g. M. Bussani & U. Mattei (eds), *Making European Law: Essays on the Common Core Project* (Trento, Dipartimento di Scienze Giuridiche, 2000).
[3] See for this distinction R. Sacco, *Legal formants: a Dynamic Approach to Comparative Law* (1991) 39 Am. J. Comp. L. 1.

until now been much discussion of their substance. Part B contains a critical evaluation of the rules of the DCFR and some further observations on their use. As the observations in part B are applicable to the whole set of rules of Book VII, one can find part B after the discussion of the cases.

Before discussing the three cases, two general remarks have to be made. First, it is important to note that the present authors did not have at their disposal the (draft) comments and illustrations to the provisions of Book VII. What is more, and unlike it is the case with most other parts of the DCFR, the Study Group on a European Civil Code's volume on unjustified enrichment was not yet published at the time this evaluation was written.[4] This makes it difficult to adequately assess the relevant draft-rules.[5] Secondly, we like to emphasise that our evaluation is restricted to three cases only. These cases deal with problems that, in our view, are representative for unjustified enrichment law. Each case focuses on the question whether a claim should exist or not; we do not deal with the technical rules on e.g. reversal of enrichment (Chapter 5) and on defences (Chapter 6). As will be shown in section B of this contribution, we believe there is a good reason for this restriction.

2. Three Cases

Case 1

Building on another's land

Building contractor City Construction BV contracts with Lars for the building of several shops and houses on a site. Lars is unable to pay the bills. It then turns out that the land on which the shops were built is owned by Lars' brother, Sven. According to rules of property law, Sven has now become owner of the buildings constructed on his land, without having paid for them. Is City Construction entitled to recover damages from Sven on the basis of unjustified enrichment?

[4] The DCFR almost literally follow the *Principles of European Unjustified Enrichment Law* as drafted by the Study Group on a European Civil Code (revised version of 27 February 2006) and published at http://www.sgecc.net. Publication of these principles, together with comments, in the series on *Principles of European Law* (Sellier, Munich) is announced for March 2010: Stephen Swann and Christian von Bar (eds), *Unjustified Enrichment*.

[5] There are two sources that elaborate on the choices made in the DCFR: S. Swann, *The Structure of Liability for Unjustified Enrichment: First Proposals of the Study Group on a European Civil Code*, in R. Zimmermann (ed.) Grundstrukturen eines Europäischen Bereicherungsrecht (Tübingen, Mohr Siebeck, 2005) 265 ff. and E. Clive, *Unjustified Enrichment*, in A.S. Hartkamp et al (eds), Towards a European Civil Code, 3rd edn (Nijmegen, Ars Aequi, 2004) 585 ff.

I. Operative Rules

Unjustified enrichment law is an area for which it remains hard to find a 'common core' of European private law. The differences in approach found in the major legal systems in Europe (such as England, Germany and France) are great and can, in many instances, be traced back to one fundamental question: on what legal basis may a claim for unjustified enrichment be grounded?

It may be useful to note at this place that the solution proposed by the drafters of the DCFR does appear to build on a common core extracted from comparative research of national solutions. The underlying legal principles on which the systems base their specific rules are in fact quite similar and may provide a basis for formulating an acceptable model rule (see further under II). The basic rule, laid down in Art. VII – 1:101(1) of the DCFR, therefore, states quite generally:

> 'A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment.'

The main elements, therefore, are (i) that there has been an enrichment, which can be (ii) attributed to (iii) another's disadvantage, and (iv) that qualifies as unjust. This rule is fleshed out in the following provisions of Book VII, however also with a certain degree of abstraction remaining in the wording of the provisions. An explanation for that approach may be that the drafters have sought to find a compromise between the national law approaches, or even elaborate on them in order to find some sort of 'best solution', without being tied to any of the taxonomies particular to specific national laws.[6] This way, emphasis is put on what the systems have in common, regardless of the fact that great differences remain in the manner in which the general principle finds expression in national systems.

The sensibility of this approach may be questioned in light of the still very prominent differences between national rules on unjustified enrichment. As will be seen, the hypothetical claim by City Construction may be successful in one jurisdiction but not in others. We will now first discuss these national approaches before turning to the question how the DCFR would solve this hypothetical case.

[6] Cf. J.M. Smits, *A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference*, (2008) 19 Stellenbosch Law Review 179, 184.

A general classification of the way in which national legal systems in Europe deal with questions of unjustified enrichment distinguishes three different categories, or taxonomies.[7] A number of civil law jurisdictions, including the Netherlands, France, Italy and Spain, draw a distinction between undue payment (*condictio indebiti*) on the one hand, and unjustified enrichment on the other. Germany and England, by contrast, do not recognise a general action of unjustified enrichment but instead recognise several types or categories of unjustified enrichment claims. The underlying basis of these categories, however, differs. Where German law fits in with other civil law systems in which the ground for the claim is sought in the absence of a legal basis (*sine causa*), English law focuses on a positive reason to reimburse for unjustified enrichment and has centred its approach around 'unjust factors' such as mistake, duress, failure of consideration and illegality.

The hypothetical case of the brothers Lars and Sven finds its origin in Dutch law, where the actual case led to a landmark decision of the Dutch Supreme Court, the *Hoge Raad*, in 1959.[8] At that point in time, the Dutch Civil Code (or *Burgerlijk Wetboek*) did not contain a general provision on which a claim for unjustified enrichment could be based. The judgment of the *Hoge Raad* proclaimed that a cause of action not based on a specific provision of the Code, such as here a right to the reversal of an unjustified enrichment, would nevertheless be recognised if it was in accordance with the *system* of the Code and with provisions that did give ground to a legal entitlement of a similar kind.[9] On the facts of the case, this meant nevertheless that the claim was unsuccessful. Under rules of Dutch property law, a landowner could not be required to return, by the payment of a sum of money, the enrichment which he had enjoyed as a result of the possessor or the lessee of the land having effected attachments to it.[10] As the possessor or lessee did not have an action for unjustified enrichment, the *Hoge Raad* was persuaded that the claimant Quint, a contractor with the lessee, by analogy should also be denied his claim. The only exception, namely where the possessor had acted in good faith and was thus accorded the protection accorded to the bona fide possessor under the Code, did not apply.[11] After all, Quint had the opportunity to check the public registry in order to ascertain that the land on which he was building in fact belonged to his contracting party, Hubertus te Poel.

If the case of City Construction and Sven were to come before a Dutch court under the current Civil Code, the outcome of the case is likely to be different, though it still depends on

[7] Smits, *o.c.*, (2008) Stell LR, 182. See also R. Zimmermann, *Bereicherungsrecht in Europa: Eine Einführung*, in R. Zimmermann (ed), *Grundstrukturen, o.c.*, 23 ff.; D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, Cambridge University Press, 2002).
[8] *Quint v. Te Poel*, Hoge Raad 30 January 1959, NJ 1959, 548.
[9] *Quint v. Te Poel*.
[10] Artt. 658 and 1603 of the former *Burgerlijk Wetboek*, in force until 1992.
[11] Art. 659 of the former BW.

whether it fits in with the general system of the Code. The action for unjustified enrichment now has a legal basis in Art. 6:212 – introduced in the new Dutch Civil Code in 1992 – which provides that 'a person who has been unjustifiably enriched at the expense of another is obliged, so far as reasonable, to make good the other's loss, up to the amount of his enrichment.'[12] Though at this general, abstract level, the rule is the same as that of the DCFR, the application of the rule is still dependent on particular provisions of national law.[13] Arts. 3:121(2) and 7:216(3) of the new Dutch Civil Code explicitly allow the possibility of an action for unjustified enrichment to the possessor or lessee, without the previous requirement of good faith. Assuming that – in accordance with *Quint/Te Poel* – this approach can be applied by analogy to the building contractor, it is likely that City Construction's claim would now be successful. Crucial to this different outcome, it should be stressed, is that the good faith requirement in the relevant provisions of property law has been dropped.

As far as German law is concerned, a different route is followed. Though § 812 BGB may suggest differently, a unified law of unjustified enrichment never developed in German law.[14] Instead, several distinct legal bases exist on which a claim may be brought, found at different places in the second and third book of the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB). The two main categories are *Leistungskondiktion* (where the enrichment is based on performance or transfer without a legal basis) and *Eingriffskondiktion* (the defendant encroaches on the property of the other party).[15]

The hypothetical claim of City Construction does not fall into either of these main categories, but finds a solution in one of two other types of restitutionary claims recognised under German law. On the facts of the case, it is arguable that the defendant's property was improved at the expense of City Construction. A possibility for reimbursement for this type of enrichment exists under specific provisions of the BGB. For example, §§ 951, 946 and 994 BGB, which apply to developments on another's land,[16] grant to the possessor a claim against the owner for reimbursement of expenditure incurred. Since the provisions, however, only see on *necessary*

[12] Translation taken from E.J.H. Schrage, *Unjustified Enrichment; Recent Dutch developments from a comparative and historical perspective* (1999) XLVI Netherlands International Law Review 57, reproduced in J. Beatson and E.J.H. Schrage (eds), Cases, Materials and Texts on Unjustified Enrichment (Oxford, Hart Publishing, 2003) 58. Whether official recognition of a general action for unjustified enrichment came with the entry into force of this provision in the new Code, or whether the timeline starts with *Quint v. Te Poel* is a matter of debate; compare J.W.M.K. Meijer, *Ongerechtvaardigde verrijking. Een systematische analyse van het begrip ongerechtvaardigdheid, toegepast op kostenverhaal bij bodemsanering* (Den Haag, SDU, 2007) 13. See also E.J.H. Schrage, *Ongerechtvaardigde verrijking en restitution* (1993) WPNR 6118.

[13] See further below.

[14] Compare Beatson and Schrage, *o.c.*, 42; B.S. Markesinis, H. Unberath and A. Johnston, *The German Law of Contract*, 2nd edn (Oxford, Hart Publishing, 2006) 27 ff., 33.

[15] Beatson and Schrage, *o.c.*, 42.

[16] *Ibid*., 50.

expenses, they are unlikely to give legal back-up to City Construction's claim. The outcome of the case, therefore, will be different from Dutch law. The other restitutionary claim recognised in German law, but not applicable here, is where the claimant paid another person's debt.[17]

The divergence between national approaches becomes even more clearly apparent in the comparison with English law. Here, as in German law, no general action for unjustified enrichment is recognised. Instead the focus is on the position of the defendant and an action for unjustified enrichment lies in cases where a claim can be brought under one of the 'unjust factors' recognised by the courts.[18] The unjustness in the current hypothetical can be found in a so-called total failure of consideration on the part of Sven. In exchange for the building works carried out by City Construction, Sven has not provided any counter-performance or transfer, him being merely a third party to the contract between his brother and City Construction.[19] Under this model, therefore, the claim would be likely to succeed.

Turning to the DCFR, it can be seen that the solution adopted there seeks to blend the approaches found in national systems in an intricate way. On the one hand a general, abstract rule is taken as a starting point (Art. VII. – 1:101, cited above); on the other hand, the content and practical application of this rule is given further substance through a list of 'circumstances in which an enrichment is unjustified' (Art. VII. – 2:101). A general right to claim reimbursement for unjustified enrichment, thus, is combined with a list of specific instances in which enrichment is deemed unjust, reminiscent of the 'unjust factors' approach found in English law.[20] The factors adopted are much more abstract, however, and it is not altogether clear how these rules would affect the outcome of individual cases.

In the hypothetical discussed here, City Construction's claim seems to fulfil at least three criteria: there is an enrichment in the form of an 'increase in assets' on Sven's part (Art. VII. – 3:101 (1) sub a DCFR), to the detriment of City Construction, and with a sufficient connection between them. More problematic is the requirement that the enrichment was 'unjust'. Prima facie, a case may be made for the enrichment to have been unjustified, as none of the factors listed in Art. VII. – 2:101 applies to suggest differently. However, an important caveat must be made: the DCFR explicitly excludes from its application issues relating to ownership of immovable proper-

[17] § 812 (1) BGB.
[18] That this is still the predominant opinion was most recently confirmed in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558. See generally on unjustified enrichment in English law: *Goff and Jones on Restitution* (London, Sweet & Maxwell, 2007); G. Virgo, *The Principles of the Law of Restitution* (Oxford, OUP, 2006); P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, OUP, 2005).
[19] Total failure of consideration is not limited to the contractual context and a more accurate description may therefore be 'failure of the basis of the transfer'; compare Beatson and Schrage, *o.c.*, 296 ff. It is, however, still a limited category and it should not be confused with the general 'lack of *causa*' principle that underlies Dutch and German law on unjustified enrichment.
[20] Compare Smits, *o.c.*, (2008) Stellenbosch Law Review 184.

ty (see Art. I. – 1:101 (2) (f)). As seen above, such rules were decisive in solving the case under Dutch and under German law. With the DCFR not giving further guidance, the outcome of the case will therefore remain dependent on the application of rules of national law.

II. Descriptive Formants

An explanation for the diversity of national approaches to unjustified enrichment may be the residual nature of this particular area of the law, i.e. the fact that it is often invoked only in instances where the core parts of the law of obligations (contract and tort) do not provide a satisfactory solution.[21] With its function to fill gaps in national laws, and gaps in different legal systems naturally occurring in different instances, the divergence of national rules is but a logical consequence. Important to realise, however, is that the underlying principle steering the law of obligations, including the rules on unjustified enrichment, is a common principle shared by all of the legal systems under consideration. It is the principle that no one should be enriched at another's expense, already present in Roman law.[22] This common principle may, where appropriate, form the basis for further development of the law of unjustified enrichment in Europe.

In light of the divergence between existing regimes, as well as the reservations made with regard to the abstract nature of the DCFR's provisions on unjustified enrichment,[23] common sense suggests that it may yet be too early for an attempt at harmonisation of this area of European private law, letting alone whether there is in fact a need for it. The question regarding the basis of the doctrine of unjustified enrichment and the proper approach to be adopted—e.g. one resting on the *sine causa* requirement or one that takes 'unjust factors' as its lead—is of great importance, nevertheless. It is not only fundamental to potential future attempts at harmonisation of national laws, but also to the internal development of the doctrine in national systems. In this respect, we would say, the greatest challenges are yet to be found. In addition to this, two further remarks may be made.

First, the prime arena for the debate is currently in English law, where a struggle between different approaches can be observed in judicial opinion and in legal scholarship. Peter Birks, shortly before his death in 2004, famously reconsidered his stance on the matter, advocating the civilian *sine causa* approach.[24] In his opinion, the so-called swaps cases[25]—in which a

[21] Smits, *o.c.*, (2008) Stell LR 182-3; J. Gordley, *Foundations of Private Law* (Oxford, OUP, 2006) 417.
[22] Pomponius, *Digest* 50, 17, 206.
[23] See above.
[24] Birks, *o.c.*

restitutionary award followed from the courts' decision that the swap contracts under consideration were void—had pushed the law of unjustified enrichment in a new direction to which the civilian model fitted much better than the traditional 'unjust factors' approach. This suggestion, however, has so far not been taken up in the case law, with the House of Lords most recently affirming the 'unjust factors' approach in *Deutsche Morgan Grenfell*.[26] Arguably, apart from practical considerations relating to the facts of the case,[27] it is not 'the right time' for English law to make such a drastic departure from established doctrine.[28] Seeing that a different starting point in an enquiry on unjustified enrichment may make a substantial difference to the outcome of a case, it is perhaps wise to have a period of reappraisal of the existing approach before making radical decisions. The comparative law debate in light of the DCFR may in this respect provide inspiration.

Secondly, a point on the classification of unjustified enrichment claims. In Dutch law, which otherwise relies on a general basis for unjustified enrichment, a separate part of the Civil Code contains specific rules on undue payment (the *condictio indebiti*).[29] The DCFR does not make such a distinction but opts for a general regime for all types of claims. It may be, and is in any case a point for consideration, that there is no longer a need to deal with undue payment separately. The separate treatment in the Code appears to be a historical accident rather than a conscious decision: from Roman times onwards, this was the type of restitutionary claim laid down in codifications, with other actions developing only later in the case law.[30] On the other hand, there is a good argument in favour of holding on to a separate treatment of undue payment: this claim is the paradigm case of unjustified enrichment. In any legal system, one knows how to deal with it whereas the boundaries of other restitutionary claims are much less clear (see below, sub B).

A related question is how the basic rule, such as the one proposed in the DCFR, relates to restitutionary provisions found in other areas of law, e.g. the ones that occur with termination of contract (on which see Art. III – 3:511 ff. DCFR). They are probably best regarded as a *lex specialis* to the general provision and as such the primary source to revert to in the instances that they cover.

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[25] *Hazell v. Hammersmith & Fulham LBC* [1992] 2 AC 1, which was followed by a string of cases, including also *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349.
[26] See above. For commentaries, see Tariq A Baloch, *The Unjust Enrichment Pyramid* (2007) 123 LQR 636; Birke Häcker, *Still at the Crossroads* (2007) 123 LQR 177.
[27] Häcker, *o.c.*, 182.
[28] *Deutsche Morgan Grenfell*, Lord Walker at [155].
[29] Artt. 6:203-211 BW.
[30] Compare Ulpian, *Digest* 12, 6, 1.

III. Meta-legal Formants

The use that will be made of the provisions of Book VII is highly influenced by the function of the DCFR. The DCFR is not a fully-fledged legal system as we are familiar with at the national level. Instead, it serves several other purposes.[31] First, the European Commission can use it as a building block when revising the present *acquis* or when drafting new rules. Secondly, it can be used as an academic text for legal science and teaching. Thirdly, the DCFR can be a source of inspiration for the national courts, the European Court of Justice and for national legislators. All these functions imply it is a 'tool box': it is a non-binding instrument[32] that, where appropriate,[33] can be used by others. Whether this will in fact be the case, depends on the persuasive authority of its provisions: without legislators and courts actually using the DCFR, it will remain dead letter. It should be questioned whether the present structure and provisions of Book VII can optimally fulfil this function. We will come back on this in part B (Critical evaluation).

Case 2

Mistaken payment

Insurance company Global Life pays money to Mrs. Colonster, widow of Mr. Colonster, upon her deceased husband's life insurance policy. Shortly after the payment, it turns out that the policy had lapsed and the insurance company had not been obliged to pay. Global Life claims back the money on basis of unjustified enrichment. Is the company entitled to recover on that basis?

I. Operative Formants

Mistaken payment can be described as the paradigm case of the law of unjust enrichment. In any jurisdiction, one finds rules on how to deal with it, regardless the extent to which other restitutionary claims or even a general claim for unjust enrichment are recognised in that jurisdiction.

[31] Draft Common Frame of Reference, *o.c.*, 6 ff. See in more detail J.M. Smits, *The Draft Common Frame of Reference, Methodological Nationalism and the Way Forward* (2008) 4 ERCL 270 ff.
[32] Communication on European Contract Law and the Revision of the *Acquis*: the Way Forward, COM (2004) 651 final, OJ EC 2005, C 14/6, 6.
[33] Communication 2004, *o.c.*, 3.

Before trying to decide the hypothetical on basis of the DCFR, it seems useful to discuss how the case would be solved in some of the existing European jurisdictions. As we have already shown in our discussion of hypothetical I, civil law jurisdictions typically recognise a separate action for undue payment (*condictio indebiti*). Thus, in France, the *paiement de l'indu* (arts. 1235 and 1376 ff. Code Civil) and in Italy the *pagamento dell'indebito* (art. 2033 ff. Codice Civile) are the most common restitutionary claims. The same is true in the Netherlands, where art. 6:203 (1) Burgerlijk Wetboek provides the clear rule that 'anyone who has given a thing to another without legal ground is entitled to reclaim it from the recipient as a performance which was not due.' Hypothetical 2 would easily fit the conditions of these provisions. Thus, in Dutch law one would reason that the insurance company can claim back the money if there is no good ground for the payment. This is rather obvious in this case: it is not likely that the payment was intended as a gift. Any other reason for paying than the company's mistaken belief it had to pay on basis of the life insurance does not exist.

In German law, the mistaken payment is a typical case of the *Leistungskondiktion* ('performance condiction'), a case where the claim is brought to recover the performance from the other party. This *Leistungskondiktion* is laid down in § 812 s. 1 BGB: 'A person who obtains something by performance by another person (...) without legal cause is bound to give up to him.' In the hypothetical, the legal ground for performance does not exist and Global Life is entitled to recover the payment. This would only be different if the insurance company knew it was not bound to perform, but still did so (§ 814 BGB).[34]

An interesting question is whether the impoverished person had to be in error about the fact that performance was due. In the hypothetical, Global Life was clearly in error, but if this would have been less clear, civil law jurisdictions differ as to the outcome. In German and Dutch law, this is of no importance: the benefit can always be reclaimed unless the impoverished party actually knew it did not have to perform (cf. § 814 BGB). The Austrian ABGB (§ 1431) on the other hand explicitly holds that a mistake of the plaintiff when transferring the money is needed. In France, this is a disputed question.[35]

In English law, the case of mistaken payment has always received its own treatment, separate from other types of unjustified enrichment.[36] The action *for money had and received* lies for the recovery of money paid by mistake. In common law, the restriction has long been that one could not recover money paid under a mistake of law: if the defendant believed he was entitled to

[34] See on German law e.g. J. Beatson and E. Schrage (eds.), *Casebooks on the Common Law of Europe: Unjustified Enrichment* (Oxford, Oxford University Press, 2003) 42 ff. and M.J. Schermaier, *'Performance-Based' and 'Non-Performance Based' Enrichment Claims: The German Pattern* ERPL (2006) 363 ff.
[35] See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998) 547.
[36] See Beatson and Schrage, *o.c.*, 255 ff. for more details.

the money and the plaintiff thought he had to pay because of his wrong perception of the law, no claim was possible. This has changed with the decision of the House of Lords in *Kleinwort Benson*:[37] mistake of law is now also a ground for restitution. The hypothetical would count as a case of mistake in fact and there is little doubt that Global Life can recover the paid sum. The hypothetical even finds its origin in English law.[38] The prevailing English approach of identifying an unjust factor[39] does imply, however, that Global Life needs to show there is a specific unjust factor such as mistake.[40]

This overview of how national jurisdictions deal with hypothetical 2 reveals that the case is not only a common one, but also the archetype of a successful restitutionary claim: any existing legal system knows how to decide it. This leads us to the question how the DCFR will deal with the case of mistaken payment.

In the system of the DCFR, no distinction is made between undue payment and other types of unjustified enrichment. All requirements of the basic rule of art. VII. – 1:101 (1) DCFR[41] have to be met before a claim can be successfully brought: apart from the enrichment of the defendant, this enrichment should be unjustified, the claimant should suffer a disadvantage and there should be a sufficient connection between the enrichment and the disadvantage (so-called 'attribution'). Only in that case, the disadvantaged person is to reverse the enrichment. The DCFR follows the German approach in holding that mistake is no requirement for a successful action (cf. art. VII. – 2:101 (1) sub b).

In the case of undue payment, the requirement of enrichment is easily met. Art. VII. – 3:101 (1) makes clear that any increase in assets counts as an enrichment. This is a very broad definition; if applied to the hypothetical, the enrichment simply lies in the fact that Colonster received payment from Global Life. The requirement of disadvantage (art. VII. – 3:102 (1)) is the corollary of this: in case of undue payment, the disadvantage is with Global Life that did not have to perform *vis-à-vis* the other party. Also the requirement of attribution is laid down in the DCFR: art. VII. – 4:101 mentions several instances where there is a sufficient connection between enrichment and disadvantage. In the case of two parties – as in the case under review here – this requirement will again be met quite easily: Colonster is enriched by the transfer of an asset by Global Life (the case mentioned sub a in art. VII. – 4:101).

Given that three of the four requirements for unjustified enrichment are easily met in hypothetical 2, the true evaluation of whether an action should be available has to take place in

[37] *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 AC 349.
[38] *Kelly v. Solari* (1841) 9 M & W 54; 152 ER 24.
[39] See below.
[40] Cf. J. Edelman, *The Meaning of 'Unjust' in the English Law of Unjust Enrichment* (2006) ERPL 312.
[41] Reproduced above, A.1.

the context of the fourth requirement: the enrichment should be unjustified. Art. VII. – 2:101 reads:

> ‘(1) An enrichment is unjustified unless:
>
> (a) the enriched person is entitled as against the disadvantaged person to the enrichment by virtue of a contract or other juridical act, a court order or a rule of law; or
>
> (b) the disadvantaged person consented freely and without error to the disadvantage.
>
> (2) If the contract or other juridical act, court order or rule of law referred to in paragraph (1) (a) is void or avoided or otherwise rendered ineffective retrospectively, the enriched person is not entitled to the enrichment on that basis.
>
> (3) However, the enriched person is to be regarded as entitled to an enrichment by virtue of a rule of law only if the policy of that rule is that the enriched person is to retain the value of the enrichment.
>
> (4) An enrichment is also unjustified if:
>
> (a) the disadvantaged person conferred it:
>
> (i) for a purpose which is not achieved; or
>
> (ii) with an expectation which is not realised;
>
> (b) the enriched person knew of, or could reasonably be expected to know of, the purpose or expectation; and
>
> (c) the enriched person accepted or could reasonably be assumed to have accepted that the enrichment must be reversed in such circumstances.’

This provision makes very hard reading for anyone without a solid knowledge of the restitution law of several European jurisdictions. As discussed in the context of hypothetical 1, when it comes to the requirement of ‘unjustified’, the European restitutionary landscape is divided in two. On the one hand, we find most continental jurisdictions that ask whether there is a good reason for a party retaining the enrichment it received. On the other hand, there is English law, that is not interested in finding a good reason for a party to keep the benefit, but looks instead for a reason why the enrichment is unjustified. This unjust factors approach (made famous by Peter

Birks[42]) requires the claimant to give a specific reason for this unjustness of the enrichment (such as mistake in the hypothetical).[43]

Art. VII. – 2:101 DCFR seems to follow the English approach: it mentions factors that make the enrichment unjustified. Still, the drafting technique is more complicated. The provision mentions factors that make the enrichment justified (s. 1: 'unjustified unless') as well as factors that make the enrichment unjustified (s. 4). The list of factors is of a highly abstract character, which makes it difficult to establish where the common case of mistaken payment fits in. Apparently, the way of reasoning should be to investigate first whether undue payment is a case listed in section 1 sub a or b. Now that this is not the case, the enrichment through the payment can be qualified as unjustified. But it is not impossible that the situation could also fall under section 4: it is clear that if one receives a payment without a valid ground (as Colonster did in this case), she can assume to have accepted to reverse it. As a consequence, the enrichment is to be transferred to the disadvantaged person (art. VII. – 5:101).

II. Descriptive Formants

Unlike it is the case with other types of unjustified enrichment (cf. hypothetical 1), the case of unjust payment has received a similar treatment in most European jurisdictions. Despite differences in taxonomy,[44] the outcome of the case is quite similar across Europe. If one compares the national solutions with the DCFR, the most striking thing is that the DCFR has not carved out a separate place for undue payment. Instead, there is the list of rather abstract factors of art. VII. – 2:101. We find it hard to see what guidance this list can offer in practice. More important is that the aim of giving a list of unjust factors seems to be undone when these specific factors are supplemented with a more open-ended case. Section 4 sub c of art. VII. – 2:101 offers such a more general category by stating that there is an action for unjustified enrichment if an enrichment is conferred and the enriched person could reasonably be assumed to have accepted that the enrichment must be reversed in the circumstances of the case.[45] It seems to us that the extra requirement of this provision that the enrichment is conferred for a purpose which is not achieved or with an expectation which is not realised (and the enriched person knows about this) will not offer a real limitation in practice. Interestingly, the chosen formulation comes close to the

[42] P. Birks, *An Introduction to the Law of Restitution* (Oxford, Oxford University Press, 1985). Birks famously changed his mind in 2003, accepting the civil law approach of 'no basis' as the better one. See also above, A.1.
[43] See Edelman, *o.c.*, 309 ff. and S. Hedley, *'Unjust' at Common Law: So Many Concepts, So Little Clarity* (2006) ERPL 399 ff.
[44] On taxonomy, see also J. du Plessis, *Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Jurisdictions* (2005) 122 South African Law Journal 39 ff.
[45] Clive, *o.c.*, 597 explains the genesis of this article, but it seems to us that the end result is not successful.

idea of a 'quasi-contract', for long the basis of an action for unjustified enrichment in English law.[46]

Clive explains that undue payment is deliberately not mentioned separately in the DCFR. The draft explicitly rejects the argument that there is no point in complicating the rules for such a simple case by submerging it to more general rules which have to cater for unusual cases: 'this argument is unattractive in the context of a new code. It is normally better to begin at a general level and proceed to particular cases which may require special treatment. Moreover, it will be unduly optimistic in assuming that all cases involving repetition of the undue will be simple cases.'[47] In the view of the drafters, any other view would lead to 'an awkwardness in the law' and to difficulties in separating the two.[48]

What to think of this 'unitary' approach? There is every reason to be critical about it. If the DCFR were indeed a 'code', as Clive suggests, it would make sense to try to create a coherent system for rules on unjust enrichment (although even then it seems strange not to accept a separate place for undue payment, a category that any European lawyer would immediately recognise). In reality, a source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible.

III. Meta-legal Formants

See above, at case 1, for some general remarks.

Case 3

Supplying goods or services without a contract

Bruni Ltd. is in need of new office space. Michelle GmbH has several buildings available and after having inspected some of them, Bruni tells Michelle it intends to rent the building at King's Bridge 28. Before any formal contract is concluded, Michelle repairs doors and windows of the building and undertakes several other works. Bruni, having told Michelle that in order to conclude the formal contract it would need the approval of its board, makes use of the building

[46] *Moses v. Macferlan* (1760) 2 Burr. 1005.
[47] Clive, *o.c.*, 588.
[48] Clive, *o.c.*, 588.

for two months. Then, Bruni informs Michelle it has found other rental space and prefers to go there. Michelle claims compensation for the two months use of the building by Bruni.

I. Operative Formants

Starting work or supplying goods or services in the expectation that a formal contract will be concluded, is a well-known case in many legal systems.[49] The case is an interesting one in view of the different treatment it has received around Europe: both unjustified enrichment and contract have served as a basis for liability of the party that benefited from the work of the other. In a typical case, A has done work for B, which was intended to be remunerated at market rates,[50] but for one reason or another there is no binding contract and B refuses to pay. Such a situation can arise for several reasons. It could be that the parties did not make a formal contract or were acting during negotiations. It could also be that the contract was void or the party performing simply *thought* a contract would be concluded. Before looking at the DCFR, we will give some examples of how such a case is decided in national jurisdictions.

Under English law, the problem is known as that of anticipated contracts. The leading case is *British Steel v. Cleveland Bridge and Engineering*.[51] The plaintiff (British Steel) negotiated with the defendant (Cleveland Bridge) about the supply of steel nodes. During the negotiations, a letter of intent was issued by Cleveland Bridge asking British Steel to start the work and, while the parties were still negotiating, almost all the nodes were delivered but not paid for. British Steel then claimed payment, in the absence of a contract, on basis of the reasonable value of the nodes. Robert Goff, J. found reason to allow payment, but not on basis of a contract: the parties were still negotiating and it was impossible to say with any certainty what the terms of the contract would have been. The proper reason for allowing the claim was that both parties expected a formal contract to eventuate:[52]

> 'In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their

[49] See for more details e.g. Beatson and Schrage, *o.c.*, 194 ff., Steve Hedley, *Implied Contract and Restitution* (2004) Cambridge LJ 444 ff. and J.M. Smits, *The Principle of Unjust Enrichment and Formation of Contract: The Importance of a Hidden Policy Factor* (2006) ERPL 423 ff.
[50] Cf. Hedley, *o.c.*, 444-445.
[51] [1984] 1 All ER 504 (QB).
[52] [1984] 1 All ER 504, at 511, per Goff, J.

> expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we say now, in restitution.'

English law would thus base liability on unjustified enrichment.[53] Much earlier, Scots law had already gone the same path.[54] The other solution would be to base the decision in the law of contract. Hypothetical 3 is actually based on a Dutch case, where contract was indeed found to be the basis for compensating the 'enriched' party. The district court held there was a contract because, in the circumstances of the case, the performing party could rely on the other party to have agreed to the contract. The Dutch Supreme Court[55] approved of this and found a contract to be available even though it was very clear to the performing party that there was no approval of the board on the other side.

These cases illustrate how the principle against unjustified enrichment can be accommodated as a restitutionary claim in one jurisdiction and as a contractual claim in another.

How would the DCFR deal with the case of supplying goods or services without a contract? It seems to us that this is precisely the type of case dealt with in section 4 of art. VII. – 2:101. According to this provision, the enrichment is unjustified if three requirements are met. First (sub a), the disadvantaged person (Michelle) needs to have conferred the enrichment for a purpose which is not achieved or with an expectation which is not realised. We assume that Michelle did anticipate that Bruni would rent the premises and is thus disappointed in its expectations. Second (sub b), the enriched person (Bruni) knew or should have known of this expectation of Michelle. Third (sub c), the enriched person (Bruni) accepted or could reasonable be assumed to have accepted that the enrichment must be reversed in the circumstances of the case. This is where the main balancing issue lies: can Bruni indeed have been expected to accept the reversal of the enrichment? The factors relevant for this decision are not indicated in the provision (or elsewhere in the DCFR). We will show below (in part II) that several elements play a role in answering this question.

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[53] Also see *Regalian Properties plc v. London Docklands Development Corporation*, 1995 1 WLR 212, where the claim was denied, and for an early example, compare *Mathieson Gee (Ayrshire) Ltd. v. Quigley*, 1952 SC 38.

[54] *Watson v. Shankland* (1871) 10 M 142, a case decided by the Court of Session. The facts and decision are reproduced in Beatson and Schrage, *o.c.*, 78 ff.

[55] *WGO v. Koma*, Hoge Raad 27 January 1984, NJ 1984, 545. Also the Dutch case of *Katwijk v. Westdijk* (Hoge Raad 18 April 1969, NJ 1969, 336) falls into this category: the decision of the *Hoge Raad* that no compensation was allowed was highly criticized in legal doctrine.

II. Descriptive Formants[56]

If goods are supplied or services are performed, there is often an irreversible situation: one party received a benefit that can no longer be 'undone' and the only way to do justice is then to allow compensation to the other party. As we saw sub I, both the principle against unjust enrichment and the argument that parties had actually intended to provide compensation (a more contract-like way of reasoning) can be used to reason in favour of compensation. We believe it is insightful that each court in the two similar cases found a different basis for allowing the claim. Each of these courts thus emphasised an important aspect of this type of cases. The English court emphasised the aspect of unjustified enrichment: one party performed at the benefit of another party who did not do anything in return. The Dutch court put emphasis on the contract it found present in the circumstances of the case: even though there was no real consent, reasonable parties *should have* agreed to compensation for the work done in view of the reliance of one party and the work done on basis of that reliance.

In our view, it is vital to see that in each of these cases – and despite the qualifications given by the courts – the elements of enrichment, reliance and 'implied' consensus can *individually* not be the foundation for the obligations of parties. On the one hand, mere reliance ('contractual expectation reasoning', as Burrows calls it[57]) to legitimise the decision is not convincing as reliance as such can never be enough. If British Steel would only have negotiated, relying on a contract to be concluded, but would not have supplied the nodes, the court would certainly have denied the action. Thus, the argument that Cleveland Bridge *benefited* from the work done by British Steel, in combination with its reliance, is what stood at the basis of the obligation. On the other hand, mere enrichment of the party for whose benefit performance took place is not enough either: it needs to be supplemented with some reliance on being paid for, usually flowing from the pre-contractual dealings of the parties. If, in hypothetical 3, Michelle would simply have let Bruni make use of the building for two months, there would have been no need to compensate. The true reason for allowing a claim in these cases therefore lies in a combination of elements. They are 'in between' cases that cannot be fully explained by contract law – that has for a goal to protect the, in these cases non-existent, consensus – nor by specific restitutionary claims. It is the cumulative impact[58] of both reliance and benefit that explains why an obligation should arise: the party that has received a benefit would be unjustifiably enriched if

[56] The following is based on Smits, *o.c.*, 423 ff.
[57] A. Burrows, *Understanding the Law of Obligations; Essays on Contract, Tort and Restitution* (Oxford, Hart Publishing, 1998) 96.
[58] See for this term also S.M. Waddams, *The Relation of Unjust Enrichment to other Concepts*, in E.J.H. Schrage (ed.), Unjust Enrichment and the Law of Contract (The Hague, Kluwer Law International, 2001) 422.

a contract would not be found to exist. The principle that unjustified enrichment should be prevented thus plays a role as a policy factor in reasoning that there is a contract. What is qualified as a restitution case in one legal system can be a contract case in another.

III. Meta-legal Formants

See above, at hypothetical 1, for some general remarks.

It is well established around Europe how to deal with the case of supplying goods or services without a contract. Any national system would be able to find a just outcome, making use of the factors mentioned in II, above. When drafting European rules, one would expect these factors to be made explicit: in particular if one drafts rules that have to derive their authority from the fact that parties, legislators or courts have to *choose* these rules, it is essential that they are made as informative (and thereby as attractive) as possible. One of the ways in which they could be made attractive is by offering progressive solutions to relatively 'new' cases such as the one described in hypothetical 3. Information about how to solve this type of cases is often difficult to find in national jurisdictions. At the moment, the DCFR does not contain many of these progressive alternatives; the common case described here could do with a more elaborate treatment in the DCFR.

3. Critical Evaluation

In the above, we already made several critical remarks about Book VII of the DCFR. In this section, we will summarise this criticism by making three different points. First, the question of taxonomy is discussed. Secondly, it is questioned whether the DCFR fully grasps the function of the law of unjustified enrichment. Finally, we look into the function of the DCFR and what this function brings with it for dealing with restitutionary claims.

3.1. The Taxonomy of Book VII Draft CFR

According to the drafters, the model rules contained in the Draft CFR are based on a

comparative analysis of the laws of the member states and of the European Union.[59] It is suggested that in case of diverging solutions, the Draft CFR takes a middle road.[60] It is difficult to assess what this middle road consists of as long as the comments to the provisions are not available. However, on basis of the text of the provisions we can conclude several things about the system of unjustified enrichment as such.

First, if compared with national systems of enrichment law,[61] it is clear that the Draft CFR does not follow any of the existing national taxonomies. It turns away from the two-tier structure in civil law jurisdictions of undue payment (*condictio indebiti*) on the one hand (cf. arts. 1376-1381 Code Civil, 2033-2040 Codice Civile and 6:203 Dutch BW) and other enrichment claims on the other. The German distinction between the *Leistungskondiktion* and the *Nichtleistungskondiktion*[62] is not followed either. Instead, the DCFR offers an integrated system in which all enrichment claims are governed by a set of uniform requirements.[63] There is one exception: the restitutionary effects of avoidance and termination of contracts are laid down in the arts. III. – 3:511 ff. These provisions repeat[64] that a party is entitled to claim restitution of benefits conferred under the contract before avoidance or termination.

We doubt that this 'new' taxonomy of the DCFR is an attractive one. According to one of the drafters, the aim of the rules is 'to lead the reader gently into the subject, leaving complex qualifications and refinements until later'.[65] When reading the present draft, we are not at all certain this will be the impression of the reader. One reason for this was already explained above (see hypothetical 2): as far as we know, any European legal system has a separate place for undue payment. Not to mention undue payment as a separate category in a text that should derive its authority from others using it seems unwise.

Secondly, we must criticise the very broad playing field for unjust enrichment: in the DCFR, any increase in assets or decrease in liabilities counts as enrichment (art. VII. – 3:101). This means that enrichment is not a normative concept: any change in someone's financial position as a result of the act of another can count as an enrichment. A contracting party that was delivered a good is seen as an enriched party (as is the party that received the price). Even the

[59] Draft CFR, *o.c.*, 12.
[60] Draft CFR, *o.c.*, 12: 'as far as there are differences between the underlying values in individual jurisdictions, or between the Member States' laws and EC law, the DCFR mediates between them and takes a balanced position.'
[61] For overviews, see D. Visser, *Unjustified Enrichment in Comparative Perspective*, in M. Reimann and R. Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford, Oxford University Press, 2006) 969 ff. and D. Visser, *Unjustified Enrichment*, in Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law (Cheltenham, Edward Elgar, 2006) 767 ff.
[62] See for an overview e.g. J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, (Oxford, Oxford University Press, 2006) 420.
[63] Swann, *o.c.*, 275.
[64] Cf. arts. 9:307-309, 4:115 and 15:104 PECL.
[65] Clive, *o.c.*, 587.

house-owner who is confronted with graffiti painted on her walls is enriched in the terminology of the DCFR.[66] Although we do see that a legal text should to some extent contain technical rules, this use of the term enrichment seems far apart from what even most lawyers would consider as enrichment.

Thirdly, the DCFR adopts the approach of identifying factors that make the enrichment either justified or unjustified (art. VII. – 2:101). Apart from the complicated drafting technique and the abstract character of these factors, we question whether this is the best way of structuring this area of the law. The unjust factors approach is heavily criticised in English law; in 2003, Peter Birks explicitly adopted the continental approach of only allowing a claim in case of enrichment without a legal basis.[67] The continental approach has the advantage that it adopts the uniform criterion of whether there is a legal ground for the defendant to retain the benefit. The unjust factors approach lacks this unified structure: the factors are very different.[68] We agree with Zimmermann's remark that 'it is hardly conceivable that a legal system engaged with the task of rationally reorganizing its law of unjustified enrichment should take its lead from English jurisprudence.'[69] The continental approach, moreover, appears to have the support of the European Court of Justice, as evidenced by its recent case law.[70] According to the Court: 'legal redress for undue enrichment, as provided for in the majority of national legal systems, is not necessarily conditional upon unlawfulness or fault with regard to the defendant's conduct'; on the other hand, 'in order for an action for unjust enrichment to be upheld, it is essential that there be no valid legal basis for the enrichment'.[71] It makes sense, not least from a viewpoint of applicability (see point 3 below), to reconsider the provisions of the DCFR with this in mind.

3.2. The Function of Unjustified Enrichment Law

The drafters consider the DCFR as a coherent system in itself: they have tried to create a legal system that is as consistent as a national jurisdiction. Within that system, the place for unjust enrichment is clearly defined. The question is whether this is completely in line with the role that the law of unjust enrichment often plays.[72]

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[66] Clive, *o.c.*, 591.
[67] P. Birks, *Unjust Enrichment* (Oxford, Oxford University Press, 2003) 87 ff.
[68] See S. Meier, *Unjust factors and legal grounds*, in D. Johnston and R. Zimmermann, Unjustified Enrichment: Key Issues in Comparative Perspective (Cambridge, Cambridge University Press, 2002) 37.
[69] R. Zimmermann, *Unjustified Enrichment*, (1995) 15 Oxford Journal of Legal Studies 416.
[70] Case C-47/07 *Masdar (UK) Ltd v. Commission* [2008] ECR I-9761, approving Case T-333/03 *Masdar (UK) Ltd v. Commission* [2006] ECR II-4377.
[71] *Ibid*. at [45]-[46].
[72] See in more detail Smits, *o.c.*, (2008) Stellenbosch Law Review 179.

We believe that restitution law differs in one important aspect from other parts of the law of obligations. While contract law and tort law are more or less coherent sets of rules, the law of unjust enrichment is much less coherent. As Gordley puts it: the law of restitution does not rest on a coherent principle, but on 'the need in disparate cases to fill the gaps left by other branches of the law.'[73] The traces of this *residual* character of restitution law can be found in all major jurisdictions. In Germany, the typology of two types of enrichment claims is for example not seen as exhaustive: there are other cases in which restitutionary claims should be allowed and it is difficult to structure these other cases in a consistent way. English law struggled for a long time with finding a proper place for the various enrichment claims. And in many jurisdictions there is an enduring struggle about the extent to which the enrichment action is a subsidiary one vis-à-vis contractual claims and claims in tort.[74] These are in our view signs of the unclear place of unjustified enrichment in private law as a whole. It fills the gaps left open by other branches of the law.[75]

If an important function of enrichment law is to correct and to supplement the other sources of obligations, will it then be possible to harmonise this area of the law? This is dependent on what we mean by harmonisation. If harmonisation means that existing national legal systems are replaced by a binding European code, it is certainly possible to carve out a proper place for enrichment law. In a well worked out system of obligations, the supplementing role of the enrichment claim can be properly defined – as it is now reasonable well defined in most national jurisdictions. But such full harmonisation is not the aim of the Draft CFR. As we saw before, the Draft CFR will primarily be used as a toolbox for new European legislation, as source of inspiration for national courts and legislators or as an optional code. In all these varieties, the so-called *multi-layered structure* of European private law will be reinforced: present efforts towards the harmonisation of private law do not lead to an elimination of national jurisdictions, but to a continuous *living together* of European and national rules. This prompts the need to think about which rules serve a certain purpose better at the European or at the national level. If large parts of enrichment law serve the function of correcting and supplementing the existing law of obligations, this function is in our view best fulfilled at the national level.[76] The way in which the principle against unjustified enrichment is applied is so dependent on the internal structure of a national legal system (the way in which the sources of obligations communicate with each other) that it is

[73] Gordley, *o.c.*, 417.
[74] Cf. H.J. van Kooten, *The Structure of Liability for Unjustified Enrichment in Dutch Law, with References to German, French and Italian Law*, in Zimmermann (ed.), Grundstrukturen, *o.c.*, 221 ff.
[75] This also explains why it is difficult to find a normative base for unjustified enrichment: see Jennifer M. Nadler, *What right does unjust enrichment law protect?*, (2008) 28 OJLS 245 ff.
[76] The obvious exception concerns rules that relate directly to the restitutionary effects of avoidance and termination of contracts. Another possible exception concerns restitutionary claims in European competition law.

almost impossible to have one ideal set of European principles. Stephen Swann employs the wording of 'constructing a castle in the air' as long as there are no common foundations underlying the European law of obligations.[77]

Does this mean one should not incorporate rules on unjustified enrichment in the CFR? This would go too far. There certainly is a need to deal with the restitutionary effects of avoidance and termination of contracts (now laid down in the arts. III-3:511 ff.). But outside of this area, the CFR should not offer a fully-fledged self-contained and self-referential[78] legal system on restitution as we know in national legal systems. In view of the function of the CFR as a *toolbox* for European and national legislators and courts, it should be enough to state the principle against unjustified enrichment. Interested parties can then use this principle as an *argument* whenever necessary. This means it is too early to draft detailed rules.

3.3. The Function of the DCFR

Finally, we repeat that the success of the DCFR is completely dependent on its use: without the European and national legislator and courts using it as a source of inspiration or contracting parties using it as an optional instrument, it will remain dead letter.[79] It is the persuasive authority of its provisions that provides the DCFR with authority.

We question whether the present structure and provisions of Book VII can optimally fulfil this function. As it is not likely that this part of the DCFR can function as an optional instrument freely chosen by the parties themselves, the drafters should have focused on offering an attractive set of rules that can be of use for legislators and courts. We have shown in the above that the present set of rules is not the best one to conceive of. A successful source of inspiration should offer model rules that can be easily transposed into existing jurisdictions. The way in which Book VII is now drafted makes this very difficult: any other solution but to accept the set of rules as a whole seems not feasible.

[77] Swann, *o.c.*, 268 ff.
[78] P. Legrand, *Against a European Civil Code* (1997) 60 MLR 45.
[79] Also see N. Jansen, *The Authority of the DCFR*, in W. Micklitz and F. Cafaggi (eds), After the Common Frame of Reference: What Future for European Private Law? (Cheltenham, UK; Northampton, MA, US, Edward Elgar, 2010), chap. 8.

Acquisition and Loss of Ownership of Goods

DCFR, Book VIII, Acquisition and loss of ownership of goods

by

Lars van Vliet

Summary: 1. Three Cases. – Case 1. – Case 2. – Case 3. – 2. Critical Evaluation.

1. Three Cases

Case 1

Sale out of a bulk

A sells 10 tons of wheat to B. At the time of the sale the seller A has 30 tons in a silo on his premises. B prepaid half of the purchase price. While the wheat is still in the silo A is declared insolvent. Did B become owner of 10 tons of wheat so that he can revindicate his wheat from the insolvent's estate?

1.1. Introduction

The case focuses on bulk sales because, inspired by the UK Sale of Goods Act 1979 the DCFR rules chose to adopt a special rule for bulk sales which under certain circumstances gives the buyer a co-ownership share in the bulk. To a certain extent it solves the problem that according to the principle of specificity ownership of an unascertained, unspecified, quantity of things

cannot exist. Without special legislation ownership of a certain quantity from a larger bulk cannot pass to the buyer before physical segregation and appropriation to that buyer's contract.

1.2. DCFR

For the transfer of ownership of goods the DCFR has chosen for a so-called *traditio* system. In principle ownership passes only after delivery or an equivalent to delivery (Art. VIII.-2:101(1)(e)). At the same time it gives the transferor and transferee the possibility to opt out of this and choose a different moment on which ownership should pass. They are able to *postpone* the passing of ownership but they can also agree to let ownership pass *before* delivery of the goods. In continental *traditio* systems the latter agreement is often called *constitutum possessorium*. For the sake of clarity I will henceforth use this term. The *traditio* system is laid down in the following requirement for transfer:

VIII.–2:101(1)(e): 'there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery.'

The DCFR does not contain an explicit reference to *constitutum possessorium*, but the Comments[1] make clear that (1)(e) does not only refer to postponement of passing of ownership, used in for example a retention of ownership clause, but that is also covers *constitutum possessorium*.

The DCFR also knows the principle of specificity. In the above case this principle would normally preclude any passing of ownership before physical separation of the goods destined for the buyer (appropriation in the terminology of the UK Sale of Goods Act 1979).

VIII.-2:101(3): 'Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. Where goods form part of an identified bulk, VIII.–2:305 (Transfer of goods forming part of a bulk) applies.'

[1] VIII.–2:101 Comment A (General), (a) Preliminary introduction, Terminology.

The DCFR, inspired by the 1995 amendment of the UK Sale of Goods Act 1979, adopted a special regime for sale out of a bulk which under certain circumstances gives the buyer a co-ownership share in the bulk. Comparable to the Sale of Goods Act 1979 the DCFR confines the co-ownership regime to cases in which the 'bulk' is identified, that is to say, in which the parties to the contract have stipulated that the goods to be delivered should come from this particular bulk only. In the DCFR this is to be found in art. VIII.-2:305(1):

'For the purposes of this Chapter, "bulk" means a mass or mixture of fungible goods which is identified as contained in a defined space or area.'

The equivalent provision of the Sale of Goods Act is section 20A(1)(a):

'the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties […]'

The rules are not an exact copy of the relevant sections of the Sale of Goods Act 1979. There are two important differences between the DCFR rules and the Sale of Goods Act. First, under the Sale of Goods Act the buyer out of a bulk receives co-ownership only if and so far as he paid for the goods. The DCFR rules give co-ownership irrespective of payment. Second, the DCFR rules operate within a *traditio* system whereas the transfer system of the Sale of Goods Act is a *consensual* system.[2] In a consensual system such as the Sale of Goods Act in principle no delivery is needed to transfer ownership. This leaves a lot more scope for application of the co-ownership regime, whereas under the DCFR it can apply only if the parties opted out of the *traditio* system.

Application of the DCFR rules in our case would not pass ownership to the buyer before delivery of the goods to him. The default rule is that ownership passes upon delivery. The special co-ownership regime of the DCFR comes into operation only if the parties agreed that ownership should pass before physical delivery. This is not explicitly laid down in the DCFR, but it can be inferred from art. VIII.-2:305(2):

If the transfer of a specified quantity of an identified bulk fails to take effect because the goods have not yet been identified in the sense of VIII.–2:101 (Requirements for the transfer of ownership in general) paragraph (3), the transferee acquires co-ownership in the bulk.

[2] L. van Vliet, *The transfer of moveables in Scotland and England* (2008) 12 EdinLR 173-199.

This is an important difference in comparison to the system of the Sale of Goods Act 1979. Despite having prepaid half of the purchase price the buyer does not receive any co-ownership share.

1.3. The National Legal Systems

I. Operative Formants

English Law

The transfer system of the UK Sale of Goods Act 1893 and the new Sale of Goods Act 1979 is a consensual system. Section 17(1) contains the principal rule on the passing of ownership, or to use the Act's own wording 'property'):

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

However, in order to categorise the Act's transfer system from a comparative law perspective, it is necessary to focus on the default rule rather than the rule which the Act happens to set up as the primary rule. The default rule – the rule which applies in the absence of the parties' express or implicit intention – is to be found in section 18. Rule 1 of section 18 provides that:

Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 5(1) adds:

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

These rules accord with the cases preceding the 1893 Act and codify the system of consensual transfer.

Under sections 20A and 20B Sale of Goods Act 1979 the buyer becomes co-owner of the bulk for the quantity paid by him. In our case 1 he acquires co-ownership for a quantity of 5 tons. Different from the DCFR rules payment is needed in order to acquire a co-ownership share. On the other hand, because the Sale of Goods Act's default rule is not passing of ownership upon delivery but rather passing of ownership when the contract of sale is made, the co-ownership regime does not depend on the parties' having agreed on passing of ownership before delivery. If the seller is declared insolvent after the buyer has become a co-owner of the bulk, the buyer still has the right to acquire individual ownership of specified ascertained goods.

Dutch and German Law

Under the Dutch and German transfer systems, which are both *traditio* systems, the principle of specificity requires that it be exactly known which 10 tons belong to the buyer.[3] The default rule is that physical delivery is needed in order to transfer ownership. This rule can be set aside by the seller and buyer by opting for a transfer of possession by way of *constitutum possessorium*. However, in our case this would not help, as no transfer of unspecified generic goods is possible. Ownership cannot pass until the goods are physically separated from the bulk or until the bulk is reduced so that no more than 10 tons is left. If this separation or reduction leading to specificity of the goods takes place on or after the day on which the seller is declared insolvent, the buyer can no longer acquire ownership. All the requirements of a valid transfer should be met before the day on which the seller is declared insolvent.

French Law

Under the French consensual transfer system ownership of goods sold in principle passes to the buyer at the moment the contract of sale is made. However, because of the principle of specificity, ownership cannot pass before the goods are identified. In our case ownership cannot pass before 10 tons are separated from the bulk and destined for delivery to the buyer. Normally such

[3] Dutch law: HR 12 January 1968, NJ 1968/274 (Teixeira de Mattos); German law: BGH 3 July 2000, II ZR 314/98, NJW 2000, 2898; MünchKomm BGB/Oechsler (2004), Anh §§ 929-936 (Sicherungseigentum – Sicherungsübereignung), Rdnr. 5-7.

separation takes place at the moment of, or right before, delivery to the buyer. As a result, in bulk sales ownership passes at the same moment as in a *traditio* system.

Cass. com. 12 April 2005, (*Reza Gem v Lafont (administrator for Chaumet et cie)*)[4] was about the sale on approval of precious stones. Here the Supreme Court stated that ownership could pass only upon identification of the stones which the buyer wished to keep. In Cass. civ. 1e 19 February 2002, (*Balat and Lauzeral v Pépinières Boissay and Vinceneux*)[5] a hort nursery Boissay sold and delivered a number of plants to another hort nursery called Lauzeral. The claimants asserted that ownership and hence risk in the goods would pass to them only after counting and weighing of the goods and not at the moment the contract of sale was made. The Supreme Court held that since certain plants had been delivered and received by the buyer, ownership (and risk) had passed at the moment of delivery and receipt.

In French law the buyer in our case 1 would not acquire ownership. Ownership of 10 tons could have passed only after physical separation from the bulk. Moreover, if before identification of the goods the seller is declared insolvent ownership does not pass to the buyer upon identification.

II. Descriptive Formants

All national legal systems described here (and also the DCFR) know the principle of specificity according to which a proprietary right can exist only in a specific thing. Since a proprietary right forms a relationship between a person and a specific thing no-one can have a proprietary right if he cannot pinpoint the exact thing or things he owns. As a result, ownership in our first case cannot pass until physical segregation. In the United Kingdom it was a decision of the Dutch Rotterdam District Court[6] that caused concern among commodity traders and led the English and Scottish Law Commissions to issuing a report[7] in which an amendment was proposed. Many traders in bulk goods had the common misunderstanding that they received ownership of bulk goods at the moment the contract of sale was made. In order to meet these wishes[8] the Law Commissions proposed a system in which prepaying buyers could get co-ownership in a bulk. In

[4] No de pourvoi: 00-19939.
[5] N° de pourvoi: 99-12585.
[6] President Rechtbank Rotterdam 20 February 1985, S&S 1985/91 (*Palte en Haentjes BV and others v Comodity SA (the 'Gosforth')*).
[7] Law Com No 215/Scot Law Com No 145, Sale of goods forming part of a bulk (1993).
[8] Law Com No 215/Scot Law Com No 145, p. 1-2.

the other legal systems considered here this popular view that ownership passes at the moment of sale has never given rise to proposals to amend the transfer system.

III. Meta-legal Formants

If the parties to a sales contract would like the DCFR co-ownership regime to apply, a very exact drafting of the contract is required. First, the parties have to stipulate that the seller can deliver goods only from a certain bulk. Secondly, they should explicitly opt out of the *traditio* system by agreeing that ownership of the goods should pass before physical separation. Often parties do not make an explicit agreement about the moment when ownership should pass. In such a case it is unclear whether they agreed to let ownership pass at the moment of physical separation or whether they agreed on a delivery via *constitutum possessorium*. In the case of a conflict the decision is made by the judge interpreting the parties' agreement. Dutch judges are generally not prepared to acknowledge a delivery via *constitutum possessorium* if there is no concrete indication to that effect.

Case 2

Sale and transfer through constitutum possessorium *by non-owner to bona fide purchaser*

B has bought a drilling machine from A. B will pay the purchase price in one year's time. A transfers ownership of the machine under a retention of ownership clause, retaining ownership until full payment of the purchase price. To raise extra cash B then resells the machine to C without A's consent. Delivery to C takes place by way of constitutum possessorium, so that the machine stays in B's control.

2.1. Introduction

The case involves a delivery by way of *constitutum possessorium* because on this point two different approaches are taken within Europe. In some legal systems a bona fide third party is unable to receive third party protection until he acquires physical control of the thing involved, thus excluding *constitutum possessorium* from third party protection. Other legal systems do not

pose this requirement and give third party protection even if the non-owner is still in physical control of the thing.

2.2. DCFR

Art. VIII.-3:101 protects the bona fide acquirer of a movable against the transferor lacking the right or authority to transfer ownership. It requires in sub (a) that all other requirements for a valid transfer of ownership (other than the right or authority to transfer ownership) have been met. Second, it requires that delivery or one of the equivalents of delivery mentioned in art. VIII.-2:101 has taken place. When we look at art. VIII.-2:101 and read the Comments on art. VIII.-3:101 it is clear that an acquirer who acquires on the basis of *constitutum possessorium* cannot invoke third party protection.[9] The protection is deliberately reserved to third parties who have acquired physical control of the movable in question.

One would expect the DCFR to take the same approach for the acquisition of limited proprietary rights, such as security rights.[10] However, art. IX.-2:108 (good faith acquisition of security right) does not limit the third party's protection to a possessory security right. If a non-owner grants a non-possessory pledge on a movable asset, the acquirer in good faith may acquire the security right despite the fact that he does not acquire physical control of the movable.

2.3. The National Legal Systems

I. Operative Formants

English Law

The most recent English judgment relevant here is *Gerson (Leasing) Ltd* v *Wilkinson and State Securities Ltd.*[11] The facts were as follows. Emshelf sold industrial equipment to Gerson (Leasing) Ltd, a financing company, under a sale and leaseback agreement. Subsequently Emshelf sold part of this equipment to State Securities Ltd, another financing company, equally on sale and

[9] Comment C (Requirements for the transfer relationship B–C), (a) (Transfer requirements of VIII.–2:101 and delivery to acquirer), (Mere agreement does not suffice) and (Arguments for this solution).
[10] In this respect Dutch law treats bona fide acquisition of a pledge and bona fide acquisition of ownership equally. This leads Dutch law to withholding protection if a non-owner tries to create a non-possessory pledge, a choice that would be contrary to the policy underlying Book IX DCFR.
[11] Court of Appeal (civil division) 31 July 2000, [2001] Q.B. 514.

leaseback. In the proceedings this part of the goods are referred to as the 'schedule 3 goods'. State did not know that the equipment had already been sold to Gerson before. The goods remained in the physical power of Emshelf. As Emshelf failed to pay the lease terms Gerson had to terminate the lease agreement. Gerson, unaware of the second sale and leaseback, sold the goods, which he thought belonged to him, to Sagebush Ltd under a retention of ownership clause. Sagebush in turn sold them to Wilkinson. Some time later, State terminated his lease agreement as well. He sold the 'schedule 3 goods' to Sagebush, which again sold them to Wilkinson. As Gerson never received payment from Sagebush he asserts to be the owner of all equipment and started an action against Wilkinson and State for conversion of these goods.[12]

The first fundamental question addressed by Clarke LJ is whether State has become owner of the 'schedule 3 goods' under s. 24 of the Sale of Goods Act 1979 (SGA). The section protects a bona fide purchaser against a previous sale and is thus comparable to art. 1141 of the French *code civil*.[13] Under certain circumstances it protects the second buyer against the seller not being owner of the things. Section 24 protects only if at the time of the second sale the seller was still in possession of the goods. Moreover, like art. 1141 c. civ. it protects the second buyer provided that he gets possession of the thing first and that he is in good faith at the time he acquired possession. The section reads:

'Where a person having sold goods continues or is in possession of the goods, or of documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.'

Section 24 SGA is one of the statutory exceptions to the so-called *nemo dat* rule. It protects the innocent buyer against the impression of ownership created by the seller having remained in possession after the first sale. However, the text of the Sale of Goods Act omits mention of two important requirements, the first of which is a valid act of disposition, a sale for example, between the seller and the third party. Every transfer of ownership under the Sale of Goods Act demands a valid contract of sale. As it requires a valid legal ground for the transfer, a valid *causa traditionis* in

[12] There was confusion whether or not Gerson and Sagebush had entered into a binding contract at all. The court held that if a contract of sale had been made at all the parties did not intend ownership to pass to the buyer before full payment of the purchase price. As a result ownership cannot have passed to Sagebush and under the *nemo dat* rule Sagebush has not been able to transfer ownership to Wilkinson.

[13] Although both provisions are not limited to sales contracts I will here focus on sales rather than other dispositions.

Roman words, the Act created a causal transfer system.[14] There is no reason to disregard this requirement when it comes to third parties, for it was never intended that third parties should be protected against voidness or voidability of the underlying contract.[15]

Although it does not provide so expressly, it seems that s. 24 SGA also requires that at the time of the first sale the seller was owner of the thing or that he was otherwise authorized to dispose of the asset. The section is drafted specially to make provision in the case of a double sale or other disposition, that is to say, it is designed to protect the second buyer against the fact that the seller had lost his right of ownership or his right to dispose as a result of the first sale. It should not protect where a non-owner sells the same thing twice, for example a thief or a buyer who bought under a retention of ownership clause. It would seem odd to protect the second buyer if, as a result of the *nemo dat* rule, the first buyer would never have been able to become owner.

For a valid transfer of ownership the Sale of Goods Act does not require a transfer of possession. However, section 24 SGA makes an exception to this rule: it requires that the seller deliver possession to the second buyer, the third party. Should we read this requirement as handing over of actual power?

In *Gerson* v *Wilkinson* the Court of Appeal held that, unless the context or subject-matter otherwise requires, the term 'delivery' in section 24 has the meaning indicated in s. 61(1) SGA: '[a] voluntary transfer of possession from one person to another...'[16] The pivotal question is whether Emshelf transferred possession to State at any moment. There has been no handing over of actual power, no *traditio vera*. None the less, the Court held that there had been a genuine transfer of possession: it took place by way of *constitutum possessorium*, to use civil law terminology. In English law this way of transferring possession is often referred to as attornment.[17] It has been acknowledged as a mode of transferring possession in for example *Elmore* v *Stone* and *Dublin City*

[14] See L.P.W. van Vliet, *Transfer of movables in German, French, English and Dutch law* (Nijmegen, Ars Aequi Libri, 2000) 111-114; L. van Vliet, *The transfer of moveables in Scotland and England* (2008) 12 EdinLR 173-199.

[15] This requirement is possibly limited to a subsequent *sale* in *English* law. Section 24 applies equally to the creation of a pledge and other dispositions. It is unknown whether these dispositions require a valid legal ground. See Van Vliet, *Transfer of movables*, pp. 130-132. Moreover, it is asserted that in Scottish law ownership may pass to the buyer even if the underlying contract of sale is void or has been avoided with retroactive effect, provided that a valid transfer of possession has taken place based on a real agreement between seller and buyer. In such a case the causal system of the Sale of Goods Act 1979 is put aside by the abstract transfer of Scottish common law. See K.G.C. Reid, *The law of property in Scotland* (Edinburgh, Butterworths, 1996) nr. 610. Here two different transfer systems apply at the same moment, and it suffices if the transfer is valid under one of these systems. See L. van Vliet, *The transfer of moveables in Scotland and England*, 173-199.

[16] The words 'delivery or transfer of goods or documents of title' in s. 24 SGA means that there should either be a delivery of goods or a transfer of documents of title. See R.M. Goode, *Commercial Law*, 3rd edn (London, Penguin, 2004) 432; A.G. Guest et al., *Benjamin's Sale of Goods*, 7th edn (London, Sweet & Maxwell, 2006) nr. 7-062.

[17] Confusingly the same term is also used to denote the transfer of possession where a third party is and remains in possession of the thing, for example where goods stored in a warehouse are sold. In the following I will use the civil law term *constitutum possessorium* instead.

Distillery v *Doherty*.[18] In English law this *traditio ficta*[19] is termed constructive delivery. So, there was no doubt that State had acquired possession constructively by way of a valid *constitutum possessorium*.

The next question is: does *constitutum possessorium*, even though valid in itself, suffice to bring third party protection into play? The question is of great commercial interest not only in the case of a double sale and lease back, but also where goods sold under a retention of ownership clause are sold by the buyer to a bona fide party without the owner's permission and before the goods are paid for. If in such a case the transfer to the bona fide third party takes place by way of *constitutum possessorium*, which happens in the case of sale and lease back or *fiducia cum creditore*, the question arises whether the third party will be protected.

The relevant section applicable to our case 2 is section 25 rather than section 24 SGA. Whereas s. 24 applies to double sale, s. 25 applies to the case in which a buyer is in possession of goods which he bought under a retention of ownership clause and then resells the goods to a bona fide third party.[20] Both sections are closely related provisions. Section 25 subs. 1 reads:

'Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods...the delivery or transfer by that person...of the goods...under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods...with the consent of the owner.'

In both sections 24 and 25 therefore the similar question arises whether or not *constitutum possessorium* suffices to meet the requirement of 'delivery'.

In *Gerson* v *Wilkinson* Clarke LJ agrees with Sir Roy Goode QC, acting on behalf of the plaintiff, that 'delivery' in s. 24 SGA includes constructive delivery. Clark LJ then draws the conclusion that as this form of attornment is a valid form of constructive delivery, the second buyer, having received possession of the goods, can rely on the protection given to him by section 24 SGA. He defends his judgment as making commercial sense: '...[I]t seems to me that the conclusions set out above make sense in modern conditions. This and other cases show that purchase of goods is

[18] *Elmore* v *Stone* (1809) 1 Taunt. 458 and *Dublin City Distillery* v *Doherty* [1914] AC 823. See L.P.W. van Vliet, *Transfer of movables in German, French, English and Dutch law*, 127-128.
[19] Lit.: fictitious transfer, that is, transferring possession by mere agreement without actual handing over being needed.
[20] An example of this is the Australian case *Gamer's Motor Centre Pty Ltd* v *Natwest Wholesale Australia Pty Ltd* [1987] 163 CLR 236.

commonly financed by sale and leaseback arrangements such as those entered into by both Gerson and State in the instant case. It seems to me that it makes commercial sense to hold that such arrangements involve a transfer of constructive possession to the finance company who buys the goods and leases them back, such that the innocent finance company can take advantage of the provisions of s. 24 of the 1979 Act [the Sale of Goods Act 1979, LvV]... For all these reasons I would hold that, on the evidence before the judge, Emshelf delivered the schedule 3 goods to State under a sale and that State received them in good faith and without notice of the sale from Emshelf to Gerson. It follows that State acquired good title to the schedule 3 goods under s. 24 of the Sale of Goods Act 1979 and that it is not liable for conversion. I would dismiss the appeal on this point.'

It is very important to note that the protection of the bona fide buyer is available only if the sale has been followed by a form of delivery. In practice, however, constructive delivery is rare, apart from sale and lease back. What is more, without an explicit agreement to this effect a constructive delivery is difficult to infer from the circumstances of the case. Delivery could have been postponed or delayed. Undoubtedly, it cannot be assumed that every sale in which delivery does not take place immediately contains a constructive delivery. As a result, in most cases of sale by a non-owner the buyer will not be protected as long as the goods remain with the seller. If the sale by Emshelf to State Securities would have been an outright sale rather than a sale and lease back State Securities would not have acquired ownership due to lack of delivery. The same applies where goods sold under a retention of ownership clause are sold by the buyer/non-owner to a third party. Normally sections 24 and 25 SGA will not apply because delivery has not yet taken place.

The decision in *Gerson* v *Wilkinson* accords with earlier judgments dealing with the interpretation of section 25 SGA, such as *Gamer's Motor Centre (Newcastle) Pty Ltd* v *Natwest Wholesale Australia Pty Ltd*[21] and *Forsythe International (UK) Ltd* v *Silver Shipping Co Ltd*[22] in which latter case Clarke J adopted the interpretation of the 'delivery' requirement given by the High Court of Australia in *Gamer's* case. In *Gamer's Motor Centre* Gamer sold motor cars to a dealer retaining ownership until full payment of the purchase price. To raise capital the dealer sold the cars to Natwest remaining in actual possession as bailee (*constitutum possessorium*). The dealer would then try to find customers for these cars. As Gamer was never paid he took possession of the cars. Natwest, however, sued Gamer for conversion claiming to be owner of the cars himself. The High Court of Australia held that Natwest had indeed acquired ownership under s. 28 (2) of the New South Wales Sale of Goods Act 1923 (which is comparable to s. 25 of the English Sale of Goods Act). It held that 'delivery' in this section covers actual as well as constructive delivery.

[21] [1987] 163 CLR 236.
[22] [1993] 2 Lloyd's Rep. 268.

In English law the outcome of our case 2 would be the opposite of the outcome under the DCFR. If the sub-buyer C is in good faith and possession is delivered to him constructively by way of *constitutum possessorium*, C will acquire ownership under section 25 Sale of Goods Act.

French, German and Dutch Law

In order to acquire ownership under art. 2276 c. civ. (bona fide acquisition of movables) or art. 1141 c. civ. (double sale) French law requires that the third party should have acquired *possession réelle* (real possession, that is, actual power over the thing).[23] Similarly, in German law § 933 BGB provides that if a thing which has been transferred by way of *constitutum possessorium* does not belong to the transferor the transferee will become owner when the thing has been handed over to him, unless he is not in good faith at that time.[24] In Dutch law a comparable solution is attained somewhat clumsily by weakening the effect of *constitutum possessorium*. If in Dutch law a non-owner who is detentor, i.e. someone holding for the benefit of another, tries to transfer an object *constituto possessorio* the transfer of possession and thus the delivery will not be valid. An example is a lessee who in breach of contract sells and transfers the leased movable. As a valid act of delivery is one the prerequisites for third party protection,[25] a third party will not be protected even though he acquired in good faith and for a recompense. Where the non-owner is a possessor, thus holding the object for his own benefit, the *constitutum possessorium* is invalid *as against* the original owner, which has similar consequences for a third party: despite the latter's good faith and recompense he cannot rely on a valid act of transfer and he will therefore not acquire ownership of the thing. An example: A sells and transfers to B and B in turn sells and transfers to C. Afterward A avoids the sale between A and B for error or fraud. As avoidance has retroactive effect, the sales contract is deemed to have been void from the outset. In a causal transfer system this results in

[23] Art. 1141, a special version of the general article 2276 dealing with a double obligation to transfer a movable, such as a double sale, expressly mentions the requirement: 'Si la chose qu'on s'est obligé de donner ou de livrer à deux personnes successivement, est purement mobilière, celle des deux qui en a été mise en possession réelle est préférée et en demeure propriétaire, encore que son titre soit postérieur en date, pourvu toutefois que la possession soit de bonne foi.' (If someone has obliged himself to give or deliver a purely movable thing to two persons successively, the person who acquires actual possession is preferred and becomes its owner, even though his right to delivery is of a later date, provided, however, that he is in good faith). See also H. Mazeaud and F. Chabas, *Leçons de droit civil*, vol. II(2), *Biens, Droit de propriété et ses démembrements*, 8th edn (Paris, Montchrestien, 1994) nr. 1529; G. Marty, P. Raynaud and P. Jourdain, *Les biens* (Paris, Dalloz, 1995) nr. 393; J.-L. Bergel, M. Bruschi and S. Cimamonti, *Traité de Droit Civil, Les Biens* (Paris, LGDJ, 2000) nr. 224; Cour de Cassation, civ 1, 25 March 1997, Nº de pourvoi 95-12705 ; Cour de Cassation 27 November 2001, Bull. 2001, I, nr. 295, p. 186.

[24] ‚Gehört eine nach § 930 veräußerte Sache nicht dem Veräußerer, so wird der Erwerber Eigentümer, wenn ihm die Sache von dem Veräußerer übergeben wird, es sie denn, daß er zu dieser Zeit nicht in gutem Glauben ist.' (If a thing transferred under § 930 [*constitutum possessorium*] does not belong to the transferor the acquirer will become owner when the thing is handed over to him by the transferor, unless he is not in good faith at that moment)

[25] Note that such a requirement does not apply in French law.

ownership reverting to A with retroactive effect. In hindsight B had no right or authority to transfer ownership to C but he was possessor at the time. If C acquired by way of *constitutum possessorium* he would be left without third party protection.

The outcome of case 2 would be the same in French, German and Dutch law, as they all have in common that the bona fide third party will be protected only if the third party received physical power over the object in question. Where delivery takes place by way of *constitutum possessorium* third party protection will be deferred until B gives up his physical power to C. From that moment S is able to rely on third party protection, provided he is still in good faith at that time.

Returning to French law another point deserves attention. In French law the acquisition of ownership by a third party is regarded as an original acquisition rather than a derivative acquisition, possibly because third party protection is often regarded as a special form of acquisitive prescription, a form of prescription without prescription period, called *prescription instantanée* (instantaneous prescription).[26] If the acquisition is original the question arises whether the bona fide third party could become owner if the contract between the transferor and the third party were invalid. The French Supreme Court holds that a valid contract between the transferor and the third party is not needed (Cass 6 June 1886, D. 1887.1.25) and thus draws a far-reaching conclusion from its view that third party acquisition is original acquisition.

The text of Art. VIII.-3:101 DCFR does not make an explicit choice between original or derivative acquisition, although the first sentence of the first paragraph does not use of the word transfer. It rather states that the transferee acquires ownership and the original owner loses ownership. Comment A (General remarks), (Persons involved and terminology) clearly shows that the draftsmen see good faith acquisition as an instance of original acquisition.[27] Different from French law, however, the text of Art. VIII.-3:101(1)(a) makes clear that a valid legal ground is needed for good faith acquisition.

II. Descriptive Formants

We have just seen that some continental legal systems do not protected a third party who acquired through *constitutum possessorium* as long as he did not acquire physical power over the

[26] See G. Baudry-Lacantinerie and A. Tissier, *Traité théorique et pratique de droit civil*, vol. XXVIII (de la prescription), 3rd edn (Paris, Larose et Tenin, 1905) 660, who regard art. 2279 c. civ. (now: art. 2276 civ.) as a special case of acquisitive prescription in which no prescription period is needed.

[27] This is a dogmatic choice which is not obvious. In some legal systems, such as Dutch law (art. 3:86 BW) good faith acquisition is regarded as derivative. According to Quack the dominant view in German literature is that third party acquisition is derivative: MünchKomm BGB/Quack, 2004, § 932, Rdnr. 59. The view of the drafters is the view generally accepted in Austrian law. Although it does not necessarily have any practical consequences the Comment in Book VIII would better refrain from such dogmatic choices.

thing, that is, as long as the seller stays in control of the thing. We should here look why these systems defer third party protection in the case of *constitutum possessorium*. Does the English and Swiss solution make more commercial sense? Pill LJ in the *Gerson* case explicitly doubted Clarke LJ's remark on this point: 'I express no view as to whether it makes commercial sense to allow innocent finance companies to take advantage of s. 24 of the 1979 Act when they conduct a sale and leaseback.'

Let us start with the oldest civil code involved here: the French civil code of 1804. Why do articles 1141 and 2276 c. civ. require the bona fide third party to have acquired actual power over the object? It appears that there is no clear answer to the question. In the parliamentary debates on art. 2279 (the old number of art. 2276)[28], the notoriously opaque *possession vaut titre* rule, no mention is made of the requirement. We should bear in mind that the requirement of *possession réelle* is not mentioned in the text of art. 2276. It is to be found only in art. 1141 c. civ. However, as art. 1141 is merely a special application of the general art. 2276 French law accepted that *possession réelle* was required also when applying art. 2276 c. civ. Unfortunately, the parliamentary history of art. 1141 c. civ. is not very helpful either. It does not explain the requirement. According to Larombière the requirement of *possession réelle* in art. 1141 c. civ. indicates that the third party's possession should be unequivocal.[29] It ought to be *publique* (public), that it, recognizable to third parties.[30]

In treatments about art. 2276 c. civ. the requirement of *possession réelle* is often explained by reference to the requirements for acquisitive prescription. And this is perhaps the key to understanding the requirement of actual possession. A large number of authors regarded art. 2276 as a special instance of *usucapio* (acquisitive prescription): a form of prescription without a prescription period. It was normally called *prescription instantanée* (instantaneous prescription).[31] The analogy was facilitated by the fact that art. 2276 had been placed in a section called *de quelques prescriptions particulières* (on various special cases of prescription). Acquisitive prescription requires, among other things, that the possession should be *non équivoque* (unequivocal) (art. 2261 c. civ.). According to these authors the same requirement applied to art.

[28] The articles on possession, among which the famous 2279, have been renumbered in 2008.
[29] L. Larombière, *Théorie et pratique des obligations*, vol. 1 (Brussels, Bruylant, 1862) art. 1141, nr. 8.
[30] L. Larombière, *Théorie et pratique des obligations*, vol. 1 (Brussels, Bruylant, 1862) art. 1141, nr. 8, 10, 12-14; G. Baudry-Lacantinerie and L. Barde, *Traité théorique et pratique de droit civil*, vol. XII (des obligations), part 1, 3rd edn (Paris, Larose et Tenin, 1906) nr. 410.
[31] This theory is no longer current.

2276.[32] So, perhaps the requirement of actual possession originated in applying by way of analogy the requirement of unequivocal possession originally written solely for acquisitive prescription.[33]

Another explanation of the requirement of actual possession may be the fact that article 2276 also gives a rule of procedural law: in the case of a conflict over who owns the object, the possessor is presumed to be the owner. The claimant who tries to revindicate the object has the burden of proof. Dross, however, points out that although the requirement of possession is logical for the procedural function of article 2276, the requirement is unjustified when article 2276 is invoked to *acquire* ownership from a non-owner.[34]

Unlike the parliamentary history of the French civil code the official explanations to the German civil code, the *Motive* and *Protokolle*, clearly indicate the reason for requiring actual possession. Here two reasons are mentioned. First of all, § 933 BGB is said to protect the owner of the thing against being deprived of his ownership without noticing it. Second, it is asserted that a third party who does not insist on acquiring actual power over the thing and leaves it with the transferor does not deserve third party protection.[35] The first of these reasons can also be found in the parliamentary history of the Dutch civil code and in the Comments on Art. VIII.-3:101 DCFR.[36]

However, although these reasons look self-evident at first sight, they are unconvincing. The argument that the owner or holder of a limited or subordinate real right should not be able to lose his right without him being aware of it aims at protecting the holder of such a right. Should the physical situation, that is, the change in physical power, warn the owner of a possible loss of his right? Obviously not, because if actual power shifts to the third party the original owner is too late: he has already lost his right. Such a warning, which will come after the event by definition, is not useful to the owner.

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[32] G. Baudry-Lacantinerie and A. Tissier, *Traité théorique et pratique de droit civil*, vol. XXVIII (de la prescription), 3rd edn (Paris, Larose et Tenin, 1905) nr. 849-850; M. Planiol, G. Ripert and M. Picard, *Traité pratique de droit civil français*, vol. 3, *Les Biens*, 2nd edn (Paris, LGDJ, 1952) nr. 381 (who do not agree with this analogy).

[33] Cf. F. Zenati, *Revindication mobilière* (1998) RTD Civ. 408.

[34] See W. Dross, *Le singulier destin de l'article 2279 du code civil* (2006) RTD Civ. 27.

[35] *Motive* III, p. 345 (Mugdan, vol. 3, p. 192) and *Protokolle* III, 3704 (Mugdan, vol. 3, 632). 'Mugdan' refers to B. Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich* (Berlin, Decker, 1899, repr. Aalen, Scientia, 1979). As the *Motive* indicate § 933 BGB accords with the traditional interpretation of § 306 of the old commercial code for the German Confederation (Deutscher Bund): the *Allgemeines Deutsches Handelsgesetzbuch* of 1861. The parallel provision of the new commercial code of 1897 still in force is § 366. This provision like its predecessor protects a bona fide purchaser who believed that a merchant was authorized to dispose. The old § 306, although silent on this point, was interpreted so as to require the third party to have acquired actual possession. Case law and literature postponed third party protection in the case of *constitutum possessorium*. See K. Cosack, *Lehrbuch des Handelsrechts*, 4th edn (Stuttgart, Encke, 1898) 149-150. So the draftsmen of the *Bürgerliches Gesetzbuch* simply applied to the civil code a requirement which had already developed on the basis of the commercial code. For the equivalent interpretation of the modern § 366 see K. Schmidt, *Handelsrecht*, 5th edn (Cologne etc., Heymanns, 1999) § 23 II 1 e.

[36] C.J. van Zeben et al. (eds), *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek*, vol. 3 (Deventer, Kluwer, 1981) 384. Art. VIII.-3:101 Comment C (Requirements for the transfer relationship B–C), (a) (Transfer requirements of VIII.–2:101 and delivery to acquirer), (Arguments for this solution).

According to Heck one of the reasons underlying § 933 BGB is the misuse made of *constitutum possessorium* to set up sham transactions (*simulatio*, *Scheingeschäft*).[37] At the end of the 19th century and beginning of the 20th century many German (and also Dutch) lawyers feared the danger of this misuse, notably in combination with *fiducia cum creditore*. However, as Heck correctly asserts, this concern cannot justify why third party protection should be postponed even where there is undoubtedly a genuine transfer *constituto possessorio*.[38] Under the DCFR, by the way, this argument of discouraging sham transactions is totally irrelevant because a transfer for security purposes, in whatever guise, is regarded as the creation of a security right (Art. IX.-1:102(3) and (4)) and the DCFR allows bona fide acquisition of a non-possessory security right on movables (Art. IX.-2:108).

The second argument, the third party does not *deserve* protection as long as he leaves the thing with the transferor, is unconvincing as well. Once the fundamental choice has been made to protect a bona fide third party under certain circumstances, why should this protection depend on the quite arbitrary question whether or not the third party has acquired actual control over the thing? What really matters is whether or not the *transferor* is in actual possession of the thing when he sells to the third party, because to innocent outsiders this actual power creates the impression of the transferor being owner. Third party protection is intended to protect outsiders who relied on this appearance of ownership. Where a non-owner in actual control of the asset sells to an innocent buyer there is an impression of ownership regardless whether or not the transfer takes place by handing over or by *constitutum possessorium*.[39] So, if the third party is preferred over the original owner when the thing is handed over to the bona fide purchaser, why does he have no preference when he leaves the thing with the transferor? It is sometimes said that since in cases like our case 2 the owner and third party put an equal trust in the second person, there is no good reason to prefer the third party.[40] However, the trust the bona fide purchaser put in his seller differs from the trust the owner may have put in the seller. The third party's confidence was based on the impression created or reinforced by the seller having physical control.[41]

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[37] Ph. Heck, *Grundriß des Sachenrechts*, 3rd edn (Tübingen, JCB Mohr, 1930, repr. Aalen, Scientia, 1994) 250. For exactly the same reason many legal systems require a *causa detentionis*. For a *constitutum possessorium* to be valid in these systems it is needed that the parties indicate exactly why the transferor remains in actual control of the goods, for example because of a loan agreement, lease, usufruct etc. These legal systems are thus said to require a concrete rather than an abstract *constitutum possessorium*. Also this requirement intends to prevent sham transactions. However, for parties who are willing to set up such a sham transaction it is very easy to pretend a loan or lease agreement as well. See Heck, p. 500-503 and as regards the problem of the *causa detentionis* in general L.P.W. van Vliet, *Transfer of movables*, 53-55.

[38] Ph. Heck, *Grundriß des Sachenrechts*, 250.

[39] Cf. E.W. Stark, *Berner Kommentar*, vol. IV (Sachenrecht), 3. Abteilung (Besitz und Grundbuch), 1. Teilband (Der Besitz, Artikel 919-941 ZGB), 2nd edn (Bern, Staempfli, 1984) 362.

[40] See M. Wolff and L. Raiser, *Sachenrecht, Ein Lehrbuch*, 10th edn (Tübingen, Mohr Siebeck, 1957) § 69 II 2c.

[41] The argument mentioned in the *Motive* on p. 345 (see fn. 24 *supra*) that the transferee who leaves the thing in the hands of the transferor will run the risk of his confidence being broken, is convincing only where the same thing is

Having seen this, it is quite strange that German law, Dutch law and the DCFR do not postpone third party protection where a seller transfers his *indirect*[42] possession to the acquirer.[43] Take the following example: a non-owner who deposited goods in a warehouse sells the goods to a buyer. As the goods are to remain there, the seller/depositor instructs the depositee (the warehouseman) to attorn to the buyer. If the warehouseman so attorns to the buyer, he acknowledges the transfer and holds the goods henceforth for the benefit of the buyer. The first argument used against *constitutum possessorium*, the argument that the owner should not be able to lose ownership without noticing it, equally applies here. The original owner will not see the warehouseman's attornment. On the contrary, there would even be a good reason to treat *constitutum possessorium* by a seller in direct possession more favourably than such an attornment by a warehouseman. For, the appearance of ownership created by such an indirect possession (possession via the warehouseman) is much weaker[44] than the appearance created by direct power in the above example of *constitutum possessorium.*

A similar weak impression of ownership is created where the seller-depositor rather than the warehouseman starts to hold the goods for the benefit of the buyer while the goods are still in the warehouse. It is a more complex example of *constitutum possessorium*. Both examples of *depositum* have in common that at the outset (the moment of sale) the depositor is indirect possessor of the goods while the depositee is direct detentor (having actual power). The physical situation is similar as well: during the transaction the goods remain in the warehouse. However, whereas in the first case the warehouseman attorns to the buyer, he is not at all involved in the second case. He may not even know of the transaction. He continues to hold for the benefit of the seller, but the seller by transferring possession *constituto possessorio* turns himself into (indirect) detentor for the benefit of the buyer and thus makes the buyer indirect possessor. It makes the warehouseman (direct) *sub*detentor. Since in both instances the physical situation creates a similarly weak appearance of ownership, there is no reason to treat these cases differently. What is more, in our example of goods deposited with a third party the seller and the buyer often do not specify whether the delivery amounts to *constitutum possessorium* by the seller or rather to attornment by the third party. This is a question of interpretation of the parties' agreement.

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transferred for the second time to a bona fide purchaser. In that case there is a good reason to prefer the second purchaser to the first.

[42] Here 'direct' and 'indirect' indicate whether or not the possessor has actual power over the object. Where the possessor has actual power he has direct possession and can be called a direct possessor. Similarly a detentor or *detentio* may be direct of indirect.

[43] Par. 934 BGB. See H.P. Westermann, K.-H. Gursky and D. Eickmann, *Sachenrecht*, 7th edn (Heidelberg, CF Mueller, 1998) § 47 II 2. As regards Dutch law see W.H.M. Reehuis et al., *Goederenrecht*, 12th edn (Deventer, Kluwer, 2006) nr. 379. As regards the DCFR: VIII.-3:101(1)(b) read with VIII.-2:101(1)(e).

[44] Unless the transferor delivers a document of title, such as a bill of lading or delivery order representing the goods. Some warehouseman's warrants are title documents.

There is clearly no justification to draw a rigid distinction between *constitutum* on the one hand and all other kinds of *traditio* on the other hand. As third party protection is based, among other things, on the appearance of ownership created by the seller's physical control over the asset the question whether or not to protect a third party should depend on the degree of control/possession which the *seller* has, and therefore the degree of appearance created by it. A supple instrument to judge the degree of appearance in every individual case is the requirement of good faith. If the seller has direct control it gives a strong impression of ownership and consequently the requirement of good faith will be met more easily. If, on the other hand, the seller merely has indirect possession or control over the asset the requirement will be much more difficult to meet.

In Swiss law, which adopted this solution,[45] a bona fide third party who acquires possession by way of *constitutum possessorium* from a seller in direct control of the goods will acquire ownership even before having acquired actual control. However, where the transferor is indirect possessor (eg goods stored in a warehouse) immediate acquisition of ownership is more difficult because of the higher standards for good faith which have to be applied in this particular case.

Moreover, Swiss law correctly recognizes that a buyer who acquires possession without ever having seen the goods cannot be regarded as bona fide if he would not have been in good faith had he inspected the goods at the time of acquisition. To give an example, if on inspection the buyer would have seen an inscription or name plate with the name of the real owner, or a damaged lock giving him good reason to doubt the seller's right of ownership, he cannot profit from not having inspected the goods.[46]

In its Comments on Art. VIII.-3:101 DCFR, however, the drafters mention the reasons for the requirement of actual control by the third party.[47] However, the arguments are difficult to understand. I agree with the drafters that the non-owner's possession has a strong influence on the third party's good faith. If the non-owner is unable to deliver possession to the third party because he has no possession in the first place, it is clear that commonly the third party cannot be in good faith. On the other hand, if the relevant comment suggests that the fact that the third party did not acquire actual power will normally take away the third party's good faith, I do not agree. The

[45] A. Homberger, *Zürcher Kommentar*, Band IV (Sachenrecht), 3. Abteilung (Besitz und Grundbuch, Art. 919-977), 2nd edn (Zurich, Schulthess, 1938) art. 933, Rdnr. 20-21; P. Liver, in M. Gutzwiller et al. (eds), *Schweizerisches Privatrecht*, vol. V/1 (Basel/Stuttgart, Helbing & Lichtenhahn, 1977) 327; H. Rey, *Die Grundlagen des Sachenrechts und das Eigentum*, 3rd edn (Bern, Staempfli, 2007) nr. 1766.

[46] A. Homberger, *Zürcher Kommentar*, Band IV (Sachenrecht), 3. Abteilung (Besitz und Grundbuch, Art. 919-977), 2nd edn (Zurich, Schulthess, 1938) art. 933, Rdnr. 20-21; H. Hinderling in: M. Gutzwiller et al. (eds), *Schweizerisches Privatrecht*, vol. V/1 (Basel/Stuttgart, Helbing & Lichtenhahn, 1977) 487; E.W Stark, in H. Honsell et al. (eds), *Basler Kommentar zum Schweizerischen Privatrecht*, Schweizerisches Zivilgesetzbuch II, Art. 457-977 ZGB, art. 1-61 SchlT ZGB, 2nd edn (Basel, Helbing und Lichtenhahn, 2003) Art. 933, Rdnr. 26.

[47] Comment C (Requirements for the transfer relationship B–C), (a) (Transfer requirements of VIII.–2:101 and delivery to acquirer), (Arguments for this solution).

comment also uses the argument that the owner should not be able to lose his right of ownership without noticing it. For the reasons set out above, this does not convince me. When he notices the loss, it is already too late to prevent the loss.

Case 3

Retention of ownership – production?

A sells cotton cloth to B, a manufacturer of cotton shirts. A delivers the cloth under a retention of ownership clause retaining ownership until full payment of the purchase price. The retention of ownership clause stipulates that until full payment of the purchase price A becomes owner of the shirts produced from A's cloth. B is unable to pay the purchase price and some time later B is declared insolvent. A wishes to revindicate the shirts produced from the cotton delivered by him. The administrator in insolvency, however, claims that the shirts are part of the insolvent's estate.

3.1. Introduction

This case, a conflict between the seller trying to extend his retention of ownership clause and the buyer's creditors, shows a divide between those national legal systems which do and those which do not allow the seller and buyer to deviate from the rules on *specificatio*.

3.2. DCFR

The DCFR rules needed to solve the third case are to be found in Book VIII and Book IX. In principle the rules of Book IX have priority if the production involves goods delivered under a retention of ownership clause (Art. VIII.-1:103(1).[48]

Before we look at the relationship between retention of ownership and the rules on *specificatio*, we should here stress that, in contrast to the national legal systems reviewed below, Art. IX.-3:107 provides that retention of ownership devices have no third party effect unless they have been registered according to Section 3 of Chapter 3 of Book IX.[49] Obviously this requirement determines

[48] Art. IX.-2:308 comment B (Modified application of Chapter 5 of Book VIII (paragraph (1)).
[49] Art. IX.-2:201 comment C (Retention of ownership devices as acquisition finance devices).

the outcome of our case 3: as no registration has taken place the seller is unable to set up his retention of ownership device against the buyer's creditors, irrespective of what the rules on production in Book VIII would bring. As a security which works only between the parties does not add anything relevant to the seller's unsecured claim for the purchase price, the retention of ownership device is worthless without registration.

Book IX DCFR wishes to prevent that the seller's retention of ownership device is *automatically* extended to the new products made from the things he sold and delivered. However, strict application of Art. VIII.-5:201 would lead to just that: an automatic extension into a security right on the new products. Where the buyer produces the new goods himself, Art. VIII.-5:201 (Production) would give the seller a claim for the value of the goods used secured by a security right on the new products. If the producer is a person different from the buyer under retention of ownership, Art. VIII.-5:201 would give ownership to the third party producer and give the *seller* a claim for the value of the materials used secured by a security right on the new product. Book IX wishes to give this claim to the *buyer* instead. To attain this result, Art. IX.-2:308(1) provides that 'references to the owner of these goods are to be understood as references to the buyer […]'

Under the DCFR rules the proprietary consequences of production (the DCFR term for *specificatio*) can be determined by agreement. It allows the seller and buyer who agree on a retention of ownership clause to extend this security device so that the seller acquires a security device on the new product. For this extension it is vital that such agreement is made prior to the production. The Comments on Art. VIII.-5:101 and IX.-2:308 stress that the security device of retention of ownership is not *automatically* extended to the newly produced thing.[50] This means that the agreement on retention of ownership (in the contract of sale or in an additional agreement) cannot be interpreted to contain an agreement on extension of the security device to new products. There should be an explicit agreement to this effect.

In our example the parties did make an agreement extending the retention of ownership device towards the products. However, Art. IX.-2:308 DCFR provides that the parties may agree on giving the seller a *security right* in the products, which according to Art. IX.-1:102 means a limited proprietary right. As a result, the retention of ownership cannot be extended in the strict sense of the word, that is, in such a way that *ownership* of the products is attributed to the seller.[51]

Furthermore, the extension is a security right which should obey the rules of Book IX Chapter 3 in order to be effective against third parties. As the security device amounts to a non-

[50] Art. VIII.-5:101 comment E, Goods subject to retention of ownership device, paragraph (3); Art. IX.-2:308 comment B (Modified application of Chapter 5 of Book VIII (paragraph (1)).
[51] In personal correspondence Prof. U. Drobnig confirmed this to me.

possessory security it is only effective against third parties if registered.[52] In order to be effective against third parties, such as the buyer's creditors, it is required that the agreement should be registered. Normally the agreement on this extension will be part of the retention of ownership clause. As we have seen above, even a simple non-extended retention of ownership device should be registered in order to be effective against third parties. As a result, it will not often happen that the retention of ownership clause has been registered whereas its extension has not.

As the extension of the retention of ownership device is not an extension in the classical sense of the word (i.e. ownership of the product) but offers the seller a limited proprietary right the question arises what the priority of this security right is. To give an example, does it take priority over a security right on the product granted in advance to a third party? Comment C on Art. IX.-2:308 shows that the security right granted to the seller has the same priority as the retention of ownership device. This includes the superpriority of Art. IX.-4:102 which gives high priority to 'acquisition finance devices'. According to Art. IX.-1:201(3) a retention of ownership clause is such a device. If the retention of ownership clause has been registered duly (under the rules of Chapter 3 Book IX) it takes priority over any security right or other limited proprietary right created by the buyer, even if created in advance (Art. IX.-4:102(1)). For the conflict between the seller under retention of ownership and the security right created by the buyer on the goods sold (i.e. before production takes place) this solution can already be based on the *nemo dat* rule: as the goods sold do not yet belong to the buyer he cannot validly burden them with a limited security right.

Art. IX.-4:103 (Continuation of priority) provides that priority is not affected if the encumbered asset is used in the production of a new thing, provided that the security right extends to the new thing. According to its text this article does not apply to our case. Its scope is limited to security rights, i.e. limited proprietary rights, and does not cover a retention of ownership device.[53] However, comment D (Production, commingling and combination) on Art. IX.-4:103 shows that the draftsmen have the intention that the article equally applies to goods delivered under a retention of ownership device.

When applying the DCFR rules on case 3 it should be noted that the contract stipulates that the products made from the goods sold under retention of ownership should *belong* to the seller. This is impossible and thus void under the DCFR. The seller's security device can only be extended to the products by an agreement that the products should be encumbered with a *limited security right*. Perhaps a very lenient interpretation of the agreement could save the seller's security device,

[52] VIII.-5:101 Comment E, Goods subject to retention of ownership device; IX.-2:308 Comment C.
[53] This is apparent from the use of the word '*emcumbered* asset' in the first sentence of the first paragraph and from the use of the phrase 'provided that the *security right* extends to the security provider's rights in the asset resulting from the production, commingling or combination' in sub (b) of the first paragraph.

but most probably a judge will hold the extension void. Contracts with extended retention of ownership clauses should therefore be rewritten to fit the DCFR rules.

3.3. The National Legal Systems

I. Operative Formants

Dutch Law

In Dutch law the answer to the question who becomes owner of a new thing produced by man is to be found in art. 5:16 BW. According to art. 5:16(2) BW someone who produces or orders to produce a thing for himself from materials belonging to others or partly from materials belonging to others, becomes owner of the new thing, unless the costs of production are so low that they do not justify this result. If the cotton shirts are made by B's employees, B is still seen as the person producing these goods, according to common opinion. In our case of the cotton shirts application of this rule would lead to B acquiring ownership of the shirts. In his insolvency the shirts are part of the insolvent's estate and A has no proprietary right in the shirts. A is a mere unsecured creditor.

Vital to our case are two interlinked questions. First, are the rules of art. 5:16 BW *ius cogens* or are the parties able to opt out? Second, how to determine who produces *for whom*: is there an objective criterion or are the parties to a contract free to determine this. Or more concretely, is a supplier under retention of ownership able to manipulate art. 5:16 BW and determine by contract that the buyer produces the shirts for the supplier so that the retention of ownership is extended to cover the shirts? In Dutch law the answer to both questions is negative. Art. 5:16 BW is *ius cogens* and objective criteria determine who becomes owner.

For industrial production the *Hoge Raad*, the Supreme Court, laid down these criteria in HR 5 October 1990, NJ 1992/226 (*Machinefabriek Breda NV v BV Machinefabriek Plaatwerkerij en Constructiefabriek St. Antonius*). The facts were as follows. Antonius produced metal parts for Breda. The materials needed for the production had been supplied by Breda. Antonius had to follow strict instruction for the production given by Breda. After production the products were 'delivered' by Antonius to Breda. Antonius sent three invoices for these orders. The invoices remained unpaid, despite repeated reminders. The District Court gave a provisional administration order to Breda. The general conditions which applied to the contract contained a retention of ownership clause for the benefit of Antonius. Before the materials were given to Antonius, Breda

had transferred ownership of the materials for security purposes to the bank financing Breda. Antonius claimed to have become owner of the products made by him through *specificatio*. Breda, however, asserted that Antonius worked on behalf of Breda so that Antonius never acquired ownership.

The Supreme Court held that, in the case of industrial production, the answer to the question for whom the new things are made and who therefore becomes owner depends on who has decisive influence on the production process and who bears the risk of disappointing usefulness, sales and profits. The judgment makes clear that under Dutch law the parties to the contract cannot op out of the rules on *specificatio*. These are *ius cogens*. Objective standards decide who becomes owner of the manufactured product. A retention of ownership clause or any other contractual clause cannot alter the outcome.

German Law

According to § 950 BGB it is in principle the producer who acquires ownership in the case of *specificatio*. Again two interlinked questions arise: is § 950 BGB *ius cogens* and can parties to a contract determine who produces for whom? The German Supreme Court (*Bundesgerichtshof*) answers these questions differently from the Dutch Supreme Court.

This may be illustrated with the following case: BGH 3 March 1956[54]. The claimant delivered aluminium plates to company S which used the materials to make aluminium covers for machines. Machines with these aluminium covers were then delivered to the defendant. The claimant asserted that, because it delivered the aluminium under a retention of ownership clause, it remained owner of the covers and he tried to revindicate the covers from the defendant. The first question that arose is whether or not the covers are essential components of the machines so that the claimant lost ownership as a result of *accessio*. The second question was whether the claimant lost ownership as a result of *specificatio* when company S used the material to make the covers.

The Supreme Court held that, where the contract stipulates that the delivery of aluminium took place under a retention of ownership clause and that the production of the covers was to take place for the benefit of the supplier, the supplier should be seen as the manufacturer in the sense of § 950. The *Bundesgerichtshof* thus gives effect to a so-called manufacturing clause (*Verarbeitungsklausel*). Although it is *ius cogens* that under § 950 BGB the manufacturer will become owner of the new product, parties to the supply contract can decide themselves who will be regarded as the manufacturer. According to long-standing case law of the *Bundesgerichtshof* the

[54] BGHZ 20, 159; (1956) NJW 788.

question who is to be seen as manufacturer of the product should be answered with reference to public opinion (*Verkehrsauffassung*). This gives the false impression that a purely objective standard is used. The *Bundesgerichtshof* does not focus on the perspective of an outsider unknown to the contract terms, but rather on the perspective of an insider who knows the contract terms between seller and buyer. The reasoning is as follows: if under the contract between supplier and buyer the goods will be manufactured for the benefit of the supplier, then from an objective perspective it is the supplier who should be regarded as manufacturer in the sense of § 950 BGB. Only where the factual situation is clearly in contradiction with the contract terms, i.e. where it is clear that the buyer manufactures the goods for his own benefit, will the buyer himself become owner under § 950 BGB.[55]

The *Bundesgerichtshof* also gives effect to a contract clause giving the supplier only co-ownership in the final product. Is has done so in BGH 19 October 1966[56]. A supplier sold and delivered leather skins to a shoe manufacturer under a retention of ownership clause. The clause stipulated that the supplier would become co-owner of the final products.

The Supreme Court held that a manufacturing clause in a retention of ownership clause may stipulate that the owner of the materials supplied will only become co-owner to the proportion that the value of his materials bear to the value of the final product. According to the Supreme Court another possibility is for the manufacturing clause to stipulate that the owner of the materials supplied will become co-owner to the proportion that the value of his materials and the value added by the manufacturer bear to the value of the final product. However, it is impossible for a manufacturing clause to stipulate that the supplier's co-ownership share depends on the value of the goods supplied and the manufacturer's labour and overhead costs. Third parties cannot easily assess the manufacturer's production costs, whereas it is easy for them to assess the added value. When the co-ownership share is difficult for third parties to assess, the principle of specificity would be violated, according to the Supreme Court.

English Law

Like the Dutch Supreme Court the English courts regard the rules on *specificatio* as *ius cogens* and do not allow the parties to a contract to opt out of these rules. This can be clearly seen in Borden (U.K.) Ltd. v Scottish Timber Products Ltd. and Another[57]. The claimants sold resin to the defendants which was to be used by them to make chipboard. The contract contained a reten-

[55] Staudinger/Wiegand, 2004, § 950, Rdnr. 23.
[56] BGHZ 46, 117; (1967) NJW, 34.
[57] Court of Appeal 10 July 1979 [1981] Ch 25.

tion of title clause, to the effect that property in the resin should pass when all goods supplied by the claimants had been fully paid for. The parties knew that the resin would be used before it had been paid for. When mixed with certain other substances, the resin as such could no longer be recovered. The defendants were declared insolvent and the claimants sued for the unpaid purchase price asserting that any chipboard manufactured with such resin or any money or property representing the proceeds of sale of such chipboard was charged with the unpaid sum and, further, that any such charge was not void by reason of section 95 of the Companies Act 1948.

Per Buckley LJ: 'It was impossible for the plaintiffs to reserve any property in the manufactured chipboard, because they never had any property in it; the property in that product originates in the defendants when the chipboard is manufactured. Any interest which the plaintiffs might have had in the chipboard must have arisen either by transfer of ownership or by some constructive trust or equitable charge, and, as I say, I find it impossible to spell out of this condition anything of that nature.'

In the above case the contract between seller and buyer did not contain a clause stipulating that the products made from the goods delivered would equally be subject to the retention of ownership clause. The question therefore arises what the effect would be if such a clause had been made. The answer can be found in *Modelboard Ltd v Outer Box Ltd (in liquidation)*[58] In this case the claimant sold to the defendant cardboard sheet boards under a retention of ownership clause which provided, among other things, that the end products belonged to the claimant until full payment of the price. The defendant did not pay the purchase price and was declared insolvent. The question was whether or not the contractual clause created a charge on the new products in favour of the claimant which was void for non-registration. The court held that, although the contractual clause created a charge, this charge was void for non-registration.

The judgment shows that in a certain way the retention of ownership clause can be extended to the end product made from the materials delivered by the seller. Not that the seller becomes owner of the new products, but he rather receives a charge on the newly created products. The problem, however, is that such a charge is void under section 874 Companies Act 2006 if unregistered.[59]

French Law

[58] Chancery Division 22 September 1992 [1992] BCC 945.
[59] R.M. Goode, *Commercial Law*, 3rd edn (London, Penguin, 2004) 609. See also R.M. Goode and L. Gullifer, *Goode on legal problems of credit and security*, 4th edn (London, Sweet & Maxwell, 2008) 22-23.

Art. 571 c. civ. stipulates that the manufacturer becomes owner of the new thing made by him, provided that the cost of his work clearly exceeds the value of the materials used.[60] In practice the provisions of the *Code civil* on *specificatio* are hardly relevant first because they are *ius dispositivum* and second because in insolvency special provision apply. A seller of raw materials is able to stipulate that his retention of ownership extends to the product made from the raw materials, so that the seller becomes owner of the final product. This extended retention of ownership works not only against the buyer but also against third parties, such as the buyer's creditors.

In insolvency special provisions apply which are *ius cogens*. The retention of ownership does work against the insolvent's liquidator and his creditors but under certain restrictions which cannot be set aside by contract. It is a peculiar characteristic of French law, different from the other systems reviewed, that original acquisition, such as *specificatio*, underlies rules of *ius dispositivum* as long as the buyer is not declared insolvent (the rules in the civil code then apply), but that it suddenly underlies rules of *ius cogens* once the buyer has been declared insolvent. The rule which applies in insolvency is art. L624-16(2) c. comm. The second paragraph, first sentence, is relevant for *specificatio*. It reads as follows:

'Goods which have been sold under a retention of ownership can also be revindicated, provided that they are in their natural state at the moment of opening of the [insolvency] procedure.'[61]

The essential criterion used to answer the question whether or not goods sold under a retention of ownership clause can be revindicated is the criterion of identity, or 'existence en nature'. French case law is very reluctant in accepting that a thing has lost its identity as a result of modifications. As a result, it is very generous against sellers under a retention of ownership clause.[62]

Cass. com. 4 January 2005 (*Philippe Jeannerot v Num*)[63] is on the borderline between *accessio* and *specificatio*. Under a contract of deposit Num delivered to René Clément computer equipment destined to be installed in computer-controlled machines sold by René Clément. The latter was declared insolvent and Num tried to revindicate the computer parts delivered by him under a retention of ownership clause and installed into machines by René Clément. The Court of

[60] Si, cependant, la main-d'oeuvre était tellement importante qu'elle surpassât de beaucoup la valeur de la matière employée, l'industrie serait alors réputée la partie principale, et l'ouvrier aurait le droit de retenir la chose travaillée, en remboursant au propriétaire le prix de la matière, estimée à la date du remboursement.

[61] Peuvent également être revendiqués, s'ils se retrouvent en nature au moment de l'ouverture de la procédure, les biens vendus avec une clause de réserve de propriété.

[62] P. Crocq, JurisClasseur Commercial, fasc 2545 (2007), *Sauvegarde, redressement et liquidation judiciaires, Situation du vendeur de meubles, Clause de réserve de propriété*, nr. 78-80.

[63] N° de pourvoi: 02-10538. However, on seemingly similar facts the Court of Appeal in Cass com. 24 March 2004 (Jacques Moyrand v Siemens), N° de pourvoi: 01-10280, decided differently.

Appeal allowed the revindication, because, even though the computer equipment had been adapted specifically to the machine and connected with cables which would lose their value in the case of dismantling, the dismantling would not cause damage to the equipment and the machine itself. The Court of Appeal held that the parts of the machine could be disassembled without changing the nature of the parts or causing damage to any of the parts, even though the cables and connectors could not be reused. The Supreme Court did not interfere and held that the Court of Appeal justified its decision correctly. In a slightly different context the Supreme Court held that must from different owners which was mixed and processed into wine by a wine cooperative had not lost its natural state: Cass. com. 11 July 2006 (les Vignerons d'Opoul).[64] Art. L624-16 c. com. also protects the revindicating seller against the danger of *accessio* and commingling.

Apart for the possibility to revindicate *the goods* delivered, French law in some cases offers the possibility to revindicate the *purchase price* from a sub-sale (art. 2372 c. civ and art. L624-18 c. comm.). However, it is a highly complex instrument and dogmatically difficult to explain.[65] An example is Cour d'appel de Lyon 22 January 2004 (*Eisen Schmid v Scarfogliero*).[66] Eisen Schmid sold and delivered under a retention of ownership clause pieces of iron to the ironworks Les Forges de la Becque, a company which sold steel sheet to the automobile industry. When Les Forges de la Becque was declared insolvent, Eisen Schmid tried to revindicate its steel from the buyer's insolvent estate. Part of the steel had already been processed into steel sheet and sold on to the ironworks' customers. For that reason Eisen Schmid also tried to revindicate the purchase price of this steel sheet from the insolvent's estate.

The Court of Appeal spelled out the requirements for revindication of the purchase price. The seller under retention of ownership is able to revindicate from the insolvent's estate the purchase price paid by a sub-buyer to the insolvent first buyer. This revindication is allowed only if the following conditions have been met: the purchase price was still unpaid by the sub-buyer when the first buyer was declared insolvent and the materials still existed in their original state at the time of delivery to the sub-buyer. Steel which at that date had already been processed into sheet steel so that the original material is transformed irretrievably, does not meet this requirement. As a consequence, the purchase price of these materials cannot be revindicated and the seller cannot invoke priority of payment.[67]

[64] Bulletin 2006 IV N° 181 p. 199.
[65] See T. Revet, *La singulière présentation, par la chambre commerciale, de la subrogation, en cas de procédure collective, de la créance du prix de sous-acquisition à la chose objet d'un droit de propriété réservé* (2009) RTD Civ 2009 751.
[66] N° de pourvoi : 2002/05630.
[67] See also P. Ancel, *Droit des sûretés*, 4th edn (Paris, Litec, 2006) nr. 458.

In the above case the seller tries to revindicate the purchase price of the materials from the liquidator in charge of the insolvent's estate. As said before, where goods which have been sold and delivered to the first buyer under a retention of ownership clause, are sold on by the first buyer to a second buyer, the original seller is able to revindicate the purchase price, provided the price was not yet paid when the first buyer was declared insolvent (art. 624-18 c com). If at the moment of revindication the price was not yet paid to the first buyer or his liquidator, the revindication is directed towards the second buyer. If during the interval between opening of the insolvency proceedings and the moment of revindication the purchase price has been paid to the first buyer or his liquidator the revindication is directed towards the liquidator. Where, during this interval, the purchase price is paid to a third party, e.g. the assignee of the claim, the revindication is directed towards this third party.[68] The revindication of the purchase price, against the second buyer, the liquidator, or a third party, is possible only if the goods sold to the first buyer were still in their original state at the moment of delivery to the second buyer. Cass com 5 Nov 2003[69] shows that the article equally applies to a contract for the sale and supply of goods (*contrat d'entreprise*). If the purchase price due by the sub-buyer is higher than the price due by the first buyer the sum due by the first buyer will be the maximum which the seller may revindicate,[70] as no creditor is allowed to receive with his security device more than is due to him under the secured claim.

In Cass. com. 20 June 1989, Bulletin 1989 IV no 197, p. 131 (BNP v SMT)[71] the Supreme Court held that, as a result of the sub-sale to a sub-buyer, the buyer's claim against the sub-buyer for the purchase price was subrogated for the goods sold to the sub-buyer. The buyer had assigned all its current and future claims against customers to BNP. Now both the seller under retention of ownership, SMT, and BNP wanted to collect payment from the sub-buyer. The Supreme Court held that the assignment to BNP did not thwart SMT's right of revindication. The buyer's claim against the sub-buyer for the purchase price never belonged to the buyer but was immediately acquired by the seller as a result of real subrogation. For that reason assignment in advance by the buyer of all his claims (or this particular claim) cannot be set up against the seller.

The term 'revindication' may render the false impression that the seller has a proprietary right, whereas he merely has a personal claim against the sub-buyer. It may look like a proprietary right because it entitles the seller to full payment despite the first buyer's insolvency. If after

[68] P. Crocq, JurisClasseur Commercial, Fasc 2545, *Sauvegarde, redressement et liquidation judiciaires, Situation du vendeur de meubles, Clause de réserve de propriété*, nrs. 120-121.
[69] N° de pourvoi: 00-21357.
[70] Cass com. 16 June 2009, N° de pourvoi 08-10.241. See P. Crocq, *Revendication du prix de revente et plus-value de l'objet de la réserve de propriété* (2009) RTD Civ. 760.
[71] Similarly, Cass com. 8 March 1988, *Bulletin* 1988 IV N° 99 p. 69; Cass. com. 5 June 2007, *Bulletin* 2007, IV, N° 152; Cass com. 16 June 2009, N° de pourvoi 08-10241.

opening of the insolvency procedure the sub-buyer pays to the first buyer, this money is not treated as part of the insolvent's estate, because the claim belongs to the seller. If the money remains unpaid by the sub-buyer, the seller simply has to collect payment of his claim. However, if his debtor (the sub-buyer) is also declared insolvent before having paid, it becomes painfully clear that his claim is a mere personal right. In Cass. com. 6 October 2009 (*Emtec v Ricoh Europe*)[72], the Supreme Court held that the seller's claim against the sub-buyer is a personal right acquired at the time of resale and that the sub-buyer's administrator in insolvency was thus not obliged to pay the purchase price. The seller thus lost his security.

II. Descriptive Formants

In modern German academic writing the case law of the *Bundesgerichtshof* on *specificatio* is heavily criticised. Almost all academics stress that the rules of original acquisition should be *ius cogens* and that it should not be possible for the parties to opt out of these rules by deciding who will be seen as the manufacturer.[73] The reason most frequently mentioned is the third party effect. The rules of original acquisition, such as *accessio*, *commixtio/confusio* and *specificatio*, attribute ownership to certain persons. This attribution also works against third parties, since proprietary rights have third party effect. For that reason third parties should be able to rely on the factual situation and infer from the facts who the goods belong to.

The same argument is used in Dutch law to support the Dutch case law on this point. The majority of Dutch authors defend the Supreme Court's view that the rules on original acquisition are *ius cogens*.[74]

III. Meta-legal Formants

As said before, the seller's retention of ownership device can only be extended in the form of a *limited security right*. This demands exact drafting of sales contracts. Moreover, the retention of ownership clause and the security interest on the products work against third parties only if registered. This puts an extra administrative burden on the seller, which may make the security device less attractive.

[72] N° de pourvoi 08-15048.
[73] Staudinger/Wiegand, 2004, § 950, Rdnr. 25. MünchKomm InsO/Ganter, 2007, § 47 Rdnr. 106. MünchKomm BGB/Füller, 2004, § 950, Rdnr. 25.
[74] J. Wichers, Breda/Antonius, in E.H. Hondius and G.E. van Maanen, *Civiele klassiekers revisited* (Deventer, Kluwer, 2003) 239-258, at 252-253.

2. Critical Evaluation

Although many rules, definitions and choices made by the drafters of Book VIII DCFR are based on Austrian law the Comments on Book VIII contain a large amount of comparative work. One of the fundamental choices which had to be made was the transfer system for the transfer of ownership. The choice made by the draftsmen is the same system that Austrian law uses. At first sight this may look like 'home bias', but the Comments show a thorough weighing up of all pros and cons of the different possibilities. Other choices made in Book VIII evidence that the draftsmen were receptive of approaches which deviate from Austrian law. A good example is the passing of ownership in the case of bulk sales. Still the influence of Austrian (and also German) doctrine is clear and a profound understanding of Austrian (and German) property law is vital to understand the rules. In this respect the Comments are also helpful.

When comparing the DCFR rules to English law we should realise that although the rule in Gerson applies both to outright sales (i.e. not for the purpose of securing a claim) and to sale and lease back, the DCFR rules distinguish between these two types of transfer. In an outright transfer by way of *constitutum possessorium* the bona fide third party will not be protected whereas in a sale and lease back or similar transfer for security purposes the bona fide third party may be protected even though the transfer took place by way of *constitutum possessorium*. Art. IX.-1:102 (3) and (4) recharacterize the transfer for security purposes as the creation of a security right. As a result, such a transfer is outside the scope of art. VIII.-3:101 and is rather covered by art. IX.-2:108 (good faith acquisition of security right). Art. IX.-2:108 does not require the bona fide third party to be in possession of the security object and thus offers protection to the acquirer of a non-possessory pledge. This difference may seem odd because the arguments used to support the requirement of physical control in art. VIII.-3:101 are all about whether or not the factual situation, i.e. physical control, should have any bearing on good faith. In none of the arguments the *purpose* of the transfer (outright transfer or security transfer) plays any role whatsoever. Yet, for some reason these arguments are seen as irrelevant if the purpose of the transfer is to grant a creditor security. From the Comments on Books IX it is clear that the Hamburg working group on Book IX made a deliberate choice not to require the third party acquirer of a security right to have possession of the asset in order to be able to invoke third party protection. Since the arguments for allowing third party protection are the same for the transfer of ownership and the creation of a security right, one would have expected the same approach for both transactions. To my view the requirement of actual power should be eliminated.

It should be stressed that an assessment via three hypothetical cases is just a spot check and cannot be regarded as a general assessment of the entire subject-matter of Book VIII, which covers a vast amount of different legal problems. What is more, even these themes in Book VIII are only a small part of property law. The current assessment is not meant to answer the question whether Book VIII DCFR would function well if used as a codification. It would be impossible to answer that question because the rules of Book VIII cannot be judged in isolation of other parts of property law and private law in general.

Critical Essays

The ‚Three Lives' of European Private Law

by

Christoph U. Schmid[1]

Summary: 1. Introduction. - 2. The First Life – The CFR Process. - 3. The Second Life – EU Consumer Contract Law. - 4. The Third Life: ECJ Jurisprudence. - 5. Conclusion.

1. Introduction

European private law is not even 25 years old as a discipline, but its development, abrupt shifts in direction, institutional limitations and irrationalities make it a typical child of European integration. During the first decades which followed the conclusion of the Treaty of Rome, the idea that the Common Market needed a common legal infrastructure for market transactions was not widespread. Instead, the Community was dedicated to removing the most obvious obstacles to trade, such as tariffs, quotas and equivalent measures; national private laws, in particular contract laws, were similar enough so as to enable most cross-border market transactions. Only with the discovery of the consumer, not only as an economic actor but also as a market citizen, did the EC develop an interest in regulating private law from a consumer law perspective. Yet it was only after the relance of European integration with the Single Market project of 1985 and the introduction of qualified majority voting in the Single European Act of 1986 that the EC managed to enact the bulk of consumer law directives, covering inter alia doorstep sales, consumer credits, package tours, timesharing rights in immovables, unfair contractual terms, guarantees in sales and distance sales. However, private law has also been affected by European measures with other political objectives, such as banking, insurance and payment regulations, e.g. the 1998 Late Payment Directive, aimed at protecting small and medium sized enterprises. Most recently, consumer

[1] This piece has benefited largely from intense discussion with Christian Joerges and Florian Rödl, who were originally foreseen as co-authors.

law integration has led to the 2007 Green Paper on the Review of the Consumer Acquis[2] and the 2008 proposal for a horizontal Directive on Consumer Rights[3], which integrates the Unfair Terms, the Guarantee, the Doorstep and Distance Sales Directives. Whereas the consumer law directives had initially generated little case law (via references of national courts to the ECJ under Art. 234 TEC), this situation has changed since the turn of the millennium. Indeed, the ECJ is increasingly confronted with core issues of private law, and several decisions have generated heated and controversial discussions.

Beyond consumer law, the integration of general contract law had for years remained a passion of academics, who since the 1970ies had been assembled in the Lando Group on European Contract Law and other transnational circles. The European Parliament supported these efforts in two resolutions of 1989 and 1994,[4] which strongly recommended a European Civil Code that should deal with private law comprehensively. Following the example of the grand national codifications, it should provide a symbolic basis for a common identity of European citizens. However, this project, albeit limited to contract law as an initial step, was only introduced on the agenda of the EC in the late nineties, in the wake of the euphoric "constitutional movement" leading to the Nice Fundamental Rights Charter and the Laeken mandate to elaborate a constitutional treaty. At the 1999 Council summits of Cologne and Tampere, the Council took a positive view on a European contract law instrument and mandated the Commission to launch a preparatory process. As a first step, the Commission elaborated the 2001 White Paper on contract law, where different legal policy options were presented and a consultation process launched.[5] The feedback from legal science, practice, business and politics prompted the Commission in its 2003 Action Plan[6] to call for a horizontal instrument, alongside further measures of sector-specific integration, in order to increase the overall coherence of European private law. To this end, a "Common Framework of Reference" (CFR), which should contain common terminology, principles and rules on core areas of private law, should be elaborated. The CFR should constitute the basis of a subsequent "optional instrument" – a seemingly harmless neologism for a European contract code which should be applicable either through the parties' choice of law ("opt in" solution) or as a dispositive regime for transnational cases if the parties had not excluded its application ("opt out" solution). The preparatory work was then assigned to a transnational network of academic expert groups. In 2008, these published a first and provisional academic draft of the common

[2] COM (2007), 744 final.
[3] COM (2008), 614 final.
[4] OJ 1989 C 158/400 and OJ 1994 C 205/518.
[5] COM (2001), 398 fin.
[6] COM (2003), 68 fin.

frame of reference (DCFR), which resembles a comprehensive codification of private law at European level.[7]

Whereas the three building blocks of European private law just described - consumer law directives, ECJ jurisprudence, and the draft of a general instrument – have evolved in a relatively co-ordinated way for decades, it seems that in the recent past, particularly in aftermath of the failure of the constitutional treaty, they are increasingly drifting apart, mostly due to changed preferences in the European Commission and the ECJ's *effet utile* driven approach to private law. This disaggregation becomes apparent not only in "mutual non-consideration" but, what is worse, also in the turn away from a classic justice-based concept of private law in favour of a regulatory framework for businesses. Against this background, the present contribution sets out to explicate the "three lives of European private law" and to discuss the implications of this fragmentation for the effectiveness and legitimacy of the field in the future.

2. The First Life – The CFR Process

As mentioned, the drafting process for the Common Framework of Reference foreseen in the 2004 action plan was assigned to two networks of academic expert groups: the so-called *Study Group on a European Civil Code* (the follow up group of the Lando group, directed by Prof. Christian von Bar), working on a classic comparative law basis, and the *Research Group on the Existing EC Private Law* (*„Acquis-Group"*, directed by Prof. Hans Schulte-Nölke), aiming at developing European private law on the basis of the already existing legislative and judicial *acquis* in that field. The work of the groups was financed under the Sixth Framework Programme for Research and Development, which was instrumentalised for that purpose. The work of the groups was accompanied by a so-called stakeholders network (representing civil society) and by another network of Member State representatives.

The academic draft common framework of reference (DCFR), jointly published by both groups in 2008, is a compilation of principles and rules, which is in its external form practically identical to a continental-style civil code. The DCFR comprises 638 articles, compiled into seven books, which deal with general contract law, specific contracts and extra-contractual obligations based on benevolent intervention in another's affairs, tort/delict (though these terms are avoided) and unjustified enrichment. Yet the present DCFR edition is still provisional: in October 2009, a revised version is announced to be published which will contain comments and illustrations (fol-

[7] Study Group and Acquis Group (eds), *Principles, Definitions and Model Rules of European Private Law* (Munich, Sellier, 2008).

lowing the model of the Restatements of the American Law Institute, already adopted by the PECL) on the rules, which will explain their comparative and/or European law background; moreover, the revised version will be supplemented by three further books on immovables, pledges and trust. The whole compendium is expected to encompass around 10.000 pages. As well as serving as a tool and a source of inspiration for research and teaching, the academic DCFR is intended to provide a model for a political CFR to be adopted by the European Commission in 2010.

Apparently at the last minute, the DCFR was endowed with a general introduction devoted to the grand principles, values and legal policy considerations on which it is based. These include freedom of contract and its limits, balancing of values and policy objectives, economic welfare, protection of human rights, solidarity and social responsibility. However, this introduction seems to be a façade: the principles and values contained therein are of course not only very abstract, but also frequently conflicting between each other, and the DCFR makes no effort to explain the formulation of its rules on the basis of the introduction. In reality, the DCFR appears to be a legal-technical instrument in the tradition of the grand continental codifications of the last centuries. Therefore, at least the present version may hardly be viewed as a political project bringing to bear a welfare-oriented European social model, as called for by Mattei,[8] Lurger[9] and Collins and others.[10] Contrary to the expectations of the European Parliament, even the political CFR is unlikely to constitute a symbolic bedrock for a common identity of, and solidarity among, European citizens. This legal-technical conception is democratically inadequate, as rightly criticised by Hugh Collins and others; but, ironically perhaps, it matches the EC tradition to guise political programmes (e.g. the internal market programme) in technical terms. Sadly enough, the failure of the Constitutional Treaty has shown that the EU is not mature for grand political projects, which would include also a "societal constitution" in the form of a civil code. That notwithstanding, especially English commentators and officials reject any European private law instrument, even in a purely technical form, as they fear it could give rise to more interventionist EC legislation in future years.

Though published only a year ago, the DCFR has already triggered a huge number of comments and criticisms. Having been compiled within a very short time frame, the DCFR has been rightly criticised for containing a number of flaws in legal craftsmanship: the sections prepared by the Study Group are not always coordinated with the sections prepared by the Acquis

[8] U. Mattei, *Hard Code Now!* (1/2002) 2 Global Jurist Frontiers, Article 1.
[9] B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Wien/NewYork, Springer, 2002).
[10] See H. Collins, *The European Civil Code* (Cambridge, Cambridge University Press, 2007).

Group; the text is not always in conformity with existing EC law; and there are many extremely open-textured formulations and clauses which seem to delegate too much discretionary powers to courts and lead to unforeseeable decisions.[11] Yet, in our view, these flaws are serious but at the present stage not decisive, as they could surely be remedied in a revised version if enough time were available. This has already been shown by the discussion following its publication, in which a huge number of alternatives and improvements in all covered fields were proposed.[12] Moreover, the draft is accused of reflecting neither modern economic theory on market failures nor modern contract law phenomena, such as information rights and network arrangements in today's service society.[13] However, a coherent orientation by economic theory on market failures capable of meeting consensus throughout Europe seems to be impossible to achieve, and none of the recent private law codifications at national level has ever made that claim. This is so because economic theory itself is extremely controversial and in constant evolution, with the latest strand labelled "behavioural law and economics" relying on empirical experiments on human behaviour for the formulation of legal rules (these experiments often show the limited value of information to avoid bad bargains or mistakes). Moreover, modern phenomena such as new information duties developed on the basis of behavioural economics, new modes of contract formation via electronic tools and innovative network contracts in today's service society could still be regulated to the extent consensus can be achieved. However, also in most current national codifications they are not addressed, without these legal systems being ineffective. From a yet more fundamental perspective, the DCFR has been criticised for being unable to capture the dynamic development of private law under democratic conditions. This argument is too radical in our view. It is of course true that the DCFR, just as any other national code, does not provide an exhaustive regulation of private law. In our view, a codification cannot achieve more than structuring the most important problems of private law – a task which the DCFR will be able to achieve, at least after corrections and revisions. Its doctrinal fine-tuning, development and constant extension to new fields emerging as a result of technical progress and/or new commercial practices may legitimately be seen as belonging to courts. It is true, though, that the actual coming into force of a European instrument in private law would require a profound reform of the architecture of its judicial implementation by European and national courts.[14]

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11 See H. Eidenmüller, F. Faust, H.Ch. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht* (2008) JZ 529.
12 See e.g. the edition 2008 Nr. 3 of the ECRL dedicated to the CFR.
13 See S. Grundmann, *The Structure of the DCFR – Which Approach for Today's Contract Law?* (2008) 4 ERCL 225.
14 For more thoughts on this, see Ch. Schmid, *Legitimacy Conditions of a European Civil Code*, EUI Working Paper, Robert Schuman Center Series, no. 14/2001 = (2001) 8 MJECL 277-298.

The two crucial problems surrounding the CRF process are related to its defective design and the unclear status of a political CRF. To start with the latter, the exact legal status of the (final) CFR was controversial right from the beginning of the process. Whereas after the 2004 Action Plan the discussion focussed on the opt in vs. opt out dichotomy, after the failure of the Constitutional Treaty it has become clear that any legally binding instrument resembling a European Civil Code will not be accepted by a majority among Member States. Indeed, a hard code created on a soft law basis by academic experts without any popular legitimation would be democratically difficult to accept. Moreover, even at private international law level, the application of the CFR as a private regime chosen by the parties was debated but finally excluded from the reform of the Rome I regulation.[15] This would leave us with the remaining function of the CFR to act as a toolbox containing models for the revision of the existing and the elaboration of new European legislation – a function which was not recognized in recent Community legislation in private law, as we shall see below.

An even more pressing problem attaches to the institutional design of the CFR process, which until now has resembled the open method of governance: politically unaccountable academic experts chosen by a small group of project pioneers have elaborated the draft in accordance with their own self-made procedural rules in non-public meetings; others have had little chance to influence the process, as competition was apparently undesired by the Commission. The meetings with the stakeholder networks were too few, too short and too little prepared to enable any meaningful feedback and legitimation by civil society. At the present stage, the DCFR would not, therefore, qualify as a legitimate hard code. The need to enhance both the scientific quality and the political legitimacy of the process is rather undeniable. If would seem, however, that both aims cannot be achieved under the current institutional setting. As an alternative, a proposal voiced in 2000 before the European Parliament has received new attention in recent times: the creation of a European Law Institute on the model of the famous American counterpart institution. Such an institute would constitute an academically and politically legitimised body, to which the responsibility of elaborating an enhanced draft could be delegated. It could bundle, structure and consolidate discussions, enhance the quality of the work, improve the acceptance of the results among lawyers and ensure the compatibility of draft legislation with the social, economic and political context in which private law operates. Without such an institution, the CFR process will probably not have the potential for further development. Yet these considerations may become irrelevant anyway if the European Commission were to abandon the CFR process by limiting itself to EU consumer contract law.

[15] Regulation No. 593/2004, OJ L 177/6.

3. The Second Life – EU Consumer Contract Law

As mentioned, the enactment of many directives in private, especially consumer law, which covered only selected subject matters and generated disintegrative effects on national private laws, had triggered in 2004 the call for more coherence, which should be achieved through a general contract law instrument. Yet, in 2005 the political climate changed, after the failure of the Constitutional Treaty in the French and Dutch referenda. The Commission indicated that from then, it would prioritise a revision of the consumer contract law acquis. Furthermore, leading personnel which had administered the CRF process in DG Sanco was transferred to other units. The prioritisation trend increased in the 2007 Green Paper on the revision of the consumer *acquis*, in which the CRF process became manifestly disconnected. Initially, the consolidation of the *acquis* was limited to eight, later to only four directives. What is even more important, the Green Paper did not refer to the DCFR, which was already available unofficially at that time, though it contained a questionnaire with issues for consultation with alternative rule proposals, all of which had already been dealt with in the DCFR.[16] This means that even the minimalist toolbox function of the CFR was frustrated, and the question which arises then is why the CFR had to be funded with a huge research budget in the first place.

The scission between the CFR process and the consumer acquis was confirmed in the 2008 proposal for a Consumer Rights Directive (CRD).[17] This scission is documented not only by the complete lack of consideration of the CFR, even in cases in which the CRD deviates from existing *acquis* incorporated in the CFR. To give but one striking example, Art. 12 CDR on the consumer's right to withdrawal in off-premises and distance contracts, surprisingly no longer refers to the notification of the withdrawal right to the consumer as starting point of the withdrawal period. This is in striking contrast not only to Art. II-5:103 (2 b) and 104 DCFR, but also to Art. 4 and 5 Doorstep Sales and Arts. 5 and 6 Distance Sales Directive.

At a fundamental level, the scission is also shown by the fact that the CRD, unlike the CFR and all other national private law instruments, deviates from the classic ethical concept of private law which pursues justice among the parties in the individual case (normally commutative, sometimes also distributive justice) as the highest objective. Instead, the CRD sacrifices justice among the parties in favour of providing European businesses with a basic but uniform regulatory framework for market transactions with consumers. This harsh judgment is based less on the fact

[16] See M. Hesselink, *The Consumer Rights Directive and the CFR: Two Worlds Apart?* (2009) 5 ERCL 290, 294.
[17] COM 2008 (614/3).

that the CRD diminishes the standard of consumer protection in many instances - not only when compared to many Member States, but also to the existing European *acquis*. Instead, it mainly derives from the legal-technical consequences of the CRD's maximum harmonisation approach,[18] which constitutes a straightjacket for private parties and Member States alike. Thereby, Member States may no longer provide for stronger consumer protection in national law, but are strictly bound to the level foreseen in the Directive. The Commission has attempted to justify the need for maximum harmonisation in a 300 pages impact assessment report annexed to the draft, which postulates huge efficiency losses in cross-border transactions due to persisting legal divergences. As a response, the fully harmonised CRD wants to provide businesses with a single regulatory framework in order to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area.[19] Specifically, cross-border contracting on the basis of an identical set of standard contract terms shall be enabled.[20] Contrary to the hollow propaganda aim of the Directive to enable also consumer trust and reliance through a single regulatory framework, consumers were of course far better served by a common minimum standard, which could be, and actually was,[21] extended by Member States to their benefit - whereas they are now subjected to a reduced standard of protection even in internal cases.

The Directive's maximum harmonisation approach conflicts with the classical concept and functioning of private law justice in various respects. To start with, private law is a complex fabric of considerations and values, with different legal-ethical roots. For example, with respect to a purchased good with a malfunctioning feature which causes a damage to the buyer, under German law, one needs to consider inter alia whether the buyer was deceived by the seller about the good's feature in question, whether the buyer or both parties made an error in their assessment of the feature, whether the feature was stipulated by the contract, whether the feature is normally to be expected for similar goods, whether the defect is limited to the product itself or caused a damage to a separable part of the good, whether the defect affected the consumer's health or other patrimony and/or caused any additional material or immaterial losses. Yet, under the Directive only the conformity of the good with the contract (i.e. whether the feature was stipulated by the

18 The turn to maximum harmonisation, already applied in the 2002 financial services distance sale directive, the 2005 unfair commercial practices directive and the 2008 new consumer credit directive, is rightly viewed as a new era in European consumer law by H.-W. Micklitz and N. Reich, *Der Kommissionvorschlag vom 8.10.2008 für eine Richtlinie über "Rechte der Vergraucher", oder: "der Beginn des Ends einer Ära…"* (2009) EuZW 279; English version: *Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights* (2009) 46 Common Market Law Review 471. See also N. Reich, *Von der Minimal- zur Voll- zur "Halbharmonisierung"* forthcoming in (2010) ZEuP 65.

19 CRD, Recital 20.

20 S. Whittacker, *Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of ‚Maximum harmonisation'* (2009) 5 ERCL 223, 240.

21 For details see the impressive *EC Consumer Law Compendium*, elaborated for the European Commission by H. Schulte-Nölke, Ch. Twig-Flessner and M. Ebers in 2008.

contract or may normally be expected for similar goods) is dealt with. How about, then, the legal provisions implementing the other considerations? If one takes seriously the Directive's aim of providing businesses with a single regulatory framework beyond which national law must not offer any additional protection to the consumer, they would all be pre-empted on the basis of maximum harmonisation. Under these conditions, the doctrinal fine-tuning of legal-ethical considerations, of which "justice among the parties" is the outcome, would no longer be feasible. For example, it may not be just to exclude the seller's liability for non-conformity according to Art. 24 Nr. 3 CRD when not only the buyer but both parties could not reasonably have been unaware of the non-conforming feature. Similarly, it may be unjust to exclude also the liability for defective products under tort law where a buyer who was injured by the product fails to communicate the non-conformity of the product to the seller within two months according to Art. 28 Nr. 4 CRD – containing the buyer's obligation to inspect and report any non-conformity of the good, a device which was previously contained in commercial law only. However, if one allows the competing application of the CRD and tort law in these cases, the aim of establishing a single regulatory framework is obviously frustrated. In this context, it should also be noted that the Directive's maximum harmonisation approach betrays not only national provisions but also other EC law sources, such as the Product Liability Directive (PLD).[22] For a malfunctioning product will often not only lack conformity with the contract, but also be defective in the sense of the PLD. Ironically, though there is no express stipulation to that effect in the PLD, the ECJ has also interpreted that Directive as a maximum standard,[23] which was apparently overlooked by the authors of the CRD. As a result, we are facing the logical inconsistency of two maximum standards, which are of course defined by different legal requirements.

Secondly, a context-sensitive and cautious application and development of private law by the judiciary, which enables justice among the parties, needs to fulfil a wide range of tasks: it needs to fill legislative gaps or concretise open-textured provisions, adjust mistakes or wrong background assumptions of the legislator, develop the law in order to accommodate new factual problems and regulatory needs, or react to parties' attempts at circumventing certain legal provisions. At European level, it is already more than doubtful whether the ECJ would *theoretically* be able to fulfil these tasks, in particular as the social, economic and political context in which private law is embedded is often characterised by national or even regional peculiarities which cannot be addressed in a uniform way. *Practically*, as is well known, the European judiciary completely lacks the resources to administer consumer contract law for 350 million people; the average length of the preliminary reference procedure of about two years already now causes exces-

[22] Directive No. 85/374/EEC, OJ L 210, 29.
[23] See below sub European jurisprudence.

sive burdens to private parties. At national level, legislators and courts are barred from fulfilling these essential functions of private law through the means of maximum harmonisation - private law will so to speak be frozen in the state of the Directive.

Specifically, developing the Directive in matters within its scope of application or resorting to national law for the purpose of gap-filling is difficult and risky for national courts, as the ECJ may later find that the Directive was interpreted in a wrong way or that its provisions were exhaustive and, therefore, the national provisions applied for the sake of (perceived) gap-filling pre-empted. For example, when Art. 7 CRD allows a commercial intermediary to state that he is acting in the name of and on behalf of a consumer so as to avoid the application of consumer law, it is doubtful whether national measures against abuses are pre-empted or not – for example, the German "quasi-seller liability" (*Sachwalterhaftung*) of a second hand car dealer who sells cars, in order to evade consumer protection, in the name of their previous owners who are consumers.[24] Furthermore, it is not clear whether remedies for non-conformity not regulated in the Directive, such as a direct claim against the producer of the non-conform good (the French *action directe*), or the English rejection right applying to non-conform goods may still be applied or are also pre-empted.[25] Moreover, Art. 27 Nr. 2 CRD states that the consumer may claim damages for any loss not remedied under the rules of non-conformity.[26] However, this extremely wide formula leaves unclear the ambit of the recoverable damage (interest in case of late replacement or repair?, costs of repair the consumer has carried out himself?, immaterial damage for the inability to enjoy the good?) and whether more detailed liability rules need to be developed autonomously on the basis of the Directive or whether national law may be resorted to for gap-filling; in the latter case, it would again be doubtful whether national liability standards might only be objective or also fault-based. In sum, when such central issues to which hundreds of pages in commentaries on national laws are devoted are no longer settled, but need to wait two years for clarification by the ECJ, the quality and foreseeability of judicial decisions, which are essential preconditions for private law justice, would be gravely affected and national private law systems might tumble into chaos. In addition, the Directive's core objective of providing businesses with a single regulatory framework cannot be reached in the first place with similarly vague formulas. Instead, the fragmentary texture of the Directive cannot reasonably be expected to enable a just, socially sensitive and legitimate handling of consumer contract law.

[24] Example from H.-W. Micklitz and N. Reich, *op. cit.*, 491.
[25] See H.-W. Micklitz and N. Reich, *op. cit.*, 508 ff.
[26] See again H.-W. Micklitz and N. Reich, *op. cit*., 507 ff.

4. The Third Life: ECJ Jurisprudence

With the exception of private international and international procedural law and some cases on the impact of the basic freedoms on national private law, European jurisprudence on core areas of private law took a while to get started, mainly since national implementation measures of European directives and the familiarisation of courts and practitioners with them were a slow process. For example, the first decision on the 1993 Unfair Terms Directive dates from 2000 only, but since that year the ECJ was confronted with it not less than thirteen times. As well shall see, however, treating ECJ jurisprudence on core private law as a separate third life of European private law is justified not only with respect to the quantity of judicial contributions to the field, but more importantly on account of its peculiar features which set it apart from the other "two lives".

From a purely external perspective, the ECJ has of course not turned its back on European private law in the same way as the CRD has done to the CRF. Instead, it goes without saying that the ECJ deals with European legislation brought before it, as this is precisely its job. As regards its relationship with the CFR, it is however too early to draw any conclusion. Yet it is to be expected that the Court will at least occasionally use it when justifying its decisions, just as it has taken into consideration other important soft law sources such as, most significantly, the Nice Fundamental Rights Charter. Last but not least, single members of the Court have also already shown their interest in the CFR process.[27]

However, similarly to European consumer contract law, we may find a scission at a deeper level: the ECJ, too, is inclined to sacrifice the classic ethical concept of private law in favour of *effet utile* - i.e. the maximisation of collective policy goals, market integration in particular, underlying European legislation. In other words, the Court tries to maximise the practical effectiveness of EC law without adequately reflecting its systematic embeddedness in its national law environment and the overall objective of justice among the parties. This criticism may be illustrated by the Court's instrumentalist approach to consumer protection and its support of maximum harmonisation.

Given its preponderance within European private law, consumer protection might be expected to provide an overarching interpretative meta-principle. Yet it may be shown that the Court does not pursue a coherent consumer model. This thesis may be illustrated by referring to its interpretation of consumers' information rights.[28] Of course, there is absolutely nothing wrong with information rights in themselves. As both economic analysis and contract practice show,

[27] See e.g. the contribution of AG V. Trstenjak, *Die Auslegung privatrechtlicher Richtlinien durch den EuGH: Ein Rechtsprechungsbericht unter Berücksichtigung des Common Frame of Reference* (2007) ZEuP 145.
[28] The following analysis draws on Ch. Schmid, *The Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code* (2005) 1 ERCL 211.

information asymmetries among professional traders and consumers are a frequent type of market failure, which information rights are able to correct in many cases.[29] In line with this basic finding, information rights constitute the most prominent and frequent regulatory tool in European consumer law. This seems to be inspired by the model of an inadequately informed consumer who is able to take rational decisions only after adequate information. Thus, to quote but one example, in the recent *Cofidis* case,[30] the ECJ quashed national time limits restricting the exercise of consumer protection rights on the ground that consumers may ignore their rights completely, but needed to be protected all the same.

Conversely, as regards national information rights, these are often found by the ECJ to be inconsistent with the four market freedoms on proportionality grounds.[31] In particular, in the field of misleading advertising, national information rights requiring clear and unambiguous information are treated restrictively. In what boils down to an unrealistic assumption about market behaviour, consumers are for example supposed to recognise objectively wrong manipulative advertising statements[32] or foreign-language labels similar to well-known domestic products.[33] In this jurisprudence, we seem to face a different model of a well-informed and intelligent consumer. As a result, consumer information requirements are construed widely in *European* consumer contract law, whereas *national* consumer protection-based limitations on the basic freedoms in national unfair competition law are construed narrowly.[34] However, this distinction is by no means justifiable under private law justice considerations, as - in the words of Stefan Grundmann - one should not require a lower degree of attention from a consumer entering into contractual negotiations than from a consumer reading advertisements in his armchair.[35]

The background of this jurisprudence seems to be that national consumer protection instruments, including information obligations, have been recognised as valid limitations of the basic freedoms in the famous *Cassis de Dijon*[36] jurisprudence. Therefore, a wide recognition of national information rights would reduce the *effet utile* of the market freedoms. At the end of the day, the different treatment of national and European information rights shows that the ECJ's true

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[29] See generally, H. Fleischer, *Informationsasymmetrie im Vertragsrecht* (Munich, Beck, 2000).
[30] Case C-473/00, *Cofidis*, ECR 2002, I-10875.
[31] On the relationship of contract law and the market freedoms, see O. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EGV* (Tübingen, Mohr, 2003).
[32] Case C-470/93, *Mars*, ECR [1995], I-1923. In this decision, the ECJ argued that a consumer would not confuse the (larger) size of a „10% more" advertisement on a chocolate package with the actual (smaller) increase in quantity.
[33] Case C-369/89, *Piagème*, ECR [1991], I-2971.
[34] This finding has recently also been confirmed by H. Unberath and A. Johnston, *The Double-Headed Approach of the European Court concerning Consumer Protection* (2007) 44 CMLR 1237.
[35] S. Grundmann, *Europäisches Schuldvertragsrecht* (Berlin/ New York, De Gruyter, 1999) 270, n. 106. For a similar critique, see H. Fleischer, *Vertragsschlußbezogene Informationspflichten im Gemeinschaftsprivatrecht* (2000) ZEuP 791.
[36] Case 120/78, *Rewe/Bundesmonopolverwaltung für Branntwein*, ECR [1979], 649.

concern is not a uniform model of a consumer and not even consumer protection as such, but the optimisation of Community law, irrespective of its contents and objectives. Thus, a coherent vision of consumer information in particular and private law in general is sacrificed to a "schematic *effet utile*" concept. Obviously, such a concept prevents private law from adequately fulfilling its core task of ensuring justice between the parties.

Similar tendencies may be shown in the Court's support of a wide notion of maximum harmonisation in product liability and unfair competition law. The jurisprudence in this fields anticipates the likely effects of maximum harmonisation in the ambit of the CRD. Regarding product liability law, the 1985 Directive[37] does not contain a minimum harmonisation clause, though most commentators read such a clause into it on account of its framework character and the large number of gaps.[38] This is fully plausible as, just as with the CRD, the fragmentary texture of the Directive cannot reasonably be expected do justice to this complex and socially highly sensitive matter governed by different national regulatory traditions.[39] However, in three cases decided on 25 April 2002, the ECJ found that no minimum harmonisation principle could be read into the Directive in the light of its paramount goal of establishing uniform regulation of product liability - so as to prevent market distorsions when undertakings in one State are forced to pay more to victims of dangerous products than in others.[40] In doing so, the ECJ deprived a Spanish plaintiff, whose health had been seriously affected by the transfusion of infected blood in a public hospital, of a claim for damages against the hospital existing under a Spanish product liability statute.[41] The reason for this was that - unlike under Spanish law, which followed US law in this respect -, the victim can only sue the producer of the defective product, but in general not another member in the commercial chain - such as the hospital which had not produced the infected blood itself in this case. Alongside the Spanish case, the ECJ convicted France and Greece in a treaty infringement procedure, as they had not transposed the Directive word by word into national law,

37 Dir 85/374/EEC, OJEC 1985 L 210/29.
38 See G. Brüggemeier, *Produkthaftung und Produktsicherheit* (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 511, 531, 534; G. Howells, *Product Liability – A History of Harmonisation*, in A. Hartkamp et al. (eds), Towards a European Civil Code (Demeter, Kluwer, 3rd edn forthcoming).
39 See H. Koch, *Internationale Produkthaftung und Grenzen der Rechtsangleichung durch die EG-Richtlinie* (1988) 152 *Zeitschrift für das Gesamte Handelsrecht* 537; the incomplete character of the directive becomes visible also in its complex interplay with product safety law: see G. Howells, *The Relationship between Product Liability and Product Safety – Understanding a Necessary Element in the European Product Liability Through a Comparison with the US Position* (1999-2000) 39 Washburn Law Journal 305.
40 The rejection of this jurisprudence seems to be quasi unanimous among European commentators: See G. Viney, *L'Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux* (2002) I 177 La Semaine Juridique 1945; J. Calais-Auloy, *Menace européenne sur la jurisprudence francaise concernant l'obligation de sécurité du vendeur professionel* (2002) 31 Recueil Le Dalloz 1458; A. Palmieri and R. Pardolesi, *Difetti del prodotto e del diritto privato europeo* (2002) Il Foro Italiano IV 296; Ch. Joerges, *Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU*, EUI Working Paper Law 2003/2; M.-E. Arbour, *Compensation for Damage Caused by Defective Drugs: European Private Law between Safety Requirements and Free-Market Values* (2004) 10 ELJ 87.
41 Case C-183/99, *González Sánchez*, [2002] ECR I-3901 (ECJ).

but had tried to remedy some of its apparent shortcomings, such as the minimum threshold required for the compensation of damages (*Selbstbeteiligung* in German, and *franchise* or *franchigia* respectively in French and Italian).[42]

This jurisprudence sacrifices national consumer protection without even any visible gain for European industries. Indeed, the narrow scope of application of the European Directive and its many gaps render its objective to provide European undertakings with a uniform product liability regime absolutely illusory.[43] As a result, the ECJ has in this case petrified a nearly 20 year old piece of legislation already infused with massive shortcomings. In doing so, it prevents Member States from adequately fulfilling their responsibility of providing industry and consumers with a socially and economically adequate and consistent product liability law.[44]

A similar development has in the meantime also taken place in regard of the 2005 Unfair Commercial Practices Directive which explicitly adheres to the principle of maximum harmonisation. In the case *VTB-VAB v. Total Belgium* of 23/4/2009;[45] the Court was confronted with a provision of Belgian unfair competition law which established a presumption of unlawfulness of combined offers of unrelated products (a certain product may only be bought, or is received for free by a consumer when another product is bought). According to the schematic reasoning of the ECJ, the national rule was in flagrant violation of EC law as it fell in a matter

[42] Cases C-52/00, *Commission v France* [2002] ECR I-3827 (ECJ) and C-154/00 *Commission v Greece* [2002] ECR I-3879 (ECJ).

[43] See the telling comment by a leading German practitioner: J. Schmidt-Salzer and H. Hollmann, *Kommentar EG-Richtlinie Produkthaftung*, vol. 1 (Heidelberg, Recht und Wirtschaft, 1986) Einl IV, 135 ff. n 73 ff., 79: 'Hält man sich die Milliarden und Abermilliarden von Produkten vor Augen, die jährlich innerhalb des Gemeinsamen Marktes veräußert werden, ist bereits bei Beschränkung auf den in der Richtlinie geregelten Bereich (Personenschäden, private Sachschäden) betriebswirtschaftlich der Nachweis, daß innerhalb der Europäischen Gemeinschaft die unterschiedlichen Haftungsregeln die Warenströme beeinflussen, abwegig. Dazu sind die Unterschiede des Haftungsrechts letztlich zu gering und treten Produkthaftungsansprüche relativ viel zu selten auf. Die Beobachtung des Anteils, den (unter Ausklammerung 1. der US-Schäden, 2. der gewerblichen Sachschäden und 3. der Produkt-Vermögensschäden die sog. konventionellen Produktschäden innerhalb der Betriebshaftpflichtversicherung haben, belegt eindeutig, daß es sich im Vergleich zu den Warenvolumina um eine quantité négligeable handelt (...) Die vorgenannten Beispiele belegen, daß ein Unternehmen (…) schlichtweg fahrlässig handeln würde, wenn es seinen Warenstrom-Dispositionen und -Kalkulationen die Haftungsregelungen der EG-Richtlinie zugrunde legen würde.'
Paradoxically, it seems to be exactly the ineffectiveness of the directive which has made it an attractive model for legislators worldwide, who want to boast a high consumer protection standard without effectively limiting their industries. See M. Reimann, *Product Liability in a Global Context: the Hollow Victory of the European Model* (2003) ERPL 128.

[44] It may be added that this case law also leads to a different treatment of various Member States: Art. 13 of the directive explicitly allows the application of competing national liability regimes based on contract or tort. However, in the lack of legislative action, national courts (for example in Germany) have developed traditional tort law into a fully fledged product liability regime. As a result, those Member States which - more or less by chance - have developed a product liability regime formally still based on fault (though in practice converted into one close to liability without fault by the inversion of the burden of proof and similar judicial devices) would probably be allowed to keep it, whereas others such as Spain, whose legislatures have opted for a strict liability regime, have to accept the primacy of the directive.

[45] C-261/07, *VTB-VAB v. Total Belgium*, nyr.

exhaustively regulated by the Directive and as it did not respect the maximum harmonisation principle:[46]

"(…) In the first place, Article 54 of the 1991 Law lays down the principle that combined offers are prohibited, notwithstanding the fact that such practices are not referred to in Annex I to the Directive. As has been pointed out in paragraph 56 of the present judgment, that annex exhaustively lists the only commercial practices which are prohibited in all circumstances and accordingly do not have to be assessed on a case-by-case basis. Thus, the Directive precludes the system implemented by Article 54 of the 1991 Law in so far as that article prohibits, generally and pre-emptively, combined offers without any verification of their unfairness in the light of the criteria laid down in Articles 5 to 9 of the Directive. Next, by operating in that manner, a rule of the type at issue in the main proceedings runs counter to the content of Article 4 of the Directive, which expressly prohibits Member States from maintaining or adopting more restrictive national measures, even where such measures are designed to ensure a higher level of consumer protection (…)"

Admittedly, the result of this decision is much less worrying than the product liability decisions. Yet in terms of legal reasoning, the outcomes are identical: under the Court's schematic interpretation of the pre-emption doctrine, the content of national measure and its contribution to justice among the parties are irrelevant, only the occupation of the legal terrain by European measures counts. With such decisions, the Court largely contributes to an instrumentalist conception of European legislation which places the *effet utile* of market integration above all - including above justice among the parties.

5. Conclusion

As this contribution has demonstrated, the current disaggregation of European private law in three lives becomes apparent not only in the "mutual non-consideration" of the CFR and European consumer contract law but, what is far worse, also in the shift of European legislation and jurisprudence from a classic justice-based concept of private law to a single regulatory framework for the internal market. Thus, the European system of multi-level governance is complemented by an internal fragmentation of European private law, which amounts to a sort of

46 C-261/07 (*VTB-VAB v. Total Belgium*) of 23/4/2009 at no. 60 ff.

“multi-compartment governance”. What should be the consequences of this situation? Our answer is grim: a European regime which is not able to safeguard its internal coherence and orientation towards justice as the key objective of private law does not enjoy the legitimacy to set aside and disintegrate national private laws, which still constitute more or less well functioning systems upholding justice among citizens. Instead, European private law should resort to classic justice-oriented legal instruments which do not suffer from a market integration bias. A revised CRF, institutionally legitimised by a European Law Institute, could be such an instrument. Conversely, the imposition of maximum harmonisation and the subversion of national social standards (as in product liability law) should stop.

Draft Common Frame of Reference and Terminology

by

Elena Ioriatti Ferrari

Summary: 1. Introduction. - 2. Common Frame of Reference (CFR) and Terminology. - 3. Draft Common Frame of Reference (DCFR) As a "Tool-box". - 3.1. General Function. - 3.2. Structure and Terminology. - 3.2. Definitions and Terminology. – 4. Conclusion.

1. Introduction

The European Union is a multilingual and multijurisdictional entity, accommodating different legal systems, which relies principally on written sources for the production of its laws.

In drafting its legal texts, the Community system[1] is bound by a strict regulation, as already in the mid - 50s the use of language and the choice of multilingualism has been the object of specific rules[2].

The choice of multilingualism[3] is not absolutely new: nowadays, more and more laws are being made by international or supranational institutions and are therefore increasingly produced

[1] After the Treaty of Lisbon the term "communitary" has been replaced with the term "of the Union". However, for practical reasons, in this paper the words "communitary" and "community" have been maintained alongside the new terminology.

[2] The policy of multilingualism was laid down in the first Regulation adopted by the Council after the entry into force of the Treaty of Rome, on 1st January 1958: art. 217 of the E.C. Treaty (art. 290 of the consolidate version) "*The rules governing the languages of the institutions of the Community shall ....(omissis)...be determined by the Council, acting unanimously.*" The Council Regulation (EEC Council Regulation No. 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385–386 (DE, FR, IT, NL); English special edition: Series I Chapter 1952-1958 p. 59, which constitutes the legal basis for multilingualism within the EU, has never been changed, but only updated every time a new Member state has been added. According to the Regulation determining the languages to be used in the European Community, all the official and working languages of the institutions are placed in an equal position. The Regulation distinguishes between working and official languages, without giving any definition of the two categories and provides (art. 4) that regulations and other documents of general application shall be drafted in all the official languages.

[3] The reasons underpinning multilingualism are the principle of equality of the languages and the exigency of ensuring democratic participation within the process of European integration. On a practical level, both these needs are expressed in the duty to draft the Community acts – particularly directives and regulations – in all the official languages of the Union. See R. Craufurd Smith (ed.), *Culture and European Law* (Oxford, Oxford University Press, 2004).

in several languages[4]. The methods of drafting multilingual law can be quite varied[5]. Canada in particular – which has a bilingual legal system (French, English) and also, in part, parallel laws – is the jurisdiction which has become highly specialised in the techniques of multilingual drafting at both the academic and practical levels.

However, the European Union provides an even more complex example of the difficulties created by normative multilingualism system.

The achievement of this institutional goal is particularly difficult at Community level, since, in drafting its legal texts, the EU has not drawn on a pre-existing legal lexicon, which is the result of a single legal culture and capable of rendering the same legal concepts in all twenty-three languages of the Union.

The early years of the European Union were therefore decisive, so far as concerned the choice of a technique for drafting and translation of laws which was - in theory - capable of filling the gaps created by the lack of a pre-existing Community legal terminology[6]. From the beginning the legal terminology of the Community came into being through the specific mechanism of lexical creation, which chiefly consists in the coining of neologisms. Such coinages may be entirely new terms, or words which are already pre-existent in one of the languages and are adapted for use in Community law; from the semantic viewpoint, the terms remain in their original form, but acquire a new, Community meaning. By this method, terms such as "directive", "regulation", "recommendation" and "subsidiarity" have been coined first in the English language - collectively referred to as "semantic neologisms"[7] - and later transposed to all the EC official languages.

[4] See the meetings organised by ISAIDAT (Istituto Subalpino per l'Analisi e l'Insegnamento del Diritto delle Attività Transnazionali): the proceedings of the first conference - Turin December 4 and 5, 1998 - have been published by Rodolfo Sacco and Luca Castellani (eds), *Les multiples langues du droit européen uniforme* (Turin, Harmattan, 1999).
The proceedings of the second International meeting – Turin, November, 28 and 29, 2001 – on interpretation of multilingual law have been published by Rodolfo Sacco (ed.), *L'interprétation de texts juridiques rédigés dans plus d'une langue* (Turin, Harmattan, 2001).
The third and fourth meetings Turin, 25, 26, 27 April 2007, *Les Frontières avancées du savoir du juriste: l'Anthropologie juridique et la Traductologie juridique* and Rome, 12 e 13 March 2008, "*Le nuove ambizioni del sapere del giurista: antropologia giuridica e traduttologia giuridica"*, have focused on the relationship between law and other sciences – linguistics, anthropology and ethnology – in order to find solutions to the problem of legal translation on a global scale.
[5] See S. Šarčević, *New Approach to Legal Translation* (The Hague/New York/Boston, Wolters Kluwer Law and Business, 1997). On the difference among co-drafting, parallel drafting and bilingual drafting see P. A. Crépeau, *La transposition linguistique*, in G. Snow, G. J. Vanderlinden (ed.) *Français juridique et science de droit* (Bruxelles, Bruylant, 1995).
[6] B. Pozzo, *Harmonising of European Contract Law and the Need of Creating a Common Terminology* (2003) ERPL 756 ff.
[7] D. Cosmai, *Tradurre per l'Unione europea* (Milan, Hoepli, 2007) 30.

Thus, community terminology is made up of numerous neologisms, whose purpose, ideally, is to ensure that all the official languages have equivalent legal concepts available to them[8].

The question then arises as to whether this technique is able to grant not only the transmission of the same term in all the language from a linguistic point of view, but also a uniform interpretation and application of the legal concepts in the single Member states.

This difficulty is the Achilles' heel of the European harmonisation process, particularly with regard to building a body of European private law, as the most important phenomenon of the Community venture. While over the last decades EU action, through directives and regulations in the area of private law, has gradually increased, a rather minimalist role was given to private law regulation at the outset of the Community creation.

As a consequence, the "translation model" referred to above was developed at a time when the European Community was mainly concerned with technical sectors (such as the agricultural market) and therefore provided for legal rules aimed at regulating factual situations (for example, the regimen for agricultural products), rather than abstract ones (for instance, consumer contracts). The fact that Community lawmakers became accustomed to drafting this type of legal rule, which did not require immersion in legal tradition, has had the effect that the EU legislator haven't needed to recognise jurists, or European legal scholarship in general, as interlocutors with whom they can develop the legal language of the EU.

With the passage of time, this way of drafting Community rules, utilised to regulate technical sectors, was adopted by default to regulate Community private law rules as well[9].

Private law of the European Union is therefore drafted using terms and expressions which have not previously been organised in a systematic way by a legal tradition[10]. From a general viewpoint, this legislative technique creates law which is not based on its own system of conceptual references or on an internal and external organised system of concepts and categories.

This has repercussions on the delicate phase of interpretation and application of the law in the Member States. For example, when interpreting directives and regulations in the field of private law, national courts will have no background against which to interpret them: no system, no common culture, no general referents.

The lack of such a general system of private law also has repercussions at the level of terminology. The Commission itself has identified different categories of problems with the *acquis*, such as the use of abstract legal terms in directives which are either not defined or too broadly

[8] F. Bonn, *Les problèmes juridico-linguistiques dans les Communautés européennes* (1964) Revue Générale de Droit International Public 708 ff.
[9] A. Gambaro, *A proposito del plurilinguismo legislativo europeo* (2004) Riv. trim. dir. proc. civ. 993.
[10] A. Gambaro, *"Jura et Leges" nel processo di edificazione di un diritto privato europeo* (1998) Eur. dir. priv. 1010.

defined, differences between national implementing laws and inconsistencies in EC contract law terminology[11]. Reasons suggested in favour of the improvement of existing Community legislation include the excessive vagueness and confusion of existing terminology and the need of greater coherence, transparency and simplicity in EC law.

2. Common Frame of Reference (CFR) and Terminology

The European Commission in 2003 and 2004[12] endeavoured to meet this situation by commissioning legal scholars and stakeholders to draft a *Common Frame of Reference* (CFR) in the area of contract, which would contain definitions of legal terms, model laws and general principles. The CFR should be a reference point for Community lawmakers, besides offering the basis of a possible "optional instrument".

The Commission can therefore be credited with realising that private law is not only assuming a role of central importance in the organisation of economic relationships constructed by the Community, but it is also the legal sector which demands the greatest degree of precision in its terminology: this might be the background of the Commission's efforts at the institutional level towards establishing legal consistency, together with linguistic/semantic coherence. In the Commissions' program, legal consistency and coherence in terminology play an instrumental role in improving harmonisation, as an action equated with better regulation and coherence and consequently instrumental for the completion of the Internal Market.

In this framework, primary concern to the Commission is the substantive content of the CFR, which should be chiefly determined by reference to the need to improve the coherence of the *acquis.* In accordance with this program, as has been clearly stated[13] "the first goal of the CFR is to be used as a terminological model in the drafting and revision of European legislation, in this way improving the functioning of the internal market by way of resulting benefits for consistency"[14].

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[11] Commission of the European Community, Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the *acquis*: *The Way Forward*, Brussels, 11.10.2004, COM(2004) 651 final, p. 3.

[12] Communication from the Commission to the European Parliament and the Council. *A more coherent European contract law, An Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final, p. 2. Communication from the Commission to the European Parliament and the Council, European Contract Law and the revision of the *acquis*: *The Way Forward*, cit.

[13] L. Miller, *The Common Frame of Reference and the Feasibility of a Common Contract Law in Europe* (2007) JBL 381.

[14] According to the Commission "the Common Frame of Reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like "contract" or "damage" and of the rules that apply for example in the case of non-performance of contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not

The structure of the CFR as proposed by the Commission – "fundamental principles, definitions and model rules" - anticipates the second objective of the Common Frame of Reference, that is "to form the basis for further reflection on an "Optional Instrument" in the area of European contract law"[15].

Moreover, some other further important purposes of the CFR would be to provide support for arbitrators, as well as to national legislators in implementing EC directives, and to courts in order to resolve the future interpretative uncertainties of EC legislation.

In general, the idea of the Commission to improve terminological coherence as the main purpose of the CFR has been welcomed with enthusiasm in Europe both at the academic and institutional level[16]. The program has been perceived as an institutional choice in the direction of a common European terminology[17], as the CFR is intended to provide the solution to the problem of the lack of a cultural link between the Community and the national legal taxonomy; furthermore, this "translation tool" is meant to develop clear and uniform concepts and terminology, to which the European and national institutions will be required to refer in the search for a commonly acceptable solution to language problems.

However, although underlining that the CFR serves as a toolbox for ensuring better coherence of the *acquis* and future *acquis* drafting, at the same time the Commission launched the "Optional Instrument", as a concrete instrument for a coherent system of private law, probably to be enacted as a *soft law* model.

Much has been written on the Commission's choice of combining these two functions in the same instrument: according to some scholars[18] the fact that the expression "Common Frame of Reference" covers at least two different European instruments, a "Tool-box" and an "Optional Instrument", has led to a certain lack of clarity as to what ought to be the real role of this instrument at the European and national level[19].

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foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application: Communication from the Commission to the European Parliament and the Council. *A More Coherent European Contract Law, An Action Plan,* cit., p. 2.

[15] *Ibidem.*

[16] See the reactions to the *Action Plan* and to the 2004 Communication on Contract Law (*The Way Forward*): http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

[17] M. J. Campana, *Vers une langue juridique commune en Europe* (2000) ERPL; N. Urban, *One Legal Language and the Maintenance of Cultural and Linguistic Diversity* (2000) ERPL 51 ff.; R. Sacco, *Language and Law*, in B. Pozzo (ed.), *Ordinary Language and Legal Language* (Milan, Giuffrè, 2005) 1 ff.; A. Fenet, *Diversitè linguistique et construction européenne* (2001) Rev. trim. dr. eur.; Pozzo, *Harmonization of European Contract Law and the Need of Creating a Common Terminology*, cit., 754.

[18] Miller, *The Common Frame of Reference and the Feasibility of a Common Contract Law in Europe*, cit., 382 ff. S. Whittaker, *The "Draft Common Frame of Reference". An Assessment*. November 2008. Study commissioned by the Ministry of Justice, United Kingdom, available at: http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm.

[19] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit.

This argument has been considered controversial by those who believe that these two roles of the CFR are simply the same facet of the same solution[20]. In general, the justification of the argument is relatively simple: law includes language and its terminology. It follows that the creation of a common terminology could not be detached from the creation of rules, which could be enacted as a *soft law* "Optional Instrument", triggered by the choice of the parties.[21]

For the purpose of this report, of particular importance is that this lack of choice regarding the ultimate purpose of this Community instrument cannot but influence the structure and the way in which the provisions and definitions of the CFR are drafted.

This point is crucial in the analysis of the terminology of the *Draft Common Frame of Reference (DCFR)*[22]: it is implicit that in designing the DCFR, the text was intended to have at least two different possible functions, which might not be entirely compatible from a terminological point of view. As we will see, there might be a contradiction in the creation of an ideal uniform set of private law rules laid down in a comprehensive and systematic text and the design of a Community-wide common legal terminology.

3. The Draft Common Frame of Reference (DCFR) As a "Tool-Box"

3.1. General Function

According to the Commission, the "toolbox" function implies primarily a DCFR as a body of uniform terms and concepts, which can be used in order to solve the problem of European private law legislation that is, in the words of the Commission, fragmented and sometimes characterised by an inaccurate use of legal language.

The DCFR would therefore ensure that legal concepts of EC legislation in the field of private law will be simple, clear, coherent and consistent.

These elements are the central core in the EU's better law-making agenda. It is well known that Community texts are linguistically structured[23] and drafting them involves applying precise rules. These rules are laid down in the directives on legal drafting techniques issued from Brus-

[20] See C. von Bar, *Coverage and Structure of the Academic Common Frame of Reference* (2007) ERCL 350 ff.
[21] I refer readers to my previous study: E. Ioriatti, *A Methodological Approach for a European Restatement of Contract Law*, Global Jurist Topics, 2004, (http://www.bepress.com/gj/topics/vol3/iss3/art4).
[22] At the end of December 2007 the Academic Research Network published the first draft of the *Draft Common Frame of Reference*, also called "academic DCFR", in order to distinguish it from the "political CFR" commissioned by the EU institutions and also to underline the academic nature of the text. The first draft was made available to the public on line in 2008 and a second revised edition was published by Sellier in February 2009. In accordance with the guidelines of the Commission, the structure of the DCFR is clearly divided into three parts: Principles, Definitions and Model rules of European Private Law.
[23] Gambaro, "*Jura et Leges" nel processo di edificazione di un diritto privato europeo*, cit., 1015.

sels: particularly important are the *Practical Guide* issued by the European Parliament, the Council and the Commission (hereinafter: the Guide) and a formulary named *Manual of precedents*[24]. These provisions in general aim at improvements in drafting and from this point of view many of them invite the draftsman to have regard to "terminological consistency"**,** understood as indicating the main instrument for lexical clarity in the Community, including legal lexis.

In particular, according to the Guide, "the terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field. Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language".

Hence, consistency and coherence in terminology are of great importance, particularly in the area of private law.

As noted above, the special multilingual character of the European Union has led to the creation of a specific Community legal language, composed of legal concepts having an independent meaning in the EU context and which are not defined on the basis of one or more national systems. The guiding principle of the EU action of legal harmonisation is the uniform interpretation of the provisions as expressed in this Community legal language. However, this purposive approach does not always lead to an effective uniform application of EU law in the Member states, because of the need for the national courts to understand the Community terminology in isolation from their own national cultural setting. Furthermore, problems of terminological consistency may also affect the implementing phase of EC legislation which is delegated to national lawmakers.

The attention attracted by the Community lawmakers' use of language has been, so far, mainly concentrated on these vertical effects; particularly the issue of interpretation and application by the primary end-users of the Community terminology, namely the national courts, as well as the difficulties encountered by national lawmakers when implementing EC law.

However, it is important to note that legal consistency could be described as horizontal too, in relation to the internal aspect of Community legal language. This concerns a theme which has remained at the outer margins of the analysis of Community terminology, but which should provide room for reflection.

[24] *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation within the Community Institutions* (Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1); *Manual of Precedents for Acts Established within the Council of the European Union*, Secretariat General European Union Council (legal – linguistic experts), July, 2002.

As noted above, consistency of terminology thus assumes great importance when acts are being drafted[25], but the lack of reference to concepts or categories, as mentioned previously, has the result that an important reference point for the Community lawmaker is the so-called "linguistic precedent"[26]: an expression already in use in Community law is adopted for the sole purpose of respecting the requirement of linguistic consistency.

The search for consistency therefore is often of a linguistic rather than legal or conceptual nature, with the effect that the term is "re-used" by the draftsman in contexts which differ from the original one, with the consequent de-contextualisation of the word itself.

This brings about a phenomenon which might be called "nomadic meaning", namely the use of linguistic expressions which are identical in themselves but which potentially express very different legal concepts, by reference to the context in which they are used. The term, once "re-used", in fact becomes part of the official "language of the law", the one which is used to draft legislation[27]. This means that Community legal terms may have the same linguistic and semantic structure, but a different legal effect with regard to the context in which they are used.

"Free movement of services" is an example of these semantic nomadisms within Community private law terminology: with regard to some of them, the Court of Justice of the European Union has recently provided new definitions and different legal effects, in accordance with the new context and their different meaning[28].

Both in the case of vertical or horizontal consistency of terminology, the DCFR would have a potential impact on the way in which future European terminology will be drafted, applied and

[25] F.P. Mateo, *La técnica normativa en el sistema juridíco comunitario* (2006) Cuadernos de Derecho Público 162.
[26] J.F. Morgan, *Multilingual legal drafting in the EEC and the work of Justist/Linguist* (1992) Multilingua 114.
[27] P.G. Monateri, *Strategie e contrasti: diritto, lingua e identità nella crisi europea?* in V. Jacometti and B. Pozzo (eds), *Le politiche linguistiche delle istituzioni comunitarie dopo l'allargamento. Redazione, traduzione e interpretazione degli atti giuridici comunitari e il loro impatto sull'armonizzazione del diritto europeo* (Milan, Giuffrè, 2006) 193.
[28] This Community term was coined in the TEU, art. 50 – "free movement of services"- and subsequently "reused" in some directives, as well in the well-known Regulation 2001 no. 44 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ L 12, 16.1.2001, p. 1–23 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). In a decision dated 23 April 2009 (C-533/07, European Court of Justice, 23 April 2009, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*) the Court of Justice itself emphasised the diversity of this linguistic expression with respect to the term "provision of services" as it has been used in the followings provisions: in the view of the Court, "freedom to provide services" under art. 50 TEU is a broad concept, whose purpose is to ensure that the maximum number of economic activities, not falling within the ambit of the free circulation of goods, capital and persons, should not be excluded from the application of the EC Treaty"; differently, "freedom to provide services" as adopted in the Community VAT Directives, according to the Court is a negative definition, since the concept of 'provision of services' is defined as any transaction which does not constitute a supply of goods. Finally, by reading the text of the Court decision, it is clear that in the context of art. (1) (a) of Regulation 2001 no. 44, the concept "provision of services" means the place where the service is provided in order to determine the place of performance of the obligation.

interpreted. As has been noted, "the European instrument will have repercussions on the meaning of the legal concepts throughout Europe".[29]

Thus, in the evaluation of the DCFR as an instrument of terminological consistency, both these aspects should be taken into account.

3.2. Structure and Terminology

One of the questions upon which the DCFR debate has focused is the structure of the draft.

According to some leading scholars, the structure of the DCFR is closer to a codification than to an instrument performing the function of a toolbox[30]. This seems obvious at first glance, as the DCFR is structured in books, characterised by the unity of the subjects and composed of legal rules organised according to a system, in a rational and coherent way. Similarly to the codes, and distinct from a mere "consolidation", the DCFR rules are not just collected under the same discipline, but some novelties are also introduced, as it is clear, for instance, in the "general principles".

As to the content, the draft - as initially envisaged by the European Commission - covers a broader area than strictly that of contract: the structure over ten books includes not only the general rules on contract, but also rules on "other juridical acts", as well as on "non-contractual obligations".

The decision to regulate contract law in the framework of a general law of obligations is not without consequences from the point of view of terminology. Particularly, the structure has led to the design of abstract categories and consequently to a terminology that is partially new in the *acquis*. The term "juridical act" is probably the most evident example of this terminology, as being new in the *acquis* and deriving its existence directly from the structure of the draft: the insertion of contract and contractual obligations in a hierarchical system of concepts implies very general and abstract concept at the highest level, namely "juridical act"[31]. According to some scholars, the decision to reach an high level of abstraction might render the structure of the DCFR less attractive and compatible with its tool-box function, as the very abstract character of the rules makes difficult to conduct an analysis in a very different practical situation; as specific situational

[29] R. Sefton-Green, *Sense and Sensibilites: The DCFR and the Preservation of Cultural and Linguistic Plurality* (2008) ERCL 290.
[30] R. Schulze, *The Academic Draft of the CFR and the RC Contract Law*, in R. Schulze (ed.) Common Frame of Reference and the Existing EC Contract Law (Munich, Sellier, 2008) 3 ff.; Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., 6 ff.; S. Grundman, *The Structure of the DCFR – Which Approach for Today's contract law?* (2008) ERCL 226 ff.
[31] See the structure as described in the *Introduction* of this book.

analysis will disappear behind the abstract language, the DCFR will not be efficient as general frame of reference of terminology and common rules[32].

This the main reason why the structure of the DCFR has been criticized with particular emphasis from the *common law* perspective, as being unnecessarily complicated and cluttered with concepts – notably "juridical act" – of no present or likely future importance in the *acquis;* it has been noted that a different approach, such as the one followed by the PECL, which simply reflects "the life of the contract" with rules on conclusion, validity, interpretation and so on, would have ensured the immediacy of the use of the DCFR as a toolbox, but also simplicity of language[33].

It is however clear that by taking the approach of inserting the law of contract into the general law of obligations, the language of the DCFR is necessary less easy to read than the PECL.

In general, in designing the DCFR a great attention to the use of a proper terminology has been given; the use of neutral terms, which are meant not to remind any terminology closed to a single legal system, particularly the common law one, has been avoided. This drafting technique was also meant to design a clear and descriptive language, to facilitate the translation of the DCFR without carrying unwanted baggage with it[34].

As a consequence, in many parts of the draft the language of the DCFR is rather different from that of PECL. Sometimes, the terminology of the PECL has been improved, as in the case of the rules on plurality of debtors and creditors[35]; in other cases, a more accurate choice of terms in the DCFR depends on the structure of the draft itself or the attempt is to avoid inaccuracy or lack of consistency[36]. For example, whereas the PECL refer to a contract meaning both the agreement and the resulting relationship, the DCFR has made a different choice: the regulation of contract in two books - Book II "Contracts and other juridical acts" and Book III "Obligations and corresponding rights"- is based principally on the fundamental distinction made in the draft between the contract concluded by the parties and the relationship which arises out of the contract.

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[32] R. Schulze and T. Wilhelmson, *From the Draft Common Frame of Reference towards European Contract Law Rules* (2008) ERCL 158 ff. According to the authors, structure of this kind of the DCFR could be an important preparatory work if one were to strive a European codification, in accordance with the one of traditional 19th century type; if a codification is intended, then the structure and the choice for an abstract language might be somehow understandable. If not, then the structural arguments behind the DCFR are weak.

[33] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., 77 ff.; Grundmann, *The Structure of the DCFR*, cit., 226 ff.

[34] DCFR, Outline Edition II, *Introduction*, p. 23.

[35] Compare Art. 10:101 PECL, dealing with the three type of plurality of debtors ("solidarity, separate and communical obligations") and Art. III 4:102 DCFR dealing with as "labelled solidarity, divided and joint obligations".

[36] H. Beale, *Quel droit européen des contrats pour l'union européenne ? Paris, 23 October 2008. The Coverage, Structure and Language of the DCFR*, available at http://www.ribeiradasgalinhas.com/paulabbiati.com/WordDocs/H.Beale.doc.

Academically, the distinction is accurate, but whether it will cause practical difficulties is debatable[37].

As the CFR is supposed to be enacted as *soft law*, and no normative function is assigned to it, the language of the rules is less prescriptive if compared to that of the traditional European codifications, as well as to the language of the typical Community acts, as regulations and directives.

However, some terms have been transposed into the draft directly from the *acquis*, sometimes with the aim of solving some problems of EC terminology once and for all. This is the case involving the term "withdrawal", to which scholars refer to as the typical example of inconsistencies of the *acquis* terms[38].

New terms have also been created, with the aim of designing new taxonomies which fit in better with European law and which differ from the ones in force in the Member States[39]. In some other cases, new terms are simply coined in order to introduce a completely new concept into the regulation, e.g. the word "accountability". In reading Book VI, it is clear that the drafters introduced a distinction between the term "accountability" – referring to a person who may be liable if certain conditions are fulfilled and in the absence of an applicable defence – and "liability" – when a person *is* liable –. This choice has been criticized as being a possible source of confusion: Whittaker[40] has noted that no provision of the DCFR makes clear the relationship between these two central concepts which sometimes overlap, as in the case of the term "grounds of accountability", which clearly means "the potential for liability".

In some cases, the choice of a specific term is a repercussion of the decision to use English as the language in which the rules have been drafted. In general, the level of the English language has been described as "excellent" and not too tied to the terminology of English law, so that the aim of the drafters to write in neutral but technical language has been put into effect[41]. The attempt to avoid meanings too connected to the common law world has led the drafters to use the Community term "non-contractual liability" and to expunge the term "tort", as too close to English law. However, with regard to some parts of the DCFR, namely "non – contractual liabil-

[37] Again, it has been noted that this distinction seems to echo the "codifying intention" of the authors of the DCFR, but in practice it shows a lack of clarity between two key concepts – the contractual relationship and the contractual obligation: Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., p. 6.
[38] On the lack of coherence of this term see: Pozzo and Jacometti (eds), *Multilingualism and the Harmonisation of European Law*, cit., 14 ff. The authors note that the English version employs the following expressions without differentiation: *"to assess the obligations arising under the contract", "right of cancellation", " right to renounce the effects of his undertaking", "right of renunciation"*.
[39] See the term "personal security", DCFR, Outline Edition II , *Introduction*, p. 16.
[40] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., p. 163.
[41] *Idem*, p. 8.

ity arising out of damages to another" - the drafters have been accused of going too far in trying to build neutral concepts through neutral terms.[42]

On the other side, the presence of Community terms together with some typical civil law taxonomy may have led to some incoherence in the DCFR terminology, because of the structure of the draft itself, in which these new rules and terms – aimed at reformulating the problems of contract law today – have been "infused into a structure which is mainly a comparative law synthesis of traditional codes, with a certain Germanic bias, supplemented by the rules taken from the *acquis*"[43].

From a semantic point of view, some peculiarities - as for example the vagueness of some terms - seem to depend on the methodology adopted by the drafters of the DCFR, which was to combine different set of rules, in the absence of any political choice expressed by the Commission. It is clear that the rules of the CFR cannot remain a purely technical matter and sooner or later, legislative and economic choices will have to be made. However, even if the DCFR has not been based on any previous political framework, choices had to be made by the researchers. Often, the logic remains implicit, with the result that the text and consequently the terminology being prepared by the researcher has a certain degree of vagueness[44]. It has also been noted that vagueness might also be a consequence of a terminology that focuses preferably on an abstract language, as this drafting technique might sometimes lack transparency[45].

In general, the DCFR structure and terminology integrate the rules for contracts within a system underlying the codifications of some Member States[46].

This way of drafting has been criticised as being too "national" [47], strongly based on the civil law tradition[48], opting for a formal approach, rather than focusing on the reformulation of a modern and improved contract law[49]. Some believe that the core object of the DCFR is to serve as a basis for a future code, rather than to be used as a tool-box[50].

From a terminological point of view, this choice might be read in two different ways.

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[42] According to Zimmermann, the unwillingness of the drafters to choose clearly between the various ways of how to regulate the law of delict have lead to a dramatic lack of clear concepts: R. Zimmermann, *The Present State of European Private Law* (2009) Am. J. Comp. L. 496.
[43] Grundmann, *The structure of the DCFR*, cit., 246.
[44] Particularly the articles dealing with formation of contracts – mainly based on the PECL: G. De Geest and M. Kovac, *The Formation of Contract in the Draft Common Frame of Reference* (2009) ERPL 113 ff.
[45] See some concrete examples in Schulze and Wilhelmson, *From the Draft Common Frame of Reference towards European Contract Law Rules*, cit., 161 ff.
[46] *Idem*, p. 158.
[47] According to Jan Smits, the proposal of rules drafted as if they were to be enacted at the national level is wrong; instead, the solution should consist in a differentiated approach, depending on the function – optional instrument, revision of the *acquis*, source of inspiration of the rules enacted. J. Smits, *The Draft Common Frame of Reference, Methological Nationalism and the Way Forwards* (2008) ERCL 270 ff.
[48] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit.
[49] Grundman, *The Structure of the DCFR*, cit., 238.
[50] See the debate as summarized in Zimmermann, *The Present State of European Private Law*, cit., fn. no. 78.

1) On one side, the enactment of rules covering a wide area of private law, organised in a system of categories and based on general principles might supplement the lack of reference, internal structure and organisation of Community legal terminology. As noted above, private law in the European Community has been drafted using terms and concepts which have not previously been shaped and organised in a systematic way by any legal tradition; as a consequence, those concepts are not linked to any general categories or system, but are "floating" in the *acquis* in some way, as they lack any conceptual internal or external referent. Given this situation, the enactment of a set of rules and principles, rather than merely isolated terms and definitions, might provide that the use of any concept or phrases by future EC or national legislator, as well as national court or the European Court of Justice itself, should be interpreted in the light of a general system of private law.

If this is the case, the crux of the matter is whether the DCFR terminology and rules are sufficiently connected to the existing *acquis* so as to fulfil the function of a general private law system, according to which the *acquis* terminology could be interpreted.

The answer to this question is strictly related to the methodology adopted by the drafters of the DCFR project. It is well known that the choice was that of combining different set of rules, arising from the results of three groups of researchers: the *Study Group on a European Civil Code*, the *Commission on European Contract Law* (the "Lando Commission") and the *Research Group on the existing EC Private Law* (Acquis Group). This last group was formed specifically to draft principles from the *acquis* and the result of its research has been incorporated in Book I and II, as well as in some other articles, such as product liability, commercial agency, late payment and discrimination. However, even if part of the *acquis* terminology has been transposed into the DCFR, it has been noted that in some cases the rules or definitions provided by the DCFR are not suitable as an efficient interpretative tool for future drafting. This is the case of the concept "consumer", a term which is crucial in the *acquis* and which has been included in the DCFR glossary. Following some analysis, the definition has been considered acceptable, but it makes a striking contrast to some important elements of the *acquis.*[51]

2) On the other side, it is undeniable that choices such as the prominence of concept of "juridical act", as well the inclusion of a "general part" on contract and juridical act, makes the level of abstraction of the DCFR particularly high, even when compared to a number of other European civil law codifications. According to some scholars, this aspect might hinder the primary purpose of the DCFR as a toolbox, that is to provide the proper basis for the interpretation by

[51] Whittaker notes that the definition of "consumer" is perfectly acceptable, but not complete as it could be and sometimes in contrast with the content of the *acquis*: Whittaker, *The "Draft Common Frame of Reference". An Assessment*., cit., p. 108.

national legislators and courts of the legal expressions used by the EC draftsmen: it has been noted that the support provided by the DCFR to legislators in order to help them to relate the EC terminology to their national law, will be less efficient in the case of English law, as this terminology is too associated to the classic *civil law* tradition[52]. Moreover, the decision to include a general part, similarly to the German civil code, will render the structure of the DCFR less attractive and less compatible with its tool box function.

3.3. Definitions and Terminology

In an attempt to create a reliable instrument functioning as a reference for Community terminology, definitions will play a central role; together with model rules and general principles, they comprise the substantive content of the DCFR.

It should be made clear that, at present, an evaluation of the DCFR from a terminological point of view is not a straightforward task, because it contains only the definitions – as well as model rules and principles - and not the comments, which are forthcoming and will be added later. However, some partial remarks, based on an evaluation of the general assessment of the DCFR, are already feasible and some opinions have already been expressed by scholars.

In general, the decision to provide European private law with a set of definitions has been welcomed[53], as many legal concepts of the *acquis* are not defined at all, or are not defined sufficiently. Only few directives provide definitions, generally in art. 2 of each act, whose value as interpretative tools are expressly limited to the purposes of the same act. This situation does not help the national legislators and national courts to understand the "Community meaning" of legal terms, nor to create a relationship with existing national laws.

This state of affairs has gradually led the Court of Justice to take on the role of creating definitions, which function as general interpretative tools for the whole *acquis*. On many occasions the Court has proved effective in defining crucial terms, not only in the field of private law[54]. These decisions might have been the appropriate occasion to debate whether the construction of definitions were the province of legal scholars[55], or whether it should have been left to the

[52] *Idem,* p. 10 ff.
[53] See on the lack of definitions in EC law: G. Ajani and P. Rossi, *Coerenza del diritto privato europeo e multilinguismo*, in B. Pozzo and V. Jacometti (eds), *Le politiche linguistiche delle Istituzioni comunitarie dopo l'allargamento* (Milan, Giuffré, 2006) 132 ff.
[54] With regard to some examples of public law terminology and the action of the Court of Justice see: T. Schilling, *Language Rights in the European Union* (2008) 10 German Law Journal 1219.
[55] A. Gambaro, *Il successo del giurista* (1983) Foro Italiano V, 93.

functionalist method of the Court[56] or to the EC legislators themselves. After the decision of the Commission to delegate the drafting of the CFR to academics, together with stakeholders and knowledgeable experts in the Member States, the primary role of legal science in the construction of definitions, as well as concepts and legal categories, is now clear.

This is particularly pressing in the case of directives in the area of private law, given the complexity of the sources and the terminology of private law in each Member State.

In the DCFR, definitions are set out in a document attached to the part of the DCFR containing the model rules; according to the spirit of this Community instrument, definitions have at least two main functions.

Firstly, similarly to the ones included in the directives, DCFR definitions work as interpretative tools. In this respect, the way in which definitions have been drafted has been the object of some criticism. As Whittaker has noted, sometimes the line between definitions and model rules is blurred, as some of the provisions of the DCFR setting out rules can also fulfil the requirement of providing definitions[57]. The consequence is that the definitions which stand in the text alone, and have not been included in the Glossary, are inapplicable to other parts of the text. On the other hand, the definitions of the Glossary are expressly applicable "for all purpose of these rules, unless the content otherwise requires"[58], with the consequence that the interpreter has a great deal of room of manoeuvre, as he can simply discard the definition at his discretion.

Secondly, as the DCFR should have a potential impact on the way in which multilingual acts are drafted in the future, an important role of definitions will be to confer a uniform legal meaning on the same linguistic terms.

As already mentioned above, the terminology used at Community level will be consistent not only vertically - leading to a uniform application and interpretation of EC terminology in the Member States - but also horizontally, or "internally", in order to permit identical concepts to be expressed by means of the same terms , among the EC acts already in force, as well as future EC acts.

As noted above, the *acquis communautaire* is full of nomadic meanings, linguistic expressions which are identical in their substance but which potentially express very different legal concepts.

[56] See also: K.P.E. Lasok, *The European Court of Justice: Practice and Procedure* (London, Butterworths, 1994); A. Arnull, *The European Union and its Court of Justice* (Oxford, Oxford University Press, 2006). See also A. Albors Liorens, *The European Court of Justice, more than a teleological court* (1999) The Cambridge Year Book of European Legal Studies 371 ff.
[57] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., p. 50.
[58] Art. I: 1: 301 (1).

Up to now, the question as to which legal meaning has to prevail in a specific context is left to the Court of Justice, as happened recently (2 April 2009)[59] with regard to the word "habitual residence".

"Habitual residence" is a term used in British/American statutes, basically for the purpose of making reference to a particular relationship between an individual and a certain geographical territory[60]. The expression is partly ambiguous, not merely because an exact definition does not exist[61], but also because it can be superimposed on other, different concepts, such as "domicile"[62].

This expression has entered into the legal lexicon of the Community, most probably with private international law as the intermediary and in the terminology of the Community it has lost its own common law connotation: it has been re-adapted for use in Community directives for the achievement by individuals (usually workers) of the right of establishment and freedom to provide services and is functional to this purpose.

The element of intention has particular importance, an aspect to which the regimen of the Community gives great weight; by this is meant the intention to establish oneself in a particular place, regardless of physical presence[63]. This is kept notwithstanding departures from it, provided the individual returns at frequent intervals to the place chosen as his/her habitual residence.

"Habitual residence", so far as Community law is concerned, has been defined in a consistent line of case law from the Court of Justice[64], as "the centre of one's own interests". As distinct from what occurs in common law jurisdictions, this has ensured uniformity of the concept in the EC context.

Therefore, in Community *law, "habitual residence" is a neologism so far as* its meaning is concerned[65], in that the expression is not new as such, bearing in mind its common-law homologue, but the meaning attributed to it in the Community context is different. Here we are dealing with a formal transposition from the English of the common-law to the English as used in the Community; the latter has then given rise to a linguistic calque in the Italian language (*residenza abituale*) and French (*résidence habituelle*).

The tried-and-tested lexicon of English legal language in the Community does not only provide a basis for legal drafting, but often forms a "linguistic precedent" as well; the evidence is

[59] Case C-523/07, Judgment of the Court (Third Chamber) of 2 April 2009. Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland. European Court reports 2009 p. 00000.
[60] M. Graziadei, "*Domicilio" (diritto comparato),* Digesto IV, Sezione Civile, VII, (Turin, Utet) 137.
[61] R.A. Leflar, L.L. McDougal and R.L. Felix, *American Conflicts Law* (Charlottesville VA, The Michie Company Law Publisher, 1986) 34.
[62] Specifically on this term see: E. Clive, *The Concept of Habitual Residence* (1977) Juridical Review 137.
[63] A.D. Candian, „*Domicilio, residenza, dimora*", Digesto IV, Sezione Civile, VII (Turin, Utet, 1991) 121.
[64] See the following decision: Case C-452/93 P. Judgment of the Court (Third Chamber) of 15 September 1994, *Pedro Magdalena Fernández v Commission of the European Communities* ECR 1994 Page I-04295.
[65] G. Cornu, *Linguistique Juridique* (Paris, Montchrestien, 2005) 108 and 109.

convincing, particularly when one considers the expression "habitual residence", as it appears in Regulation 2201/2003[66] relating to competences, recognition and execution of judgments in the field of family law and parental responsibility; here, under art. (8) (1), the jurisdictional competence of Member States' authorities is determined on the basis of the habitual place of residence of a minor, specified later as the *"habitual residence of the child"*.

"Habitual residence" under Regulation 2201, however, refers to a novel situation, in that it pre-supposes the physical presence of the minor in the territory of a particular Member State, a presence which cannot be occasional and which produces a procedural result and not the recognition of some individual enforceable right.

The semantic drift of the term "habitual residence" has become the subject of a preliminary reference by a Finnish judge to the Court of Justice[67], concerning precisely the definition of the concept of "habitual residence" under Regulation 2201/2003. In this very recent decision the Court, in defining the concept of "habitual residence" as used in this regulation, expressly states that that it "cannot make reference to its own precedents relating to this concept which up to the present time have been used in Community law" .

In this context, "habitual residence" can be differently defined, as meaning "the place which represents the social, scholastic and familial integration of the child".

This example shows that the impact of the DCFR on Europe's multilingual terminology will be consistent and definitions have an important role in helping the EC lawmaker design a coherent legal taxonomy in the future. In the absence of any point of reference, the Court of Justice, in the short term, has proved to be an efficient institutional support in addressing the problems raised by nomadic meanings, but the construction of definitions, as well as concepts and legal categories[68] are the province of legal scholars[69] and should not be left to the functionalist method of the Court.

The issue, then, is not whether this internal function of terminological consistency should be part of the scope of definitions contained in the Glossary, but how such an important function of the DCFR should be fulfilled. "Habitual residence" in the Draft is not the object of a clear

[66] Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See; OJ L 367, 14.12.2004, p. 1–2 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV), OJ L 153M , 7.6.2006, p. 253–254 (MT).
[67] Above, fn. n. 59.
[68] R. Sacco, *Dottrina (Fonte del diritto)*, Digesto IV, Sezione Civile, VII (Turin, Utet, 1991) 217.
[69] Gambaro, *Il successo del giurista*, cit., 93.

definition, nor is the regulation contained in the model rules clear, with regard to the general function that this concept has played in the *acquis*[70].

However, this is not to be evaluated as a defect of the DCFR itself, as the introduction to the DCFR itself makes it clear that the choice of setting out the definitions in an appendix to the main text will enable the list of terms to be extended at any time[71].

4. Conclusion

The main purpose of this essay has been to offer a general, although not exhaustive, assessment of the DCFR as an instrument for consistency in terminology. In particular, it has focused on the role of the DCFR as the basis of a future CFR as a "tool-box". As stated above, this is the main role that the Commission "has in mind" for the CFR and the DCFR could be a possible candidate as the basis of this EC instrument.

However, it must be recalled that the drafters themselves have clearly stated that the DCFR has its own role and significance, which is distinct from that of the CFR[72]. It is clear that an effort for terminology coherence and consistency of private law in Europe is part of the "vision" of the drafters, independently from its possible enactment as CFR tool-box. The description itself of the "definitions" makes it clear that "they have a function of suggestion for the development of a uniform European legal terminology"[73]. Therefore, independently of the Commission's political CFR, the DFCR could be in itself a vector of such a unified terminology.

Moreover, the DCFR in its role as an optional instrument would also contribute to the evolution of a European terminology; as it has been clearly stated, "it will provide us with an agreed set of concepts and terms, not just for drafting EU legislation but for lawyers dealing with each other"[74].

It is perhaps this function of the DCFR which finds most accord among legal scholars[75], whereas various writers have expressed reservations about the potential of the draft as a tool-box. Taken as a whole, the main thread running through these opinions can be identified in the hybrid nature of the instrument, which is placed half-way between terminological support and para-

[70] See art. III. – 2:101: the concept "habitual residence" is alternative to the concept of "place of business".
[71] DCFR, Outline Edition II , *Introduction*, p. 9.
[72] "The DCFR ought not to be regarded as merely as a building block of a possible Common Frame of Reference, as it would stand on its own and retain its significance even if a CFR were not to emerge", DCFR, Outline Edition II, *Introduction*, p. 6.
[73] DCFR, Outline Edition II, *Introduction*, p. 9.
[74] H. Beale, *The Future of the Common Frame of Reference* (2007) ERCL 275.
[75] But see *contra* Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., p. 11, who thinks that the DCFR, as it stands, is not suitable to be used either as a tool-box or an optional instrument.

legislative instrument. According to these writers, the lack of a clear choice as regards the DCFR's function has brought about the creation of a structurally complex instrument which, in the short-term at least, is more likely to be used as an optional instrument than as a terminological reference-point for courts and legislators[76].

From the theoretical perspective, the DCFR seems not unlike a code within the tradition of the majority of the legal systems in the Community, whose qualities as an optional instrument can only be evaluated over the course of time. Given that it is a soft law instrument, offered as an experimental model, it may be adopted or ignored by the contracting parties, just as it may be an excellent instrument on paper, or fail in the phase of practical application: any legal instrument has to prove its worth in concrete terms, in the sphere of applied law ("law in action"). At any event, it is an experiment worth trying.

There are different considerations to be made, dependent on whether the DCFR is destined to represent a tool- box, as a stable terminological reference point for Community lawmakers, national legislators and the courts themselves. The endeavour to create a conceptual system of reference should certainly be welcomed, as this is totally lacking in Community law. Having said that, it has been noted that such a system should not be completely extraneous to the Community's terminological tradition[77].

One of the DCFR's crucial aspect is that both the terminology and the categories which constitute it are closed connected to those which traditionally form part of the national codes[78], but less has been drawn from the language which makes up the Community *acquis*[79]. As we have seen, the terminology adopted by the draftsmen of the DCFR has particular characteristics; in a further simplification of the discussion above, it utilises a neutral English terminology not entirely within the common law tradition, but instead only partially referable to the taxonomy that has developed over time, as a result of the drafting practices adopted for Community acts, and to which Community draftsmen still refer today. Sometimes there is therefore a divergence between the Community taxonomy and the language of the DCFR. This aspect is important whenever a certain degree of binding effect is given to the DCFR, as regards the interpretation of concepts contained in the directives. According to Whittaker, the CFR could in fact be adopted as an in-

[76] See A. Vaquer, *Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR)* (2009) ERPL 495: "*it mainly provides a common terminology for jurisdictions that already share common doctrinal foundations*".

[77] Zimmermann comments that the terminology proposed by the Consumer Rights Directive often differs from that suggested by the DCFR ("*trade*" rather than "*business*", "*off-premises contract*" instead of "*contracts negotiated away from business premises*"): Zimmermann, *The Present State of European Private Law*, cit., 488.

[78] See Vaquer, *Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR)*, cit., 493. The author discusses some of the concepts of the DCFR and concludes that most of the terms developed by the "German Pandectistic School" are present in the DCFR.

[79] Whittaker, *The "Draft Common Frame of Reference". An Assessment*, cit., p. 6.

strument to which Community lawmakers are bound to refer when choosing the terms to use in drafting directives and regulations, implying that they would have to be interpreted in the light of definitions, model laws and the principles of the CFR.[80]

This is the function which the drafters themselves attribute to the DCFR; according to them, "it would be presumed that a word contained in a Directive was used in the sense in which it is used in the CFR (DCFR) unless the Directive states otherwise"[81].

It is nonetheless clear that the Community terminology will, partly at least, be interpreted in the light of a taxonomy which is foreign to it. The example given above[82] of the concept of "habitual residence" demonstrates in practical terms how a term to which Community case law attributes the meaning of "the centre of interests", loses its Community connotation if it is interpreted in the light of the model law as formulated in the DCFR, acquiring instead a sense which is nearer to the national meaning of "domicile"[83].

As it has been noted, legal terminology is the outcome of a process of assimilation; with regard to Community law, this process has created a whole raft of concepts from the practices of the Community institutions, which, while lacking organisation and classification into categories, now represent a consolidated body of terminology. Moreover, some terms have been analysed and defined by the same Court of Justice – "habitual residence", "provision of services" – with the consequence that those community legal concepts[84] are delineated once for all with reference to the context in which they are used.

It is therefore a contradiction that in the absence of a theoretical framework, it falls to the Court of Justice to bring about a terminological and legal re-configuration of community terms, but when the theoretical framework – namely the DCFR – is finally created, the result of the Court's effort is not part of the terminology patrimony of the draft.

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[80] According to Whittaker, the DCFR's impact depends on the degree to which it will given binding force. There are three possibilities: "first, at the weakest, the CFR would provide a range of provisions which may be adapted by the European legislator if it is so chose, as a "fixed menu" or "definitions or model rules" on which the EC legislation could draw as it saw fit in the context"[80]. This first hypothesis therefore refers to the DCFR as a *soft* model, to which the Community legislator could freely refer.
The second and third options put forward by Whittaker consider t the CFR as a reference point for interpretation and demonstrate a binding level which differs from the first. With reference to the second option, "in the event that the legislator should decide to refer freely to one of the model laws in the CFR, the concepts contained in it should be interpreted according to the definitions contained in them". The third option has the highest degree of binding effect: "at its strongest the CFR would provide that the use of its concepts or phrases by future EC legislation should be interpreted in the light of its definitions, model rules and principles".

[81] DCFR, Outline Edition II, *Introduction*, p. 32.

[82] Above, fn. n. 70.

[83] On this term see: Graziadei, *"Domicilio" (diritto comparato)*, cit., 137.

[84] On the creative role of the European Court of Justice: R. Sacco, *Concepts juridiques er création du droit communautaire par le juge*, in R. Schulze and U. Seif, Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft (Tübingen, Mohr Siebeck, 2003) 88 ff.

With reference to the future of the DCFR, two further open questions have been indicated in the literature.

The DCFR features the structure and, in part, the terminology, which is typical of the continental systems, the German legal system in particular [85]. The language used is sometimes quite distant from some of the Nordic systems – namely the Scandinavian countries – but it is the British legal system that is particularly isolated, in a cultural sense, with respect to the choices made by the DCFR draftsmen[86]. The gradual adjustment by the English to Community terminology will require a further effort, namely coming to terms with an entire system of terms and concepts which are characteristic of a different legal tradition. The reactions of common lawyers will therefore be one of the unknown factors with regard to the future of the DCFR toolbox.

The second issue has to do with the possibility of translating the DCFR. According to the Commission, and the authors of the DCFR themselves, the original English text should be translated into all the official languages of the Community. As is well-recognised, any translation of legal information risks losing the original meaning of the concepts. This is particularly true of a text which has to be translated into several languages.

We should also take account of the fact that, at present, the Member States lack the awareness that the language of the Community is quite distinct from the legal terminology used in the member states of the Community; if the translation of the DCFR is not preceded or, at least, accompanied by a considerable body of information and legal education, there is a risk that meanings from the national legal systems, arising from differing legal traditions, will be imposed on the Community terms.

This is why it might help, as a first step, to become familiar with and assimilate the DCFR in its English version first, so as to understand the concepts and institutions which it embodies[87]. It is clear that all this implies making a further effort to comprehend and absorb a new terminology, but one which could perhaps form the basis of a new European legal language.

As it has been observed: "law is also about accessibility, intelligibility and comprehensibility"[88]: if, one day, the EU intends to become an interlocutor among other actors in the global marketplace, it must develop an appropriate civil lexicon, which is capable of expressing and transferring a coherent terminology, in all areas and languages.

[85] Vaquer, *Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR),* cit., 493 ff.
[86] See Whittaker, *The "Draft Common Frame of Reference". An Assessment,* cit.
[87] On the need of the CFR to be perceived and applied as an autonomous European model see: S. Van Erp, *DCFR and Property Law: the need for consistency and coherence,* in R. Schulze, Common Frame of Reference and Existing EC Contract Law (Munich, Sellier; de Gruyter, Berlin/New York, 2009) 249 ff.
[88] M. Mekki and M. Kloepfer- Pelose, *Good Faith and Fair Dealing in the DCFR* (2008) ERCL 341.

Social Contracts in the Light of the Draft Common Frame of Reference for a Future EU Contract Law

by

Luca Nogler and **Udo Reifner**

Summary: 1. The Ignored Social Dimension of the DCFR. - 2- The Limitation to Consumer Sales. - 3. Its Political Threat to Social Contracts. - 3.1. A European Commercial Code for Social Interests? - 3.2. Political Programme in a Legal Form. - 3.3. An English Welfare Model for Social Contracts? - 3.4. Collective Interests as Charity. - 4. A Problematic Concept of Contractual Justice. - 4.1. Justice "without regard to the person". - 4.2. What Justice for Social Contracts? - 4.3. National Social Law as Distributive Contractual Justice. - 4.4. "The DCFR Is Particularly Concerned To Promote What Aristotle Termed Corrective Justice" - 5. Ignoring Labour Contracts. - 5.1. National Employment Law Is More Than the Law of the Contract of Employment. - 5.2. The Social Dimension of the Commercial Contract Between the Temporary Work Agency and the User. - 6. Ignoring Consumer Credit Contracts. - 6.1. Consumer Credit in Modern Contract Law. - 6.2. The Asocial Concept of Consumer Protection. - 6.3. The Impact of General Contract Law. - 6.4. The Failure to Provide Answers for Responsible Credit. - 7. Conclusion.

1. The Ignored Social Dimension of the DCFR

The Draft Common Frame of Reference[1] has been already criticized for its dogmatic weakness and political implications[2], extended scope on a limited basis[3], its fragmented

[1] For references to the text of the *DCFR* and the *Acquis* we have used the 2009 edition of the Principles, Definitions and Model Rules of European Private Law DCFR. Outline Edition February 2009, as available at http://www.storme.be/2009_02_DCFR_OutlineEdition.pdf. For the *Acquis* we have used "Principles of the Existing EC Contract Law (Acquis Principles) – Contract II: by the Research Group on the Existing EC Private Law (Acquis Group), Munich 2009, as available at http://www.acquis-group.org/.

[2] H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G.. Wagner and R. Zimmermann, *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems* (4/2008) 28 OJLS 659–708; as far as the underlying *Acquis* in consumer law is concerned in N. Jansen and R. Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law* (4/2008) 71 MLR 205 ff.

[3] H. Eidenmueller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner and R. Zimmermann, *DCFR for European Private Law—Policy Choices and Codification Problems*, cit., 659 ff; T. Wilhelmsson, *Constitutional values and social justice*, presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) (available at www.era.int); N. Jansen and R. Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law* (4/2008) 71 MLR 505-534.

relationship to national legal cultures[4]. In this essay we want to focus on the vertical questions of whether the DCFR would threaten and undermine the social *acquis* of continental European social contract law. Such an approach shares a common basis with the critique by the Manifesto group[5] on the deficit in social justice, shared by an increasing number of authors[6]. Even the EU Parliament, before officially discussing this Draft, asked for an exploration of the "role of fairness and social justice in the DCFR"[7] which led to a general defence of the DCFR by a member of the Manifesto group recommending some minor amendments to its principles.[8]

Starting from the premise that social justice is an important criterion for a future European Civil Code, we choose a quite different methodology. *Social justice* as a yard-stick, as proposed by the EU-Parliament, is a far too arbitrary and vague concept in private law. Its *genus proximus* is justice which all law has to obey. Therefore, one would have to concentrate on the tiny word

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[4] G. Cornu, *Un code civil n'est pas un instrument communautaire* (2002) D. Chron., 351; Y. Lequette, *Quelques remarques a' propos du projet de code civil européen de M. von Bar* (2002) D. Chron., 2202; P. Malinvaud, *Réponse hors délai à la Commission européenne à propos d'un code européen de contrats* (2002) D. Chron. 2542.

[5] The Critique of the Study Group on Social Justice in European Law (Manifesto Group) has been expressed in: *Social Justice in European Contract Law: A Manifesto* (2004) 16 ELJ 653-674. H. Collins, *European Private Law and Cultural Identity of States* (1995) ERPL 353-365; R. Sefton-Green, *Cultural Diversity and the Idea of a European Civil Code*, in M.W. Hesselink (ed.), The Politics of a European Civil Code (The Hague, Kluwer Law International, 2006) 71-88. For its rejection see especially P. Legrand, *Against a European Civil Code* (1997) 60 MLR 44-62 and P. Legrand, *A Diabolical Idea*, in A.S. Hartkamp et al. (eds), Towards a European Civil Code (The Hague/London/New York, Kluwer Law International, 2004) 245-272.

[6] See for a survey of critical voices, M. Hesselink, *The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and "Social Justice"*, Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11 - IP/C/JURI/FWC/2006-211/Lot3/C1/SC2. See further T. Wilhelmsson, *Varieties of Welfarism in European Contract Law* (6/Nov. 2004) 10 ELJ 712–733; T. Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth, Aldershot, 1995); T. Wilhelmsson, *Constitutional values and social justice*, presentation at the ERA conference 'The Draft Common Frame of Reference' (Trier, 6-7 March 2008) (available at www.era.int); B. Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union* (Baden-Baden, Nomos, 1998); B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna/New York, Springer, 2002); J.B.M. Vranken, *Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht*, in J.M. Barendrecht, M.A.B. Chao-Duivis and H.A.W. Vermeulen (eds), Beginselen van contractenrecht: Opstellen aangeboden aan B.W.M. Nieskens-Isphording (Deventer, Kluwer, 2000); C. Jamin, *Plaidoyer pour le solidarisme contractuel*, in G. Goubeaux et al. (eds), Études offertes à Jacques Ghestin; Le contrat au début du XXIe siècle (Paris, LGDJ, 2001); A. Somma, *Social Justice and the Market in European Contract Law* (2006) 2 ERCL 181-198, 184; G. Alpa, *Trattato di diritto civile*, Vol. I, *Storia, fonti, interpretazione* (Milan, Giuffrè, 2000) 604 ff; D. Mazeaud, *Loyauté, solidarité, fraternité*, in Mélanges Terré (Paris, Dalloz, 1999) 603; B. Lurger, *The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe*, in T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), Private Law and the Many Cultures of Europe (Alphen a/d Rijn, Kluwer Law International, 2007) 177 ff; H.W. Micklitz, *From Social Justice to Access Justice: the European Challenge*, EUI LAW WP 00/2008 199, 184; L. Nogler and U. Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, in Jubilee Thomas Wilhelmsson (Helsinki October 2009); L. Nogler and U. Reifner, *Der menschliche Makel – Principles of European Contract Law zwischen Merkantil- und Dienstleistungsgesellschaft*, in Th. Dieterich, K. Kezuka, M. LeFriant, L. Nogler and H. Pfarr (eds), Festschrift Ulrich Zachert (Baden-Baden, 2009) 54-74; L. Nogler *Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?* (4/2008) 14 ELJ 500-502(3) with comments by U. Reifner and Th. Wilhelmsson; U. Reifner, *Verbraucherschutz und Neo-Liberalismus - DCFR, Verbraucherrichtlinien und die Kritik Stürners* (1/2009) Verbraucher und Recht 5-14.

[7] European Parliament Contract no. IP/C/JURI/FWC/2006-211/LOT3/C1/SC2 implementing the framework service contract no. IP/C/JURI/FWC/2006-211/LOT3/C1, on the "values underlying the draft common frame of reference: what role for fairness and 'social justice'?"

[8] M. Hesselink, *The Values Underlying the Draft Common Frame of Reference: What Role for Fairness and "Social Justice"*, Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11, cit.

social as this is the *differentia specifica* which distinguishes this kind of justice from law in general. The English language, in which the DCFR paradoxically has been drafted by civil lawyers who have learned their English in a foreign legal context, is already a barrier to a proper understanding of the word *social* in law.[9] Looking at its Latin roots (*socius*) does not help either, since it refers only to such conduct which today we would call joint or collective.[10] In this sense each legal rule is by definition a social norm[11], so that "social" would be meaningless.

But the notion has evolved long since, in current national as well as EU social policies. To understand its meaning, these developments should have been taken much more into account by contract lawyers.[12] Social policy aims at ensuring a decent life for all. It concerns the generation and use of income in a modern money economy for managing one's own family and social life with dignity, providing access to those goods and services which are especially *needed*. It wants to protect human beings from all forms of poverty and deprivation, especially from lack of income, usury and exploitation, insufficient means for personal well-being and shelter them from (the effects of) unemployment, homelessness and overindebtedness.[13] These tangible foundations lead us to a solid ground where those contracts prevail which respond to the generally accepted aspirations of social policy, which we would like to call *social contracts*.

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[9] See below, par. n .0.

[10] Sharing, associated, allied, partner, comrade, associate, ally. In German: Bundesgenosse, Gefährte, gemeinsam, Genosse, verbündet.

[11] See M. Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (Tübingen, Mohr, 1956) 191.

[12] This is also true for the Manifesto and especially valid for the expertise delivered by Hesselink, which totally ignores the relationship between social justice and social policy and gives several vague, contradictory definitions when he constantly refers to the criteria of social justice but accepts the definition which the European Parliament put forward in the research with the question: "Does the DCFR perceive contract law only as a tool for regulating private law relations between equally strong parties or does it contain elements of 'social justice' in favour of consumers, victims of discrimination, small and medium sized enterprises and other possibly weaker parties to contracts?" (Hesselink, 2008, p. 6). Although Hesselink, himself a member of the Social Justice Group, points to a social policy approach of this group when he argues that the group was inspired by the lack of concern of the Commission as to "how citizens obtain the satisfaction of their basic needs (think of education, health, utilities, pensions, communication and travel)", his own definition does not follow up anything in this approach but first uses "social justice" as an already known category when describing legal developments and European contract law, while defining it later in the rather poor way and even wants the CFR to pass a "social justice test" (p. 19). He then (p. 21) enumerates five elements that should constitute what "social justice" would mean, in a test obviously derived from Habermas and Rawls theory: 1. democracy (addressee should be author of a rule), 2. Protection of the weaker party (asymmetric power), 3. both "ideologies" (liberal and socialist) should be represented, 4. individual justice (freedom for the judge to adapt general rules to specific problems), 5. General Principles reflecting the European values should be allowed to be used in the interpretation of the Law. Four elements (1, 3-5) tell us how social justice should be admitted into rules, the one which describes it reduces it to alimony but not in a social sense, where real life problems as enumerated above play a role but where the real person is already the "party of the contract" and shows a specific "contractual weakness". In total the typical combination of the informational model in consumer protection where paternalistic care is combined with a reductionist view of consumer problems as asymmetric information and decision-making, has now become the core test for social policy in private law. See B. Lurger, *The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe*, cit., 177- 199.

[13] See the 1947 Social Policy (Non-Metropolitan Territories) Convention (ILO C82) to the EU; European Social Charta 1961, 1996; the activities of DG Social Policy as well as the activities of national ministries of Labour and Social Affairs.

Social contracts are long-term contracts pertaining to the way human life time is spent[14]; contracts through which people try to address some of the consequences deriving from the fact that human lives are inevitably exposed to social phenomena which are beyond their individual control. They comprise labour contracts as well as all other legal forms where labour is invested to gain one's living through dependent long-term relations, including collective forms of secondary labour income. Because labour income flows neither steadily nor eternally and is not paid where it is needed, credit services in money and in kind provide for its local and timely allocation. Credit is the necessary complementary contractual relationship in which either income is allocated to times and circumstances in which it is needed (consumer credit, mortgage loans, private pension schemes, educational finance; bank account and payment services), or in which access to certain services such as housing, transportation, water, heat, electricity are provided in the form of deferred payments or rent. Social contracts therefore use the legal form of a rent contract, which in Roman law was called *locatio conductio* (*operarum, rei and irregularis*) as a counterpart to *emptio vendita*. The *locatio conductio socialis*[15] provides a common legal ground for labour, landlord and tenant and finance lawyers[16], who have no reason to accept its deformation into a form of the *emptio vendita* as a timeless *spot contract*[17] and to an asocial (*do ut des*) form[18] of understanding human relations. The sales society has already been superseded. Social contracts should be the form in which European private law could be constructed to manage the challenges of the present credit and service society. Although this relationship between contract law and social policy is obvious, there seems to be little connection within legal science ,or sociology and political science and among welfare economists[19], who keep questions of the Europeanization of labour law[20] and social policy[21] separate.

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[14] L. Nogler and U. Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, cit., 437-455.

[15] U. Reifner, *Renting a Slave – European Contract Law in the Credit Society*, in T. Wilhelmsson et alii (eds), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn, Kluwer Law International, 2007) 325-342

[16] A group of such lawyers met in September 2009 in Trento to develop principles of European contract code EuSoCo. See www.eusoco.com.

[17] L. Nogler and Udo Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, cit., 437-455.

[18] U. Reifner, *The Lost Penny - Social Contract Law and Market Economy*, in T. Wilhemsson and S. Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatization and Private Law* (Ashgate, Dartmouth, 1999) 117–175; U. Reifner, *The Vikings and the Romans - Contract Law and Social Economy*, in T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Brookfield (Vt), Dartmouth Publishing, 1993) 171 ff.

[19] L. Nogler, *Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?*, cit., 500-502.

[20] H. Collins, *European Social Policy and Contract Law* (1/2005) ERCL 115 ff; H. Collins, *Justifying European Employment Law*, in S. Grundmann, W. Kerber and S. Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (Berlin, de Gruyter, 2001) 205; S. Deakin, *Labour Law as Market Regulation: The Economic Foundations of European Social Policy*, in P. Davies, A. Lyon-Caen, S. Sciarra and S. Simitis (eds), *European Community Labour Law: Principles and Perspectives* (Oxford, Oxford University Press, 1996) 63.

[21] F. Scharpf, *The European Social Model: Coping with the Challenges of Diversity* (4/2002) 40 JCMS 645-670.

2. The Limitation to Consumer Sales

After a somewhat uneven and contradictory political discussion on legal integration, starting from the collection of Principles of European Contract Law (PECL) up to the development of a unified European civil code (Study Group[22]; Padua project)[23], Commission and Parliament finally asked legal scholars to provide *A More Coherent European Contract Law, increasing the coherence of the acquis communautaire, the promotion of the elaboration of EU-wide standard contract terms*[24]. The recitals of the actual Draft of a Common Frame of Reference (DCFR) have reduced its aspirations as well as its own area of reference, scope and function, in a way which does not seem to match with the outcome:

(1) Promoted by the *Study Group on a European Civil Code* it is now called merely *Draft Common Frame of Reference (DCFR*[25]*)*, which wants to provide *"principles, definitions and model rules of European Private Law"* similar to the approach of the long-term Trento project on *Principles of European Contract Law* (PECL). (Introduction 1 f).

(2) While the PECL and all other projects referred directly to the acquis of legal culture in Europe embodied in national private law and its great historic codifications (BGB, Code Civil, Burgelijke Wetbok, ABGB, Codice Civile), the present draft has officially opted for an EU-approach where EU law is understood as only that law created by EU institutions. The newly founded *Research Group on Existing EC Private Law (the 'Acquis Group')* bases its work explicitly and solely on genuine EU law inherent in EU Directives and the treaty, as applied by the European Court of Justice. (Introduction 49 ff).

(3) Within this body of EU Directives, problems of legal and scientific competence have led to a further narrowing down of consumer protection (*Acquis consommation*).

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[22] C. von Bar, *Die Study Group on a European Civil Code*, in Festschrift für Dieter Henrich (Bielefeld, Gieseking, 2000) 1; W. Wurmnest, *Common Core, Kodifikationsentwürfe, Acquis-Grundsätze Ansätze von internationalen Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa* (2003) 11 ZEuP 714, 732, 735.

[23] For a European Contract Code see Parliament Resolution A2-157/89 [1989] OJ C158/400; Resolution A3-0329/94 [1994] OJ C205/518; see also, from 2000, Resolutions B5-0228, 0229 and 0230/2000 [2000] OJ C377/323; the first two resolutions; for the Commission see Communication from the Commission to the Council and the European Parliament on European Contract Law COM(2001) 398 final (11 July 2001); see (2001) 9 ZEuP 963. (1993) 1 613; (1995) 3, 669. For a Common Frame of Reference see Resolution of the Communication from the Commission to the European Parliament and the Council, *European Contract Law and the revision of the acquis: the way forward*, COM(2004) 651 final (11October 2004).

[24] Action Plan COM (2003) final, OJ C 63/1 even further reduced in Communication from the Commission to the European Parliament and the Council, *European Contract Law and the revision of the acquis: the way forward*, COM(2004) 651 final (11 October 2004).

[25] For this essay we use the latest available publication of the DCFR: Ch. von Bar, E. Clive, H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR)* Outline Edition Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Based in part on a revised version of the Principles of European Contract Law (further members of the group Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll) (Munich, Sellier, 2009).

(4) But even this is reduced. In the used material as well as in the Draft itself, only sales-related directives on standard terms and marketing forms (electronic, at distance etc) are taken into account, excluding most financial services[26], labour[27] as well as tenant[28] law principles.

The authors of the DCFR call it "an *academic* draft" (Int. 1) developed by "a body of legal *scholarship*" with a "*scholarly* elaboration" of 20 EU-Directives and as well as of the jurisprudence of the ECJ. "The DCFR is an *academic* text. It sets out the results of a large European research project and invites evaluation from that perspective" (Int. 6). This self-explanation merits some doubt. The number of limitations and reductions starting from English language to the selection of material used, the outreach of science, the persons involved, the money used from political sources at EU and national level to proceed, all make it difficult to believe that this project has not been influenced by political decisions and directions which have finally determined its outcome.

Particularly, it seems that questions of legal and personal competence have influenced this draft. The astonishing ability of its authors to follow even opposing instructions from the political side cannot be totally ignored.

The question of EC competence to enact the DCFR has made it especially difficult for social contracts to influence its contents: the Treaty gives no competence to the EC on general civil law and even less to social policy. Arts 125-128 TEC have even opted for an Open Method of Coordination, which is contrary to what Commission and Parliament wanted to establish for contract law in general. Harmonisation of social contracts through a 29th regime is not envisaged by the Treaty, especially in the light of the experience with the European Social Charter.[29] Beyond this part of the Treaty, the EU does not assume that there is a sufficient Acquis Communautaire in social contracts which could justify a Draft Code. It therefore uses or misuses the loophole of its competence in consumer protection and internal market (Art.*153, 95 TEC) to propagate the idea of a European Civil Code without regard to social policy. This has influenced the selection of scholars, the idea of justice behind the Draft and the empirical basis for its reasoning, where housewives are more visible than labourers and debtors. It led to the promotion

[26] For example Directive 2008/48/EC on Consumer Credit, Directives on Payment Services, on Distance Marketing of Financial Services, Investment Directive, MiFiD etc. concerning financial services.

[27] The assumption that the existing Directives on labour law (see H. Collins, *European Social Policy and Contract Law* (1/2005) ERCL 115 ff.) are outside the area of consumer law is erroneous since there is a rising consensus in European labour law that a worker relation can also be addressed by consumer legislation, which, on the contrary, also classifies consumers as parties in labour law.

[28] Because tenant law was the first form of consumer law providing protection within a special service to consumers (renting a car is part of consumer law, renting a house not?) there is no reason to exclude it from the general body of consumer law today. See e.g. P. Krummennacher, *Konsumentenleasing: zur Anwendbarkeit des Konsumkreditgesetzes und zwingender Bestimmungen des Mietrechts auf Konsumentenleasingverträge* (Zürich, Schulthess, 2007).

[29] This is not taken into account in S. Weatherill, *The Constitutional Competence of the EU to Deliver Social Justice* (2006) 2 ERCL 136-158; Hesselink, 2008, p. 16.

of a more industry-driven idea of a rather free European internal market, where binding social rules in contract law should be *restricted to a minimum*. (Principle 2)

But not only a lack of EC competence hinders social contracts from becoming more important in the DCFR. Also the group which has developed shows a certain deficit in dealing with social contracts. Internationally active English speaking lawyers are traditionally focussed on commercial law, or doing research under the label of IPR in the general parts of contract law. These parts reflect the dominant sales law models[30] of contract law of the 19th century property rule, where time and social policy play a less important role. Furthermore, only a few authors of the DCFR are known for their skills in legal sociology and political science necessary for understanding social contracts. Legal realism, sociology of law or *Rechtstaatsachenforschung*, the most important areas for labour, tenant and consumer credit law, are missing. Instead, the traditional separation of *Sein und Sollen* has been further developed through the adaptation of the efficiency approach of economics, in which reality is replaced by *models of efficient* behaviour of information seekers as *average consumers*.[31]

Having in mind these restrictions, the DCFR could still be accepted as an academic effort to develop a Draft Common Frame of Reference for a European Consumer Sales Law (DCFR-ECSL). Such denomination would have extended the Acquis of the Consumer Sales Law Directive already integrated in the Proposal for a Directive on Consumer Rights of October 8, 2008[32] to other sales- related consumer directives, like the ones on Unfair Practices (2005/29/EC), Time-share (94/47/EC), Package Travel (90/314/EEC) and E-Commerce (2000/31/EC). This would have provided a consistent ECSL with adequate legal competence and sufficient legal foundations in other international sales law efforts, such as the Uni-Droit Principles or the CISG, which have been generalised already by the PECL principles. There would be no problem with tort law and undue enrichment in this draft, as far as they cover either primarily the reversion of intended sales contracts or sales-related contracts (undue enrichment) or primarily discrete non-contractual human relations (tort, delict). Even nearly the whole general part of the DCFR, including its definitions, could be maintained, since very few deal with life-time or similar social issues. As far as the principles are concerned, those who intend to cover social contracts like solidarity, cooperation or some forms of consumer protection (early withdrawal) would conversely have to be removed, since they do not recognise the thorough legal and social re-

[30] L. Nogler and U. Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Mode*, cit., under 2.1 with further references.
[31] T. Wilhelmsson, *The Average Consumer: a Legal Fiction?*, in T. Wilhelmsson and P. Paunio (eds), *Private Law and the Many Cultures of Europe*, cit., 243 ff.; for a general critique in economic science see U. Reifner, *Die Geldgesellschaft* (Wiesbaden, VS-Verlag, 2010).
[32] This proposals integrates Sale of consumer goods and guarantees (99/44/EC); Unfair contract terms (93/13/EC); Distance selling (97/7/EC); Doorstep selling (85/577/EC).

search available among social contract lawyers in this area, which is especially visible in the absence of any reference to collective forms of law.[33]

The problem of the DCFR is that it provides more and different rules, as well as principles than its formal basis and legal and personal competence would allow. It goes beyond EU consumer law, provides an applicable civil code instead of mere principles and uses the word principles wrongly for recitals, which introduce a new questionable political element into the application of civil law. An honest disclosure of its limited area of application would allow the development of a second project on social contracts with its own general part, default rules and principles, which could then later be merged into a true DCFR.

3. Its Political Threat to Social Contracts

The DCFR will affect the further development of a European contract law, in so far as national legislators as well as the European Court of Justice will increasingly make use of it. It will have enormous impact on social contract law, which as we will show later to be more and more governed by general civil law in the credit society.

3.1. A European Commercial Code for Social Interests?

In spite of its introductory self-presentation, the DCFR has been designed in the form of a European civil code (*Model rules* book 1 to VII), imitating in this part the techniques of the cited national codes with their general and specific parts, with binding and default rules, with contractual and legal obligations, with unilateral and consensual juridical acts (Art. II.-I:103). In this it leaves the foundations of EU Directives who are not diredtly applicable in national law and do not oblige the national legislators to offer default rules. They also do not and will in future not cover such a vast area of civil law, according to the Treaty. The general part of the DCFR rules contains a number of abstract basic definitions and rules which have no counterpart in EU regulation but are directly derived (in particular) from the German civil code.

Although the DCFR pretends to use only EU consumer law, it goes far beyond existing EU Directives. It regulates (a) all relations of natural and legal persons, (b) provides general

[33] The word collective is used only in FN 40 to describe the way the authors worked together. For the different forms collective interest take within social contract law see U. Reifner, *Inclusive Contract Law - Poverty in Common and Civil Law* (Hamburg/New York, 2000) 44 ff., available at: http://www.verantwortliche-kreditvergabe.net/media.php?t=media&f=file&id=2486; U. Reifner, *Zur Zukunft des europäischen Verbraucherrechts – Soziales Dauerschuldverhältnisse in der Kreditgesellschaft*, Verbraucher und Recht (22. Jg.) Sonderheft 20 Jahre IFF, 1, 30 f.

definitions and rules for the whole of civil law (Book I to III) including family law, labour law and the law of successions where party autonomy plays a role and civil lawyers usually refer to the general parts of the civil code. (b) In its special parts it covers also non-contractual legal obligations, such as tort law, undue enrichment and benevolent intervention in another's affairs[34] which, with the single exception of product liability, are not covered by Consumer Directives.

Driven by its desire to provide a consistent civil code for Europe, it uses its own more or less liberal policy approach to fill the gap where no EU precedents exist and national law provides controversial solutions. Given the still existing differences visible, especially in the existing social models within the EU[35], it opts in any case for a common law instead of a civil law approach, where responsibility and good morals are replaced by fairness, *causa* and will by reasonable expectations, protection by information, social concern by anti-discrimination and *ordre public* by party autonomy.

3.2. Political Programme in a Legal Form

The DCFR is not only problematic for its omission,s but also for the open form it employs. This purpose-driven open form of rules is rather unique and also dangerous, especially for politically sensitive areas. In social contracts, suppliers/employers and workers/consumers have partly antagonistic interests, which need secure and clear delimitations in the law. They protect the weaker parties from abrupt political interventions into the legal system like they have taken place in legal history, especially but not only under fascist regimes.[36]

The initial part, called *Principles*, does not provide general and abstract rules which in the hierarchy of legal reasoning have to be observed when interpreting ordinary rules. The explanation (Introduction 10) refers to the use of the word in other contexts, but not to law. In particular, the reference to the PECL or to an administrative use by the Commission cannot explain why a law is introduced with separate principles, which then should not be abstract since "abstract principles tend to contradict each other." (Intr. 11) In fact, the named *Principles* are taken form the Acquis approach and therefore resemble *recitals* to a model law as used in Common Law Legislation and EU Directives. But EU Directives are different from statutes, since

[34] An incorrect subjective limitation of *Geschäftsführung ohne Auftrag/gestion d'aiffaires d'autrui* which now must be "benevolent" instead of objectively required by a moral or legal obligation.
[35] Continental, Scandinavian and Anglosaxon Model: For this see F. Scharpf, *op. cit*.
[36] See the critique from labour lawyers of the role the highest German labour court took against collective actions of trade unions in Germany by O. Kahn-Freund, *Das soziale Ideal des Reichsarbeitsgerichts* (1931), in Th. Ramm (ed.), Arbeitsrecht und Politik. Quellentexte 1918-1933 (Neuwied, 1966) 149 ff.; W. Däubler, *Das soziale Ideal des Bundesarbeitsgerichts*, in Streik und Aussperrung (1974) 411-522 ff. Similar criticism has been recently formulated by P. Derleder, *Subprime Judikatur. Die Bewältigung der Finanzkrise und die Anforderungen an eine risikoadäquate Zivilrechtsprechung* (1/2009) Kritische Justiz 1 ff. with respect to the Banking Senate of the German Supreme Court.

they address legislators and not citizens or administrations. To date, civil law has always rejected the so-called *subjective or historical interpretation* of the law, where legislators can change the effects of a law by providing the underlying purposes. This safeguard against political voluntarism in civil law has proved its worth when comparing the civil law under Italian fascism and German National Socialism. In Germany, docile lawyers trained to replace the law by moral persuasion had only to be provided with one single purpose clause[37] added to the beginning of the penal code, as well as with the order to use the party programme as the source of principles for the civil code, to be able to misuse the legal system as a form of an *efficient* tool to first exclude and then exterminate millions of people with the help of the law.[38] Again, in Stalinist East Germany, the communist party used this strategy and provided its judges with the party programme full of "principles". European lawyers aware of this historic failure of a purpose-driven law should fiercely reject such rules where the wording of the rules is subjected to its purpose.

Ninty-nine recitals over 39 pages would normally be what a government would call *Motive*[39] delivered together with the Draft law to the law-making bodies. Instead of an inflation of legal purposes, true legal principles, at least in the continental philosophical tradition, would have to be ordered hierarchically and in the last resort related to one single purpose of law, which Viehweg called the central *topoi* which is *Justice.* In its first part it is true and in its second probably exaggerated and a-historical to say that "Justice is hard to define, impossible to measure and subjective at the edges, but clear cases of injustice are universally recognised and universally abhorred." (Intr. 40) Instead, the inflation of such purposes leads to the opposite of Principles. They open the door to political argument, devaluating the quest for justice by juxtaposing it either with empty or dangerous principles of efficiency or market integration. The most shocking a-historical principle is then that of *efficiency.* This neo-liberal weapon of social destruction comes directly from a bureaucratic view of power and discounts the fact that human society is founded on two pillars which are founded onto labour and empathy. Empathy can never be efficient and labour without love is inhuman.

We therefore have to agree with the conservative critique that the present DCFR already provides a politically important nucleus for a future genuine Civil Code of Europe, which will have important repercussions for the social policy impact on the development of national civil

[37] Art. 2 German Criminal Code 1935: „Bestraft wird, wer eine Tat begeht, die … nach dem Grundgedanken eines Strafgesetzes und nach dem gesunden Volksempfinden Bestrafung verdient.“ („Punishable is what deserves punishment according to the sane feelings of the people“), Law of 28.6.1935, RGBl. I 839.

[38] For Germany see B. Rüthers, *Die unbegrenzte Auslegung*; U. Reifner, *Das Recht des Unrechtssstaates* (Franfurt/Main, Campus, 1991).

[39] See *Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich*. Amtliche Ausgabe. Bd. 1–5, (Berlin/Leipzig, 1888).

law in the near future. The draft occupies the key area of general rules in private law and will therefore be especially important for social contracts, whose importance seems so far to be totally neglected in the apolitical and merely legal development of this Draft. The vast body of contract law regarding all kind of long-term labour relations, housing and services for basic needs as well as financial services for consumers especially consumer credit, mortgage loans, private pension systems and basic payment services need reconnaissance.

3.3. An English Welfare Model for Social Contracts?

The DCFR has been developed in the pragmatic English language.[40] This was at the same time also an option for the selection of people who developed this Draft, an option for the contents and the way Common Law is formulated and designed and very importantly also an option for the social model which underlies many of its implications.

The drafters of the DCFR have a predominant reputation in their experience and knowledge of the relation between the law of their home country and the law of the UK and America and special skills in English legal language[41]. They are mostly trained commercial lawyers and specialists in international private law. Neither qualification favours the introduction of social contracts and social thinking into the DCFR.

With regard to the social system, the Anglo-Saxon countries represent a one of the 'three worlds of welfare capitalism'[42], which is especially weak in social care, solidarity and state responsibility. The main differences lie not only in the social security system, but also in the "differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is expected to perform, from those that ought to be left to private provision, either within the family or by the market) ... These structural differences have high political salience. They correspond to fundamentally differing social philosophies ... The

[40] R. Sefton-Green, *The CFR and the Preservation of Cultural and Linguistic Plurality*, paper presented at the SECOLA 2008 conference (forthcoming in ERCL).

[41] The editors have gained special reputations in English and American international and private law: Main editors: Christian von Bar (Cambridge 1981 and Oxford 2000); Eric Clive (Edinburgh); Hans Schulte-Nölke (Visiting Senior Researcher in an English programme at the University of Nijmegen, Netherlands). Other editors Hugh Beale (UK), Johnny Herr (Stockholm Business School with its English language BA PHD programme). Jérôme Huet was trained as a Visiting Professor at the University of Tulane, New Orleans, United States (1988-1990), Paul Varul is a business lawyer from an international business law firm in Estonia, Anna Veneziano got her Master Degree from Yale School, USA and Fryderyk Zoll at Jagiellonian University with its American Law cooperation with its School of American Law (Columbus University).

[42] G. Esping-Andersen, The Three Worlds of Welfare Capitalism (Princeton, NJ, Princeton University Press, 1990); M. Ferrera, A. Hemerijck and M. Rhodes *The Future of Social Europe. Recasting Work and Welfare in the New Economy* (Oeiras, Celta, 2001).

present diversity of national social-protection systems and the political salience of these differences make it practically impossible for them to agree on common European solutions".[43]

British and continental European contract law mirror these deep-rooted differences. "It is only by understanding English pragmatism that we can understand English reservations against achieving social justice through law"[44]. Nominalism and empiricism are the main obstacles Micklitz identifies for the English contract system to accept principles of social responsibility. It is therefore not surprising that social contract lawyers are more internationally organised among themselves, in the non-English environment of the European Continent.

Using English legal language as a primary tool to formulate the Draft Common Frame of Reference therefore already represents a threat to the introduction of social contracts into its thinking and principles. The literal meaning alone of the word "social" is so diffuse in English compared to continental European thinking that it has nearly no meaning at all. "Social events, socialising, social seat" have nothing to do what on the Continent is perceived as "social". In America it has even got a negative connotation identified with Eastern style socialism, state intervention, communism etc. In French, Italian and German law social/sociale/sozial has evolved into a quite sophisticated concept to describe a form of action and behaviour with regard to other members of society. It is present in Rousseau's *contrat social*, in the German constitution as *Sozialstaat*, in politics as *Sozialsystem* or in "*sozialem Verhalten*" or "*Asozialem Verhalten*" in educational science. "*Soziale Gerechtigkeit*" in German and "*justice sociale*" and "*giustizia sociale*" in French and Italian would even be a pleonasm. Justice/justitia in the catholic Latin culture is of itself social. In the core social Encyclical of Leo XII, *Rerum Novarum*, paragraph 33, justice is either social or not at all justice: "The first and chief is to act with strict justice - with that justice which is called distributive - toward each and every class alike." and in paragraph 34 it continues with the core of social policy when it says: "Justice, therefore, demands that the interests of the working classes should be carefully watched over by the administration, so that they who contribute so largely to the advantage of the community may themselves share in the benefits which they create-that being housed, clothed, and bodily fit, they may find their life less hard and more endurable."

This continental European tradition is different from the Anglo-Saxon Protestant and Calvinistic tradition, where wealth is seen more as an individual merit and less as a social obligation. This is why the English language does not distinguish between "*gesellschaftlich/gemeinsam*" on one hand and "*sozial*" on the other. It uses "social" for behaviour which

[43] F. Scharpf, *The European Social Model: Coping with the Challenges of Diversity* (4/2002) 40 JCMS 645 ff., 650;
[44] H.-W. Micklitz, *From Social Justice to Access Justice: the European Challenge*, EUI LAW WP/2008, describes the fundamental differences of social justice in English and French contract law between pragmatism and principles.

translated into German[45] by i.e. "*gemeinsam, gemeinschaftlich, gesellschaftlich, sozialdemokratisch, gemeinwirtschaftlich, kameradschaftlich, gesellig, gut, etatistisch*" etc. while in the English dictionary the word "*sozial*" in German is falsely translated as "caring". In so far the use of English as the core and only language for the development of this Draft is already a political decision against European social contract law since "the use of a language has already an important influence on the way of thinking"[46].

The vague pragmatic approach is already visible in the somewhat arbitrary selection of "principles", even as they are now grouped into four general principles of freedom, security, justice and efficiency to which a number of other principles are added, such as Protection of human rights, solidarity and social responsibility, cultural and linguistic diversity, welfare and internal market, which are sometimes human rights (freedom, equality), sometimes "desirable technical goals" (effectiveness) or sometimes only the expression of a political will (internal market).

As far as social contracts are concerned, the relationship between those principles which promote property, free flow of capital and economic freedom and those which have distinctive social implications are the test for its understanding of the idea of justice. In the Introduction (No 13) the distinction between "non-mercantile values such as human rights and solidarity and social responsibility" and other values is embarrassing. It looks as if the primary goal of this draft is not to provide a Civil Code where all citizens find adequate forms of expression, but a mercantile code with some exemptions for non-mercantile values.

3.4. Collective Interests as Charity

For social contracts it is especially interesting to see how solidarity and social responsibility (Intr. 18) are defined. Here we learn that these principles are "generally regarded as primarily the function of public law (using, for example, criminal law, tax law and social welfare law) rather than private law." With regard to the history of the welfare state, the authors seem to ignore the important role trade unions played in its beginning and still today. It was only by strikes and collective agreements that the idea of the welfare state could progress. Both are constitutionally acknowledged parts of private law. The public law theory of collective labour law was an early attempt by the authoritarian state to deprive the labour movement of the most precious form of freedom: the freedom to organise and to act in solidarity. This form of solidarity is mirrored in other forms of social contracts, such as consumer credit or tenant law, where exploitation,

[45] The LEO dictionary was used at http://dict.leo.org.
[46] J. Traband, *Über das Ende der Sprache*, in M. Messling and U. Tintemann (eds), Der Mensch ist nur Mensch durch Sprache (Munich, Fink, 2009).

eviction, and usury have limitations in the name of a solidarity-based society, in which the mere profit motive has to respect certain basic needs and human dignity. Instead, the authors of the DCFR present a different idea of solidarity in private law. "In the contractual context the word “solidarity” is often used to mean loyalty or security." One could call this a misuse of the word. Loyalty is a more or less feudal concept which in labour law ("*Treuepflicht*") has only recently been abandoned because of its paternalistic and conservative connotations. Security in consumer credit contracts is a concept which is only used for a secure claim against debtors who in the name of security are foreclosed against or otherwise prosecuted. When the authors continue that "the principle of solidarity and social responsibility is also strongly reflected, for example, in the rules on benevolent intervention in another’s affairs, which try to minimise disincentives to acting out of neighbourly solidarity", they should just read the existing law which talks about moral and legal obligations to act as if a contract had been concluded. Solidarity in social contracts is a way of indicating that social interests need a collective form of expression, in which taking care of others is the expression of self-interest and not of charity. The authors even allude directly to the charity approach when they continue: "It is also reflected in the rules on donation, which try to minimise disincentives to charitable giving (an expression of solidarity and social responsibility which was at one time all-important and is still extremely important)." Charity and solidarity were opposing principles at the turn of the last century, where all kind of charitable associations tried to convince the labour movement not to form alliances but to leave the care of individuals to the owners of capital as well as to the state.

Not a single one of the seven principles issued by the European Coalition for Responsible Credit would qualify for this kind of understanding of solidarity and social responsibility, which ignores different classes in society and the tradition of the labour movement.

4. A Problematic Concept of Contractual Justice

The social question has become the core question of the industrialised societies of the West in the 21st century. From the legal viewpoint, the issue is whether this question should be addressed only by the welfare state and its public law, or whether private law also has a “social” role to play.

Justice is commonly thought – this is also the starting point of the DCFR 47 - to have two applications, which Aristotle distinguished as «distributive» and «commutative» justice. The first, distributive justice, is concerned with the “distributions of honour or money or the other things”;

[47] DCFR, Interim Outline Edition (Munich, 2008) Introduction, n. 24.

the second form of justice, commutative justice, is about the treatment of an individual in a particular transaction.

«Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another), and (B) one is that which plays a rectifying part in transactions between man and man. Of this there are two divisions; of transactions (1) some are voluntary and (2) others involuntary- voluntary such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, letting (they are called voluntary because the origin of these transactions is voluntary), while of the involuntary (a) some are clandestine, such as theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness, and (b) others are violent, such as assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult».[48]

As we see, Aristotle ascribed to «commutative» justice both contracts (transactions between man and man) and extra-contractual relations or unjust enrichment (involuntary).

The regime governing property rights and the law governing personal rights (status), on the other hand, were indirectly classified as part of «distributive» justice.

4.1. Justice "without regard to the person"

The law governing personal rights (and slavery in particular), and therefore «distributive» justice, governed the majority of employed relationships during the period of the Roman Empire, whose legal system was marked by a strong sense of individualism[49].

During the pre-modern period, law which could be classified according to the principle of «distributive» justice was traditionally justified as being based on nature as the originating power, whose legitimacy could be traced in the last analysis to God himself. This conferred a privileged status upon «distributive» justice with respect to «commutative» justice. Economic barter has been demonised by canonical doctrine. Society was dominated by the principle of hierarchy [50] and therefore by the obligation of obedience. The hierarchy was prescribed by divine distributive

[48] Chap. 5 of Aristotle, *The Nicomachean Ethics*, translated by William David Ross, 1908, available at http://www.sacred-texts.com/cla/ari/nico/.
[49] See P. Grossi, *Locatio ad longum tempus* (Neaples, 1963) 47, who makes reference to the judgment reproduced in the text in the period up to the 2nd century BC, the time of the great classical jurists, and R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford, Oxford Univesity Press, 1996) 387.
[50] T. Mayer-Maly, *Überwindung des Lohnvertrages?*, in Selbstinteresse und Gemeinwohl (Berlin, Duncker & Humblot, 1985) 13 ff.

justice. It has been rightly said that "the law of master and servant was a metaphysical structure"[51].

The theoretical basis of an economic order based on freedom of contract and the market system – a vision that assumed that the persons have the natural instinct «to truck, carter, and exchange one thing for another»[52], was only possible because the legitimation of modern law no longer derives (in the descendant phase) from natural law, but (in the ascendant phase) from history, or rather, in democratic regimes, from the will of the people. This has given rise, with the post-war constitutions, to the necessity to "establish the moral viewpoint within the law in force"[53].

The important aspect to note, which this reversal has brought about is that «commutative» justice has now assumed a more elevated role in relation to «distributive» justice. As Canaris points out: «the iustitia commutativa (…) as justice "without regard to the person" may readily be understood in both contract law and in the area of prohibited activities (that is to say, criminal offences) as meaning that the value of the persons concerned is treated as absolute»[54]. For this reason the leading modern scholar of French employment law (Gerard Lyon-Caen) stated that the contract «*est porteur de valeurs liées à la liberté de l'homme* – embodies values linked to human freedom»[55]. It is only through this repositioning of commutative justice that overcoming the class system and social structures, such as the medieval guild-system, has been possible[56].

4.2. What Justice for Social Contracts?

Otto von Gierke is credited with having grasped the importance of obligations, whose performance need not be fulfilled at any *precise* moment, but over a *period* of time. Such relationships which, in the original version of the BGB, were referred to in only one paragraph of the regimen governing the most important type from a social viewpoint, namely the *Dienstvertrag* (§ 617 BGB), confer a further function – still according to Gierke[57] - on the law of obligations with respect to the traditional one of transferring the ownership of property: long-lasting relationships of power.

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[51] K. Orren, *Methaphysics and Reality in Late Nineteenth-Century Labor Adjudication*, in L. Tomlins, Labour Law in America (Baltimore and London, 1992) 160.
[52] «Nobody ever saw a dog make a fair and deliberate exchange of one for another with another dog» (A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, I, Chapter II, 118).
[53] L. Mengoni, *Note sul rapporto tra diritto e morale* (1998) Iustitia 305 ff.
[54] C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Munich, Verlag der Bayerischen Akademie der Wissenschaften, 1997) 31.
[55] G. Lyon-Caen, *Défense et illustration du contract de travail* (1968) Archives de Philosophie du Droit 13, 69.
[56] C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Munich, Verlag der Bayerischen Akademie der Wissenschaften, 1997) 74.
[57] O. von Gierke, *Dauernde Schuldverhältnisse* (1914) 64 Jerhings Jahrbücher 406-407.

Originally, the hierarchy had been prescribed by natural law. When natural law was superseded, the hierarchy remained, in practical terms in any case in social long-term contracts (such as labour, tenancy and consumer credit contracts). In these contracts the debtors are confronted with a power relationship because the other contracting party has control over the re-distribution of access to those goods and services which are particularly vital needs. By means of these social contracts the debtors provide for themselves against poverty and deprivation, especially from lack of income, usury and exploitation, insufficient means for personal well-being and such contracts shelter them from (the effects) of unemployment, homelessness and overindebtedness.

As Hugo Sinzheimer, «the father of the science of labour law[58]», has stated, the law must not just consider the freedom of the citizen as a formality, but project itself into the real essence of freedom and recognise it in practical terms, when confronting the citizen's real relational needs[59]. From the *Genossenschaftslehre* of Otto von Gierke, Sinzheimer had learnt that statute can play an entirely secondary role in the evolution of law[60]. Sinzheimer's great intuition was to realise that the employment relationship is not merely a contractual relationship, but also a power relationship. Employers, in the same way as banks and property-owners possess «Verteilungsmacht – distributive power»[61] in respect of the narrow commodities of labour and income. One issue to be addressed by private law consists in the role of the "distributors".

Considering the matters described above, setting out the distinction Aristotle made between commutative and distributive justice, we can say that long-term contracts need a combination of both forms of justice.

Contrary to the system of private law in which the law of contracts is dominated by values related to the circulation of goods (and therefore with commutative justice), in which the worker is likewise considered as the owner of his own body (Adam Smith), or his potential for work which he sells or, at any event, hires out to his employer, Otto von Gierke, in his pioneering study of long-term contracts in 1914, observed that it is beyond doubt that «the general doctrine of obligations rests upon relationships of obligation which are transitory in nature»[62] and that, therefore, the specific problems of long-term contracts had to be resolved in isolation from the law of obligations, by combining the latter with, respectively, the regimen governing property

[58] O. Kahn-Freund, *Hugo Sinzheimer (1875-1945)*, in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie, Gesammelte Aufsätze und Reden*, edited by O. Kahn-Freund and T. Ramm, voll I and II (Frankfurt-Köln, Europäische Verlagsanstalt, 1976) 73 ff.
[59] H. Sinzheimer, *Das Problem des Menschen im Recht* (Groningen, 1933) also in Id., *Arbeitsrecht und Rechtssoziologie*, 2 (Frankfurt am Main, Europäische Verlagsanstalt, 1976) 53 ff.
[60] H. Sinzheimer, *Otto von Gierkes Bedeutung für das Arbeitsrecht* (1922) Arbeitsrecht 1.
[61] C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, cit., 37, 40.
[62] O. Gierke von, *Dauernde Schuldverhältnisse*, (1914) 64 Jerhings Jahrbücher 356-357.

rights for contracts guaranteeing the right of possession, the use or usufruct of goods and, on the other hand, the regimen governing personal rights for those which he colourfully called the *Rechtsgschäfte* for social organisation which included, for example, employment contracts.

History, if we limit the discussion to Germany, for a while judged Gierke to be in the right. From the beginning of the Weimar Republic until the middle Eighties of last century, work relationships were described as *personenrechtliche Gemeinschaftsverhältnisse*[63]. This solution also found favour outside Germany, because it was supported by the father of modern French employment law (Paul Durand)[64] and in Italy by a faction of academic writers in the early period after the Second World War.

But this solution was still based on antiquated medieval assumptions that labour is a resource of the community. As with the *locatio ad longum tempus*, the tenant acquired a property like right by way of redistributive justice workers were protected through the mechanism – itself redistributive – of a personal relationship, which obligated the employer to look after every aspects of the worker's life. This was justified as being the natural order of the classes, which was invested with a largely metaphysical power.

With the decline of the Ford model, the "total" contractual view of labour, lawyers like Philipp Lotmar, Luigi Mengoni, Gino Giugni[65], Gerard Lyon-Caen[66] and Franz Gamillscheg[67] have come to predominate in Europe. This view does not have recourse to personal or property rights, but has led to the innovation (that is, to support the needs of long-term employment contracts) wholly within – and not outside- the context of contractual relationships (total contract view).

4.3. National Social Law as Distributive Contractual Justice

However, the achievement of this total contractual view for the social contracts is not simply because, as Canaris observes, the significant form of justice within present general

[63] O. von Gierke, *Die Wurzeln des Dienstvertrages*, in Festschrift für Heinrich Brunner (München-Leipzig, Duncker & Humblot, 1914) 37 ff.
[64] P. Durand, *Traite de droit du travail* (Paris, 1947); whereas for Spain cp. M. Rodríguez Piñero, *Contrato de trabajo y relación de trabajo. (Bilance provisional de una polemica)* (1967) XXVII Annales de la Universidad Hispalense. Derecho 1 ff.
[65] L. Mengoni, *Contratto e rapporto di lavoro nella recente dottrina italiana* (1965) Riv. società 682 and G. Giugni, *Mansioni e qualifica nel rapporto di lavoro* (Naples, Jovene, 1963).
[66] G. Lyon-Caen, *Du Role des Principes Généraux du Droit Civil ed Droit du Travail (Première Approche)* (1974) Revue Trimestrelle de Droit Civil 229 ff. 231ff.; C. Radé returns to this point, *La figure du contrat dans le rapport de travail* (2001) Droit social 802 ff.
[67] BAG Grosser Senat, 27 Feb. 1985, in AP, § 611 BGB, no. 14 which marks the now definitive abandonment of the ideology of the *Treuepflicht*; F. Gammillscheg, *Das deutsche Arbeitsrecht am Ende des Jahrhunderts* (1998) Recht der Arbeit 5, where the most authoritative contemporary German labour law scholar takes the opportunity to lament the fact that those abroad are often reluctant to take note that German legal scholars have abandoned this for some time now.

contract law «is the commutative justice in the Aristotelian sense»[68]. General contract law is in fact essentially pure procedural justice.

«The function of resolving problems of well-being, whether individual or collective, does not belong to the sphere of contracts»[69]. This is certainly true of the Anglo-American world.

Given that, beyond the law of contracts, the State possesses other instruments for achieving the redistributive aims which it is constitutionally bound to pursue: Bildungs-, Sozial- und Steuerrecht, the realities of the national disciplines for social contracts show that there are six aspects of crucial importance in order to achieve a law of contracts which follows the principles of distributive justice: the guarantee of use-value at an affordable price, the complusory regulation of social relationships of power arising out of contracts, justice with regard to the person, the possibility of establishing contractual relations so as to avoid them ceasing arbitrarily and, finally, more generally andby way of summary, the discipline of human needs, namely existential issues which arise as a result of phenomena beyond the individual's control.

A) Whereas under commercial law, use-value only acquires significance to the extent that it falls mainly by chance into the hands of the consumer, as part of proprietorship, in continuous social obligations, precisely the fact that this use-value is guaranteed, is central. Thus, a landlord is increasingly held responsible for the effective and humane utilisation of the dwelling by the tenant (§§ 535 Abs. 1 S. 2 BGB). Similarly, a lender has a duty to ensure that the loan can be applied effectively in the purchase of the item for which it was taken out, by ensuring that the item is free from defects (defence against enforcement under § 359 BGB), which is comparable to the duty of employers to ensure that the place of employment is humane and that wages are paid consistently. Moreover, all continuous social obligations share a distrust of pure market pricing, which is the cornerstone of the ideology of commerce.

In the case of services of "general economic interest" even in the wake of neo-liberal deregulation and privatisation, the State has established public commissions equipped with extensive mechanisms for price control in the areas of, for example, radio, television, gas, water, electricity and the railways[70]. What the minimum wage achieves in terms of obligations in the context of employment, whether directly or indirectly through pay agreements under individual employment contracts, legislation on rents achieved through regulations relating to "local comparable rents" under §§ 558 ff BGB. While consumer credit in France, the Benelux countries, Italy and Poland is regulated through statutory restrictions on usury, in Germany the public policy

[68] C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, cit., 75.
[69] G.B. Ferri, *La «cultura» del contratto e le strutture del mercato* (1997) Riv. dir. comm. 863.
[70] Even C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, cit., 50, concedes that the problem must be confronted beyond the market principle and according to the tenets of distributive justice.

requirement under § 138 Abs. 1 BGB extends the principle of double the average local comparable rent to interest rates as well.

B) In place of the neutrality of contract law, in terms of the outcomes of the freedom to contract and freedom of competition, private law must directly regulate the social hierarchy which derives from relationships of distributive power. There are legal limits which make the market into a system aimed at the achievement of the maximum possible collective well-being.

For this reason labour and employment law has opened the way to the use of techniques which traditionally were part of public law, such as, for example, the diffusion of fundamental rights in the context of employment relationships, the prohibition on discrimination, abuse of power, unequal treatment, the conditioning of the exercise of extra-judicial powers (power of dismissal) by the existence of a factual assumption.

C) Alongside this absence of content, however, the commercial principle of freedom to contract also had to be subject to limitations in order to take humane considerations into account. While it is possible to interpret anti-discrimination legislation in terms of competition law, the legislation contains provisions for the employment of disabled persons or women; similarly, regional savings bank legislation creates duties to provide current accounts for overindebted people. In the US, Community Reinvestment legislation compels the banks to lend in impoverished districts[71]. The rental housing market is subject to prohibitions and provides compulsory provisions in times of crisis, and a duty is imposed on the utilities to connect the supply of telephone, gas, water, electricity or transport. Continuous social obligations thus do not leave human needs or the dependency on wage labour out of contracts, as is suggested by commercial contracts.

D) Justice *with* regard to the person (and not *without* regard to the person): the regimen for employees' contracts governs the parties' reciprocal obligations on the basis that this contract, so far as the worker is concerned, performs a pre-eminently social function of support and affirmation of his/her personality. For this reason, the risk of non-performance based on impossibility, linked to specific events of the kind which may befall (illness, accident, pregnancy, conscription, performance of public duties, etc.) relating to the debtor, is transferred from the latter to the creditor who, contrary to the synallagmatic principle (no work, no pay), is required to pay remuneration for a certain period[72].

[71] Overview at U. Reifner, *Social Banking - Ansätze und Erfahrungen über die Integration sozialer Zielsetzungen in privatwirtschaftliche Finanzdienstleistungen*, in L. Schuster, *Die gesellschaftliche Verantwortung der Banken* (Berlin, Erich Schmidt, 1997) 205 ff.

[72] For the German context, cp. G. von Hoyningen-Heune, *Arbeitsentgelt ohne Arbeit – Die Durchbrechung des Synallagma im Arbeitsrecht*, in Festschrif für Klaus Adomeit (Cologne, Luchterhand, 2008) and C.W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht*, cit., 81 ff.

It is interesting to note that the recent financial crisis, has brought about a situation in which the principle of justice *with* regard to the person has been affirmed in the context of other long-term relationships (other than those of work). For example, one of the most important commitments which Italian credit institutions have taken on in order toh ave access to the Tremonti bond (bank bonds) underwritten by the State to inject liquidity into the troubled banking sector, which provide a yield of between 7.5 % and 8.5 % (and which are governed by legislative decree no. 185 of 29 November 2008, converted with amendments into Act no.2 of 28 January 2009): the banks are committed to suspending, for at least 12 months, the mortgage payments of employees who have lost their jobs, (see the memorandum of understanding signed by Abi and the Treasury Minister). As can be seen, there has been an enlargement of the typical labour-law principle of the transfer of risk of supervening impossibility linked to specific personal events (illness, unemployment) from the customer to the bank.

The protection of non-economic interests should also be ascribed to the principle of justice *with* regard to the person: a) *Duties of care* (§ 241, para 2, BGB) are recognised, protecting the debtor's person and – so resolving the problem for the solution of which the Gierke tradition had created the *Fürsorgepflicht* (paternalistic care) – that of the creditor[73]; b) the rules on liability involve the payment of damages only if the debtor is responsible for the inadequate performance of the obligation (§ 280 BGB; art. 1218 c.c.); this presupposes the differentiation between the content of the duty and the object of the credit right[74] and the construction of contractual liability on the basis of inadequate performance (see the Italian Civil Code and the 2002 reform of the BGB); d) the possibility of claiming damages for non-economic loss.

E) What is much more clear is the restriction on freedom to contract in its counterpart namely in the termination of continuous social obligations. All continuous social obligations are subject to protection from termination, going beyond contractual arrangements, to introduce certain forms and fees and, at the same time, under credit legislation, an attempt at amicable continuation of the relationship is required (§ 498 Abs.2 BGB). Moreover, under landlord and tenant legislation and employment legislation, termination is restricted structurally, and in both cases "social justification" is required, arising from the conduct, the person of the employee or the tenant (ILo Convention No. 158 of 1982; §1 KschG,; art. 1 Law No. 604 of 1966 in Italy,

[73] See the fundamental 1929 writings of H.C. Nipperdey on *Die Privatrechtliche Bedeutung des Arbeiterschutzes*, in *Festgabe für das Reichsgericht*, IV (Berlin-Leipzig, de Gruyter, 1929) 203 ff. He highlighted the importance of provisions aimed at the protection of the worker's person, as accessory obligations for private law, too.

[74] See L. Mengoni, *L'oggetto dell'obbligazione* (1952) JUS 156 ff. and L. Mengoni, *Obbligazioni «di mezzi» e obbligazioni «di risultato» (Studio critico)* (1954) Riv. dir. comm., I, 185-209, 280-320, 366-396.

§573 BGB [75]), or from overriding economic considerations ("business necessity", "prevented by reasonable business operations"), in which account must be taken of social considerations. (§§574 BGB, ILo Convention No. 158 of 1982; §1 KschG; art. 1 Law No. 604 of 1966 in Italy). The breach of contract required to terminate a contract is also made relative, and must attain a certain level of gravity in all continuous social obligations, such as the continuation of conduct in breach of contract despite a warning under employment or tenancy law, or arrears of two payments of rent or credit instalments.

F) The litmus test of private law thinking is the interaction with human need.[76] The return of homeless soldiers; sickness, accident, family circumstances, childcare, matters affecting contractual duties long-recognised in employment law have not made much progress in relation to other continuous social obligations, where the principle that "you have to have money" overshadows everything. For that reason, the German Civil Code avoids any echo of financial liability in the context of potential indeterminate obligations limited by labour capacity, instead inserting "termination for compelling reasons" in the General Part, thereby enabling employers, landlords and lenders to further their interests through termination of the contract, without explicit reference to the social needs generated for employees, tenants and borrowers.

Yet what appears logical within commercial ideology seems illogical when examined in the light of the sociology of law, not only in France, Norway or Finland, where social *force majeure*[77] has found its legal expression. With the right to pay arrears of rent until the first hearing date in the eviction proceedings, the German Civil Code created the opportunity in practice for the social welfare office to intervene with a payment and make termination of the tenancy for arrears of payment ineffective. Nor do borrowers face liability forever when they are in hardship. If they run out of money, consumer bankruptcy comes to the rescue under §§ 286 ff InsO. That law provides for release from debts after six years (§ 301 InsO), irrespective of the contract, while in France and the USA immediate release is possible where borrowers have no assets and, in the Netherlands and Belgium, a period of 3 to 4 years applies. Contrary to all exchange principles, the hard-hearted creditor discovers that his claim is worthless, while the debtor "lives on", unlike an insolvent company. The debt dies, instead of the person of the debtor.[78]

[75] For references with regard to dismissals see B. Hepple, *European Rules on Dismissals Law?* vol. 18/2 CLLPJ 204 ff.
[76] Cp. U. Reifner, *Inclusive Contract Law - Poverty in Common and Civil Law*, elektron. Ressource Hamburg/New York (2000) available at: http://www.money-advice.net.
[77] T. Wilhelmsson, *Critical Studies in Private Law – a Treatise on Need-Rational Principles in Modern Law* (Dordrecht, Kluwer, 1992) 180 ff.
[78] On the "Death of Debt" Doctrine cp. U. Reifner, *'Thou shalt pay thy debts' Personal Bankruptcy Law and Inclusive Contract Law*, in J. Niemi-Kiesilainen, I. Ramsay and W.C. Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Portland, Hart Publishing, 2003) 194-228.

As a result of the reform of debt law and the European privatisation of pension provision provision, rent and consumer credit have entered the German Civil Code in §§ 498 ff., 535 ff. BGB. The same applies to all long-term consumer transactions, such as contracts with travel agents, bank accounts and remittance payments. Reform of insurance law has brought with it the application of contract law concepts in that area as well, and has produced the equivalent of a General Part for continuous social obligations, which takes into account the human element of risk. In their form as private law agreements, retirement pension policies, long built into the former *Reichsversicherungsordnung* (now the *Sozialgesetzbuch* – Social Code), took their social form from tax law, under which only agreements which incorporated criteria known as "Riester-Rente" criteria were given tax advantages, meeting the requirements of old-age certification legislation. Even in this context, public law governing savings and investments in securities and endowment policies merely had the appearance of being untouched. Even there, the underlying principles of guarantees of nominal value for the protection of the vital interests of consumers in their old age were taken into account in general legal principles.

4.4. «The DCFR Is Particularly Concerned to Promote What Aristotle Termed Corrective Justice»

While European contract law has, at least in part, felt the effects of the legislative evolution imposed by the law on employment contracts, and with other social contracts, contract law in the common law system has remained anchored in the strictly commutative principle: a neo-Roman Law. "European Legal Systems are not converging"[79]. The statement which provides the title of this paragraph 83 seems tailor-made for the English system, also for the reason that alongside commutative and distributive justice, a third category is introduced: corrective justice, that « it is for a judge to correct an inequality that is created by an act of injustice», whereas commutative justice refers to persons "freely to exchange goods" in a market[80]. In this way, the idea is transmitted that the market and private law do not arise from regulation but «[arise] more or less naturally».[81]

A) In the civil law systems, so far as the law of contracts is concerned, labour law has contributed to making the distinction between *Abschlussfreiheit* and *Gestaltungsfreiheit*, between the formal regulation and the content of the agreement, between intention and judicial control,

[79] P. Legrand, *European Legal Systems are not converging* (1966) 45 ICLQ 52 ff.
[80] M. Papaluk, *Aristotele's – Nichomachean Ethics – an Introduction* (2005), at 195-196 cited by N. Reich, *The Public/Private Divide in European Law*, draft paper to be presented at the 14th General Meeting of the Common Core Group, Turin, 11.7.2008.
[81] L.A. Williams, *Beyond Labour law's Parochialism: A Re-envisioning of the Discourse of Redistribution*, in J. Conaghan, R.M. Fischl and K. Klare, Labour Law in an era of Globalization, 8th edn (Oxford, University Press, 2002) 94.

between initial regulation and mechanisms for adaptation of the individual contract (for instance, the *direct effects* of collective agreements).

Such distinctions are not commonly used in English legal practice: «the law of contract was developed by the courts, and the principal conceptual instruments which they handled were the intention of the parties (…) and public policy which, in a few extreme cases, may destroy a contract, but which cannot mould it»[82]. Under the English law of contract, the literal meaning of the contract is preferred, clearly from the prevailing perspective of certainty in the law. This is probably the reason why the conduct of the parties is not invoked in the provisions on interpretation in the *DCFR Model Rules*[83] (we refer here to art. 8:107 ff. of the second Book). English contract law has certainly evolved since the time of Kahn-Freund to today. The courts «have created a special set of rules for the employment relation of mutual trust and confidence»[84]. Between the end of the 60s up to the first half of the 70s «legislation was drafted with a greater reference to and use of the contract of employment in the design of the statutory right. At this stage, the contract of employment was enlisted as a device mainly to facilitate the public policy in the legislation»[85]. However, «the strong presumption» still persists «(…) that the general rules of contract law apply equally to commercial contracts and employment contracts» such that the principle of implied terms represents «small deviations from ordinary contract law»[86]. In classifying a work relationship as an employment contract or self-employed contract, for example, «the British approach remains distinct from that of most continental systems in the emphasis it gives to the autonomy of the contracting parties»[87].

In fact , in the economic analysis of law, market *freedoms* are claimed to be more *efficient* for providing *security* for social aspirations too. They have globally called this *Justice*, which has thus been reduced to fair procedures.[88] This ideology, which discounts historical wisdom about the main functions of law as *tamed social power and* as a *peace-keeping* alternative to war (Hob-

[82] O. Kahn-Freund, *A Note on Status and Contract in British labour Law* (1967) MLR 641.
[83] P. Stein, *Norme fondamentali: in tema di accordo, contenuto, forma, interpretazione del contratto nel «codice civile europeo dei contratti»* (2007) Riv. dir. civ., I, 235.
[84] H. Collins, *Similarities and difference between labour contracts and civil and commercial contracts*, XVI World Congress of Labour and Social security, Jerusalem 3/7/2000.
[85] S. Anderman, *The Interpretation of Protective Employment Statutes and Contract of Employment*, (3/2000) 29 Industrial Law Journal 228.
[86] H. Collins, *Similarities and difference between labour contracts and civil and commercial contracts*, XVI World Congress of Labour and Social security, Jerusalem 3/7/2000.
[87] C. Barnard and S. Deakin, *Redefining the Employment Relationship: flexibility or security? The UK Experience in a Comparative Perspective*, available at: www.eng.dpis.unibo.it/NR.
[88] A number of recent economic publications defend the traditional market approach against criticism with the intention to prove that direct application of social justice will lead to no social justice in the end. See, e.g., P. Kirchhof , *Das Maß der Gerechtigkeit* (Munich, Droemer Knaur, 2009); H.W. Sinn, *Kasino-Kapitalismus: Wie es zur Finanzkrise kam, und was jetzt zu tun ist* (Berlin, Econ, 2009); T. Straubhaar and M. Hüther, *Die gefühlte Ungerechtigkeit: Warum wir Ungleichheit aushalten müssen, wenn wir Freiheit wollen* (Berlin, Econ, 2009). They defend the procedural approach to justice where human dignity is replaced by fairness best expressed in Rawls', Theory of Justice, as criticised by Amartya Sen, *The Idea of Justice* (London, Allen Lane, 2009).

bes)[89], still perhaps the most convincing justification for a unified European legal system in the eyes of ordinary people, has been expressly made the basis of the DCFR. The DCFR starts with the following phrase: "1. The four principles. The four principles of *freedom, security, justice and efficiency* underlie the whole of the DCFR. Each has several aspects. *Freedom* is, for obvious reasons, comparatively more important in relation to contracts and unilateral undertakings and the obligations arising from them, but is not absent elsewhere. Security, justice and efficiency are equally important in all areas. ...Law is a practical science. The idea of *efficiency* underlies a number of the model rules and they cannot be fully explained without reference to it."

While law is basically defined as a restriction on freedom, especially the freedom to pursue one's own interest through private force (feud, vendetta, faida, self-help) the DCFR assumes "that formal and procedural hurdles should be kept to a minimum." (Principle 2) It further states in Principle 3 "As a rule, natural and legal persons should be free to decide whether or not to contract and with whom to contract. They should also be free to agree on the terms of their contract." While classical codifications were cautious enough not to legislate on the principle of freedom of contract, the DCFR dares to formulate this, not only as a principle but even as a rule in Art. II.-I:102, when it states "Parties are free to make a contract or other juridical act and to determine its contents". This statement in the indicative form shows how deep neo-liberal model thinking is rooted in the minds of the authors of this draft. Mass unemployment, homelessness, overindebtedness, lack of drinking water and electricity, child labour, monopolies, all kind of addictions but also imposed standard terms and long-term dependency do not just exist for the sacred principle of freedom of contract. These are all exceptions which, due to the exclusion of social contracts, were not in contemplation when this idealised principle was formulated.

B) The statement that the promotion of solidarity is «primarily the function of public law (…) rather than private law» is also typical of English law.[90] Protective legislation was and is in English law «thought of not as operating on a contract but as imposing extra-contractual obligations, enforceable through criminal prosecutions and through actions in tort» [91]. In this way, justice *with* regard to the person is not integrated into contract law, which is also demonstrated by the fact that in the outline edition it was stated that «private law must contribute to the protection of human rights» but no longer, as in the interim edition[92], to «human dignity».

[89] Codifications in the middle ages were known as "Landfrieden" (peace to the country; lat. *constitutio pacis, pax instituta pax jurata*) where powers of certain regions renounced to even legitimate exercise of physical power to enforce legal claims. See A. Buschmann and Elmar Wadle (eds), *Landfrieden. Anspruch und Wirklichkeit* (Paderborn, Schöhningh, 2002).
[90] DCFR, Outline Edition, (Sellier, Munich, 2009) Introduction, n. 15.
[91] O. Kahn-Freund, *A Note on Status and Contract in British labour Law* (1967) MLR 641.
[92] Introduction, no. 31.

In addition, protection of non-economic interests of the other party have not been incorporated into the DCFR under general contract law, but, following the English tradition, clearly ascribed to extra-contractual liability. In fact, obligations arising from social contact, which in the civil law tradition are normally considered as accessory to the principal obligation, can only be invoked under the provision in the DCFR by which «parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing and any other mandatory rules»[93]. But will this be good faith with «esprit de solidarite», as set out in the French *Avant-project*, or instead an ordoliberal good faith, defending commutative justice?[94]

Contractual justice as envisaged by the DCFR is essentially justice *without* regard to the person as the generalised *right not to be discriminated against* demonstrates[95].

We entertain considerable doubt on the subject of direct influence (unmittelbare Drittwirkung[96]) which is a feature of the new configuration of a «contracts infringing fundamental principles»[97] – whatever «*principle recognised as fundamental in the laws of the Member States of the European Union*» –, which is considered a nullity .

We are aware that this new provision addressed the problem of evasions of the law which are more complex. However, the expression 'principles' indicates a "normative assertion" which normally connotes an essential interpretative influence in relation to legislative provisions. It is true that in relations between private parties there are (at least) two stakeholders with fundamental interests and therefore it is almost always necessary to reach a compromise between fundamental principles. This operation takes place in the interpretation phase of the legal rule which in practice is applicable. Without this filter, there is the risk of opening the door to the sudicia tyranny of individual constitutional principles (see also retro § 3.2), which operates by way of endless appeals on the grounds of unlawfulness.

5. Ignoring Labour Contracts

Art. 1:101 of the DCFR states that the rules are «not intended to be used, or used without modification or supplementation, in relation to rights and obligations of a public law nature, or in

[93] Art. 1:102, 1° c. of book I of the *DCFR Model Rules* corresponding to art. 1:102 of the *PECL* as to which see C. Castronovo, *Good faith and the principles of European Contract Law* (2005) Eur. dir. priv. 589 ff.
[94] As A. Somma fears, *La buona fede contrattuale: modelli solidali e modelli ordoliberali a confronto* (2003) Eur. dir. priv. 634 ff.
[95] Artt. 2:101-2:105 of Book II; see F. Zoll, *Remedies for Discrimination: a Comparison of the Draft Common Frame of Reference and the Acquis principles*, European Contract Law, ERA Forum Special Issue 2008 (New York, 2008) 87 ff.
[96] On this theory see S. Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today* (4/2006) 24 OJLS 627 ff.
[97] Art. 7:301 of Book II.

relation to», among other things, the «employment relationship». Art. 1:101 of the underlying Acquis principles adds that "they are not formulated to apply in the areas of labour law ...."

The rules are intended to be used in relation to *service contracts*[98]. The DCFR itself does not define what is meant by service. It is made up of a general and a specific part. The distinguishing criterion within the latter part is not centred on the classification of the provider (and therefore, on the differentiation between a work contract and a tendering contract) but, in an innovative way, on the type of service: *construction*, *processing*, *storage*, *design*, *information or advice* and *treatment*. On the whole, analysing the individual norms on *service contracts*, the conclusion is easily reached that regulation of contracts which involve the sale of goods (contratto di compravendita) has been accorded special status[99].

The fact that *employment relations* are excluded from the scope of the *code* or from the *principles* is highly problematic, since labour law has influenced the structure of national contract laws[100]. In any case, this exclusion does not imply that there is no interest of labour lawyers to be represented in these principles.

5.1. National Employment Law Is More Than the Law of The Contract of Employment

«Employment relationship» is a new concept for EC law. However, it is easy to foresee that this will be interpreted as synonymous with contract of employment. Both in the case of EC Regulation no. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and in the case of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the EC has not defined the meaning of «an individual employment contract». In general, national courts and academic lawyers infer, by analogy with the Community concept of «worker», that it must in its turn be interpreted autonomously and not by reference to national law[101].

The ECJ has developed a significant body of case law on the concept of «worker» for the purposes of art. 39 (48) of the EC Treaty (free movement of persons). With regard to the concept of worker, the leading case is *Lawrie-Blum*[102]. At para. 17 of the judgment, the ECJ set out the now classic definition of worker: «that concept [“a worker”] must be defined in accordance with

[98] M. Barendrecht, C. Jansen, M. Loos, A. Pinna, Cascão, S. van Gulijk, *Principles of European Law. Service Contracts (PEL SC)*, (Oxford, Oxford University Press, 2007).
[99] See C. Wendehorst, *Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht* (2006) 206 AcP 295.
[100] L. Nolger, *Diritto del lavoro e diritto contrattuale europeo: un confronto non più rinviabile* (2008) 118 Giornale dir. lav. rel. ind. 171 ff. The exclusion of labour contracts from the DCFR is critically evaluated also by S. Whittaker, *A Framework of Principle for European Contract Law?* (2009) 125 LQR 330 ff
[101] For a short summary see C. Barnard, *EC Employment Law* (Oxford, Oxford University Press, 2006) 172 ff.
[102] July 1986, 3, Case C- 66/85 [1986] ECR 2121.

the objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration». The real criterion used today by the ECJ is therefore the relationship of «subordination»[103]. According to the European tradition if a creditor retains the power of direction, the contract is without doubt a contract of employment. By contrast, the "contract for services" (or self-employment) in this legal tradition never gives the creditor a power of direction over the work activity.

Everywhere in Europe the difference in treatment between self-employed and subordinate employee is open for discussion[104]. Simon Deakin takes the view that «the problem which vertical disintegration poses for labour law is not so much the growth of self-employment at the expense of protected forms of labour; rather it is the blurring of the "binary divide" itself. As the Supiot report recognized the growth of a "grey zone" of workers who are neither clearly employees nor self-employed affects all systems. (…) what is of particular interest is that the response has not taken the form of a de-socialization of the employment relationship. On the contrary, it is an attempt to extend the logic of social protection to certain forms of self-employment.» [105]

To extend the logic of social protection everywhere in Europe, employment law divides today people up not into two groups, as the DCFR implicitly does, but into three: a) employee, b) workers (England)/ employee-like persons (Germany [106])/ para-subordinate (or -dependent) workers (Italy[107], France[108] and Spain[109])/dependent contractors (Sweden[110]) and c) the self-

[103] See lastly, at point 68 of the judgment of the Court on 13 January 2004, *Debra Allonby* Case C-256/01, [2004] ECR 873.

[104] C. Engels, *Subordinate Employees or Self-employed workers? An analysis of the employment situation of managers of management companies as an illustration*, (1/1999) 21 CLLPJ 1, 76. For the proposal of the transformation of the contract of employment into an extended form of "labour market status" see A. Supiot, M. Casas, J. de Munck, P. Hanau, A. Johansson, P. Meadows, E. Mingione, R. Salais, P. van der Heijden, *Au-delà de l'emploi: Transformations du travail et l'avenir du droit du travail en Europe.* Rapport pour la Commission Européenne (Paris, Flammarion, 1999).

[105] S. Deakin, *The Evolution of the Employment Relationship*, in The future of work, employment and social protection: The dynamics of change and the protection of workers (Lyon, 17/18 January 2002), ILO, 192. About vertical disintegration see H. Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws* (1990) OJLS 353 ff.

[106] These are legally independent but economically dependent workers who need protection like that accorded employees and so they are, for example, excluded from the scope of layoff legislation, but are covered by certain labour law provisions on disputes, leave, and working conditions (specific legislation exists for homeworkers and commercial representatives). Two specific conditions must be met for workers to be described in this way [art. 12a(1) TVG]: first, they must work alone, without the assistance of salaried staff; second, most of their work or income must come from a single person or institution. For further details see W. Däubler, *Working People in Germany* (1999) 21 CLLPJ 1, 88-97 («the worker-like person is conceived as a "Typus", too»).

[107] The labour law relationship known in Italy as «co. co. co» was defined for the first time in the Italian legal system by Art. 409 of Codice di Procedura Civile («the Italian CPR»), introduced by Act No. 533 of August 11, 1973 which concerns: «*1) the relationships of private subordinated work, even if not relating to enterprises*»; …*omissis*…«*3) the relationships of commercial agency, of commercial representation [as for instance power of attorney in commercial*

employed. In short, everywhere in Europe there is a sort of middle category. In England it is «a statutory category which includes both employees and certain self-employed workers»[111], in Germany, Italy, France the middle statutory category includes only self-employed workers and replaced personal subordination with a test based on the economic dependence of the worker on the enterprise[112]. To conclude, the doctrinal debate in Europe is currently polarised around Freeland's proposition of «instantiation within labour law of a new conceptual category, the "personal employment contract" which effaces the old binary divide» (employment and self-employment relationships) and which centres on the concept of economic dependence[113].

In short, there are increasing numbers of commercial and civil contractual relations which are not labour contracts but fulfil the same functions for the creditor through other forms such as, for example, contracts of independent labour or franchising contracts, etc.[114]. Contracts of autonomous labour or product marketing which reproduce the gap between form and power relationship which historically appeared in relationships of subordinated work. The criterion for excluding only «employment relationships» from the DCFR is too restrictive. It reproduces the false binary divide between employment and self-employment.

Conversely, the DCFR should have developed, in the context of private law, what Deakin calls the "socialisation" of these relationships which are steadily increasing in importance for achieving human needs. With regard to economically dependent work relationships too, the principle, for example, should operate that «there must also be a time dimension in the decency

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business] and – here the co. co. co. contracts appear - other relationships of cooperation which in concrete terms correspond to the carrying out of a continuative and coordinated activity, mainly personal, although not having character of subordination». Act No. 335 of August 8, 1995, therefore, introduced the obligation to pay contributions to a specific section of the INPS. If the co.co.co. are working under a «contract of coordinated and continuative collaboration» and do not have their own specific *cassa (pension fund)*, the total amount of the contributions is equal to 24.72% of the gross pay of the collaborator (of which 8, 24 per cent is charged to the collaborator and 16,48 to the employer). The boundary between dependent and "para-dependent workers" is the same as exists between dependent workers and the self-employed.

[108] Arts L. 751, 761-2, 762-1, 763-1 and 782 code du travail; see O. Razzolini, *The Need to Go Beyond the Contract: "Economic" and "Burocratic" Dependence in Personal Work Relations*, forthcoming.

[109] Law No. 20/2007 July, 11 Estatuto del trabajo autonomo (LETA).

[110] K. Källström, *Employment Agreements and Contract Work in the Nordic Countries*, (2002) 43 Scandinavian Studies in Law 77 ff.

[111] S. Deakin, *The contract of employment: a study in legal evolution*, Working Paper 203, ESCR Centre for Business Research, (Universty of Cambridge, 2001) 34.

[112] See A. Perulli, *Economically Dependent/Quasi-subordinate (Parasubordinate) Employment: Legal, Social and Economic Aspects. Study for the European Commission.* Retrieved April 27, 2006, from:http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf.

[113] S. Deakin, *Does the „Personal Employment Contract" Provide a Basis for the Reunification of employment law?* (2007) 36 ILJ 70; M. Freedland, *The Personal Employment Contract* (Oxford, Oxford University Press, 2003).

[114] A. Jeammaud, *L'assimilation de franchisés aux salariés*, (2/2002) Droit social 161; H. Collins, *Regulating the Employment Relation for Competitiveness* (2001) 30 ILJ 21; B. Nagel, *Franchisenehmer und Arbeitsrecht*, in *Recht und soziale Arbeitswelt*, Festschrift für Wolfgang Däubler, (F.a.M., Bund-Verlag, 1999) 100 ff.; W. Däubler, *Working People in Germany* (1999) 21 CLLPJ 1, 83, 89.

of jobs. This refers to the sustainability of decent work»[115]. The time dimension can be achieved through civil law measures (protection again dismissal) or of civil and public law (a decent job is "embedded" in an institutional network with the chance of quickly finding another decent job and/or enjoying proper social protection during the transition from one job to the other).

We have seen previously how the national regimen for *social contracts* has raised doubts about the dogma that obligations must be temporary in nature (see § 4.3).

An analogous evolution should now be envisaged for autonomous work relationships which take place under conditions of economic dependance[116]. The point that the contracting party to any contract for services may withdraw *ad nutum* is dealt with too hurriedly in the DCFR[117]. In fact, under art. 1:103 of the DCFR, «in exercising a right to terminate an obligation» the principle of good faith and fair dealing should be respected. However, experience in various Member States – Germany in particular – shows that this general clause can, at best, be invoked in the subordinated labour sector, given the legislative policy restricting the scope of application of special laws of protection from dismissal.[118]

5.2. The Social Dimension of the Commercial Contract Between the Temporary Work Agency and the User

A temporary work agency is any business which is licensed to hire out employees to other companies on a commercial basis. On the basis of continental national laws, commercial contracts between the agency and the user should contain a range of clauses protecting third-party workers, hence in *Ansehung der Person* of the employee.

In Italy Legislative decree No. 276 of September 10, 2003[119] established that "leased" workers are entitled during their assignments to receive pay 'not inferior' to that of the user firm's employees with the corresponding job grade (tasks performed remaining equal) according to the collective agreement, both national and company-level, applied to the user firm. This entails

[115] Auer and Gazier, *Introduction*, in The future of work, employment and social protection: The dynamics of change and the protection of workers (Lyon, 17/18 January 2002), ILO.
[116] Among the few positive aspects outlined by the Green Paper on Modernising labour law to meet the challenges of the 21st century [Bruxelles, 22.11.2006 COM (2006) 708 final] we draw attention to the fact that the issue of protection for economically dependent workers has been raised: on this, see *The labour lawyers and the Green Paper on "Modernising labour law to meet the challenges of the 21st century". A critical and constructive evaluation*, available at: http://www.lex.unict.it/eurolabor/news/en/doc_libroverde.pdf.
[117] Art. 2:111 of Book IV part C.
[118] *Verfassungsgerichtshof* , 17.1.1990, NZA, 1998, 470.
[119] In Italy, temporary agency labour (the equivalent term is 'leased labour') is regulated by articles 20-28 and 85 of Legislative Decree 276/03. Temporary agency work was introduced in Italy by Law 196 of 1997, whose section covering this type of employment was repealed in 2003 by Legislative Decree 276/03, which changed the denomination from 'temporary agency work' to 'staff leasing' but made only minor changes to the previous law. Since 1 January 2008, the date when Law 247/2007 came into force, it has no longer been possible for agencies to stipulate indefinite staff-leasing contracts, but only fixed-term ones.

complete parity of economic treatment between the user firm's employees and the workers "leased" by the agency. Besides parity of economic treatment, the law also establishes parity of legal treatment between the employees of user firms and "leased" workers. This entails complete equality of entitlements (even if not expressly stated either by the law or bargaining) as regards, for example, working hours, job classifications, overtime and night-time work, holidays, leave, etc.

In Germany, the social clause is not as rigid as in Italy. The Temporary Employment Act (*Arbeitnehmerüberlassungsgesetz*, AÜG)[120] stipulates that agencies are obliged to guarantee their workers the same pay and employment conditions that apply to the permanent employees in the user enterprise. In contrast to the Italian model, a deviation from the principle of equal treatment and equal pay for temporary agency workers is allowed if the employment contract refers to an existing collective agreement in the temporary work agency sector[121]. Moreover, if the temporary agency workers were previously unemployed and if they have never been employed by the agency before, the latter may also temporarily deviate from the equal treatment principle.

In Germany the significance of temporary agency work is increasing[122]. Both the number of agencies and the number of temporary agency workers has grown since 2004[123]. The equal treatment clause of the Temporary Employment Act, which provides the relevant regulatory framework, has led to the country-wide coverage of temporary agency work by three competing collective agreements. The agreements have allowed the agencies to deviate from the equal treatment clause. IG Metall has launched a campaign for the fair handling of temporary agency work (*Leiharbeit fair gestalten*), with the aim of recruiting agency workers as members and enforcing equal treatment arrangements in collective and works agreements.

This is only one example showing how the regimen of commercial contracts should take account of distributive justice.

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[120] In Germany the legal definition is given in the first paragraph of the AÜG: *Employers* (temporary work agencies) *who intend to make the services of workers* (temporary workers) *available to third parties* (user enterprises) *on a commercial basis shall require a licence.* A TWA must meet the typical obligations of an employer. If it does not, it is deemed to perform only placement services. Workers who are employed only to be hired out are temporary workers and those companies who hire them are user enterprises.

[121] See M. Fuchs, *Gleichbehandlungsgebot und Tarifvertragspraxis in der Leiharbeit*, in T. Dieterich, K. Kezuka, M. LeFriant, L. Nogler, H. Pfarr (eds), Festschrift Ulrich Zachert (Baden-Baden, Nomos, 2009).

[122] However, the extension of collectively agreed minimum wages under the Posted Workers Act (*Arbeitnehmerentsendegesetz*, AEntG) to temporary work agencies is currently under discussion. BZA and iGZ together with the bargaining association of all trade unions that are affiliated to the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund, DGB) have applied to be covered by the Posted Workers Act. As competing collective agreements exist in the sector, the two parties forming the present coalition government disagree about the legality of granting the application. At the moment, the Posted Workers Act applies only to a small number of industries.

[123] H. Schaefer, *Warum die Zeitarbeit boomt*, Thema Wirtschaft Nr. 108, IW Köln (Cologne, 2007); W. Wassermann and R. Wolfgang, *Leiharbeit als Gegenstand betrieblicher Mitbestimmung*, Arbeitspapier No. 148 der Hans-Böckler-Stiftung (Düsseldorf, 2007).

6. Ignoring Consumer Credit Contracts

Consumer credit contracts use others capital for individual needs. Without credit, problems in transportation (cars), education (student loans), housing (mortgages, furniture, appliances) or temporary lack of liquidity due to accidents or other unforeseen events or due to unemployment and loss of income, would significantly threaten the well-being of consumers. Consumer credit transfers individual labour income to where and when it is needed.

6.1. Consumer Credit in Modern Contract Law

Making one's own future income available in an accumulated form has become one of the core conditions for being able to make adequate use of one's own labour. Individual protection in credit and housing are thus the logical continuation of labour protection concerned not only with the amount of income, but also its availability for consumption. Industrialised societies turned into credit societies around 1987[124] in Europe, when the first Consumer Credit Directive was passed while in North America this emergence of consumer credit had already occurred in the 1960s.

American consumer law books[125] have consequently concentrated on consumer credit and finance law and finally abandoned teaching sales law remedies, because in sales law extra-legal procedures increasingly replace traditional rights to repair and withdrawal in case of defective goods.

Since the 2008 subprime crisis, consumer credit has also been recognised as a macro-economic basis of modern society, defining the well-being of people with nearly the same intensity as labour and housing. It is even gradually replacing traditional rent and labour relations, by providing job and housing opportunities in permitting access to home ownership and independent labour. While on the surface this seems to have created independence and freedom which may appear to have made labour and tenant protection superfluous, it has in fact increased

[124] See U. Reifner, *Die Geldgesellschaft: aus der Finanzkrise lernen* (Frankfurt, Lang, 2009) Third Chapter; see also Fortune July 6, 1987 "The Money Society"; V. Muttilainen, *Credit society*, National Research Institute Publication No. 189 of Legal Policy (Helsinki, 2002) 301: "Credits and debt problems are closely associated with social policy. Credits constitute an important part of a household's income and they provide a means of transferring funds from one stage of life to another. They also balance temporary fluctuations in income. Debt problems, again, increasingly constitute a risk to a person's income that can result in serious economic and social harm. To secure an income in risk-prone situations has traditionally been a basic function of social policy."

[125] J.A. Spanogle, R.J. Rohner, D. Pridgen and J. Sovern's, *Cases and Materials on Consumer Law*, 3rd edn American Casebook Series (West Law School, 2007); J.A. Spanogle, R.J. Rohner, D. Pridgen, and J. Sovern's, *Selected Consumer Statutes* (West Law School, 2009).

dependency, shifting responsibility towards the credit sector and making social protection even more important in the law.[126]

In the UK, but also in Spain, foreclosures have shown that banks have become de facto landlords, who can evict occupants when they are unable to pay. Independent labour is tied to the actual employer through credit and debt, if the agent starts with a loan from this company, which has to be repaid out of the income from a highly regulated form of subordinated labour. Franchising systems have equally replaced labour through credit dependency.

An increasing amount of jurisprudence is now dedicated to credit issues[127], which has also reached the ECJ. The first consumer protection directive of the EU concerned consumer credit.[128] Now the provision of consumer credit is regulated at EU level by Directive 2008/48/EC and by the Directive on the Distant Marketing of Financial Services and covered in many others. But the core of its regulation concerning the lifetime of the contract and its possible effects is still regulated at national level, where debtor's protection has become a core concern of protection in consumer credit law.

Since the DCFR repeatedly claims to have constructed its rules on the EU consumer acquis,(Intr. 12, 61, 63; Principles 9, 20, 46, 53, 59) and since it builds its claim to observe social justice on the assumption that its foundations in consumer protection are proof of its social-mindedness in Principle 60 and repeated in many other parts of the DCFR. (Intr. 11; Principles 2, 6, 11, 40; 46)[129], one could have assumed that the most protective parts of consumer law, i.e. consumer credit and tenant law, were one of its foundations. But the Acquis group had already been mandated to put together consumer law, with the exception of financial services. Although in their explanation of the scope (Art. 1:101 (3) Acquis), consumer credit contracts are not exempted, in fact their principles do not contain the words *loan, credit* and *debt, usury, default, early repayment, refinancing, exploitation, weakness, needs* or similar notions. Instead, the Acquis principles have created "*disadvantaged consumers*" (articles 2:203; 2:207; 2:208; 2:E01; 2:G01; 2:G02; 2:G03 Acquis) whose sole problem is information asymmetry, which can be cured through additional information rights. The disadvantage is explained as being "because of the technical medium used for contracting, the physical distance between business and consumer, or the nature of the transaction". (Art. 2:203 Acquis). Social disadvantages do not exist.

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[126] For a discussion see J. Kampfner, *Don't risk real freedom for short-term material gain - Our civil liberties are in jeopardy and we are to blame. We have reduced democracy to the right to make and spend money*, The Times September 7, 2009 (http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6824027.ece).

[127] The database on financial decisions FIS, which has collected case law in Germany over the last 15 years, contains 8415 decisions mainly from higher courts (Supreme court: 2643) , the vast majority concerning consumer issues. (http://www.money-advice.net).

[128] Dir. 87/104/EEC.

[129] This claim is shared by M. Hesselink (see above, fn. 366366).

The DCFR expressively excludes in its Part F on *loan contracts (a) those under which a business lends to a consumer; and (b) those where the loan is made for the purchase or maintenance of immovable property.* In addition, the chapter on consumer leases excludes *contracts where the parties have agreed that ownership will be transferred after a period with right of use even if the parties have described the contract as a lease.* (Art. IV. B. – 1:101) and due to its restriction to goods as "corporeal movables" (Definitions) also housing. *Rent of immovable property rights* is only mentioned with regard to a right of withdrawal if concluded at outside the business premises. Although rent contracts for homes are not covered, the principles make clear that their general rules also apply in this field when, in Principle 18, they argue that the visitor of a tenant cannot get damages under contract law. Thus the Draft shows that social rights of tenants which protect their social environment and the integrity of their homes (Schutzpflichten zugunsten Dritter) are even excluded by a draft law which claims not to regulate landlord - tenant relations.

6.2. The Asocial Concept of Consumer Protection

This indirect regulation is also true for consumer credit. One of the core elements of consumer credit law is the idea of consumer protection, which in Germany the supreme court as well as the constitutional court have called a constitutional principle, especially with regard to the situation of debtors. In the discussion between an informational approach and a social approach to consumer protection, where market and non-market, informational and social, formal and substantive consumer protection are juxtaposed, the Draft expressively excludes all allusions to a social approach to consumer protection.[130] The Draft takes sides with the neo-liberal reduction of consumer protection to asymmetric information problems, excluding from the realm of consumer law the traditional debtors' protection, as well as question of basic needs, health and access. This, in the same way as the reductionist approach in Directive 2008/48/EC, has had an important impact on social policy in the EU, which is thus gradually replaced by market mechanisms.

[130] Especially the group led by Norbert Reich, Hans Micklitz, Thomas Wilhelmsson, Geraint Howels, Brigitta Lurger, Klaus Tonner, Iain Ramsay, Tony Williamson, Bernd Stauder, Thierry Bourgoignie and others dominant in the International Association of Consumer Law, have always insisted on the two dimensions of consumer protection. The Kennedy Doctrine as well as the EU alludes to this dimension always by calling it the protection of *economic interests of consumers*. For further discussion see U. Reifner, *Verbraucherschutz im Kreditrecht – Aktueller Stand und Perspektiven*, in H.-W. Micklitz (ed.), *Verbraucherrecht in Deutschland – Stand und Perspektiven*, Tagungsband der 1. Bamberger Verbraucherrechtstage 6. – 8. Oktober 2004, 2006, 458 pp. 155 - 190; Id., *Verbraucherschutz im Umbruch – Nachhaltigkeit oder Selbsthilfe durch die Hilflosen* (2004) Verbraucher und Recht 13-14; Id., *Bankenethik und Verbraucherschutz*, in A. Wagner and C. Seidel, *Ethik in der Bankenpraxis* (Ffm: Bankakademie Verlag, 2004) 61-94; Id., *Verbraucherschutz und Kreditwirtschaft*, in (2000) Sparkasse 554 - 559; Id., *Finanzdienstleistungen und Verbraucherschutz in der europäischen Harmonisierung*, in S. Grundmann (ed.) Rechtsfragen der Europäischen Harmonisierung (Tübingen, Mohr Siebeck, 2000) 577 ff.

While the roots of social consumer protection all lie in the principle of "good morals" or "unconscionability", "ordre public" and "usury", which have historically served as the demarcation line for the asocial outcome of an unlimited freedom of contract, the DCFR instead subscribes to the procedural concept of "fairness" and calls "usury" just "unfair exploitation". It still recalls its origins when it addresses elements of social policy by referring to "economic distress and urgent needs". But it turns the principle upside-down when it converts it into a tort, where the interdiction on such behaviour depends on the fact that this weakness has been "knowingly" "exploited ... by taking an excessive benefit or grossly unfair advantage." (II.-7:207) It does not state that the weak person needs protection; the wealthy person is punished for "unfair behaviour". The same has happened to the principle of good faith; whereas it had been a means of achieving morally and ethically acceptable outcomes, the DCFR turns it into a mere procedural concept of fair dealing:

I. – 1:103: Good faith and fair dealing (1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question."

The moral dimension of social responsibility is thus excluded. The difference between unconscionable behaviour and protection of the weak has been thoroughly elaborated and discussed in German jurisprudence, when distinguishing between the outdated article on individual exploitation (Article 138 (2)), which has now literally been taken up in the DCFR (= II.-7:207)) and the new principle of "social exploitation" out of "good morals" in Article 138 (1) BGB[131] similar to *ordre public* in French law. Both are not mentioned in the Draft. This view in contract law has even gained constitutional acknowledgement. Instead, the Draft leaves this out and opts for efficiency. It is exactly this principle of efficiency which has been used by neo-liberals against usury protection and responsible credit. Rate ceilings, as developed out of "good morals" in Germany, are viewed as "ineffective", since they are said to restrict offers to vulnerable consumers on the market. The efficiency theory argues that rate ceilings will inevitably lead to the exclusion of the poor from credit, as well as jobs and homes. Empirical evidence reveals instead that countries like the UK and America, without significant rate ceilings, minimum wages or rent limitations and any other social consumer protection, have the highest exclusion rates

[131] For a description in English see U. Reifner, *„Good Faith": Interpretation or Limitation of Contracts? The Power of German Judges in Financial Services Law*, in R. Brownsworth, N.J. Hird and G. Howells, *Good Faith in Contract* (Dartmouth, Ashgate, 1999) 269 - 310; BGH NJW 1986, 2564; 1988, 1659; 1995, 1019; 1991, 834; Erman-Palm, BGB 12th edn 2008, §138 No. 96 ff; Godefroid, *Verbraucherkreditverträge*, 3rd edn (Munich, Beck, 2008) No. 335 ff; P. Derleder, K.-O. Knops, H.G. Bamberger/Artz, *Handbuch zum Deutschen und europäischen Bankrecht* (Berlin/Heidelberg, Springer, 2004) §26 No. 2 ff; H. Schimansky, H.J. Bunte and H.J. Lwowski/Gundlach, *Bankrechtshandbuch*, Vol. 1, 3rd edn (Munich, Beck, 2007) §82 Rdn. 11 ff; P. Bülow, *Sittenwidriger Konsumentenkredit*, 3rd edn (Köln, RWS-Verl. Kommunikationsforum, 1997); U. Reifner, *Handbuch des Kreditrechts* (1991) 113 ff.

among industrialised nations, while Germany and especially France, with a significant system of rate ceilings (*taux d'usure, Wuchergrenze*), minimum wages (*SMIC, Mindestlohn*) and rent limitations (*Vergleichsmiete*), face much less social exclusion.

The consumer model of the DCFR builds its claim to consumer protection on a concept in which consumption does not play a role at all. While consumption is a process where human needs are satisfied by *using* (not *acquiring*) products and services, its focus on the informational model (Principles 7,8,9) and the rational buyer (Rule I. – 1:104) excludes a view based on needs and social policy issues. Consequently, a consumer is not someone who consumes, but someone who lacks commercial interest in the transaction (Rule I. – 1:105). This concept is designed to further competition and rational choice. Whether they suffice to protect the social interest of consumers as borrowers or tenants, is more than questionable. Because the definition of consumer protection in the DCFR has been developed without taking into account the present state of social policy interventions in markets and has also neglected any form of collective protection of workers and consumers, it can masquerade as caring for weaker parties. But this is only by definition and model thinking. A millionaire buying goods from a small business is indeed technically the weaker party. But this does not prove that the DCFR provides a basis for social consumer protection rules, which are dominant in national consumer credit and tenant law.

This tendency becomes quite clear when analysing the strange emphasis the DCFR has laid onto the right of withdrawal (Intr. 29, 62; Principle 20; Rules III. – 5:106 III. – 5:118 46; II. – 5:101-106; II. – 5:201;II. – 9:410; VII. – 7:101;II. 3- :103; II. - 3:106; II. – 5:104-105III. – 5:118 II. – 5:201; II. – 3:109; II.– 5:105-106; II. – 5:201; II. – 5:102-104;II.– 3:102-103; II. – 3:105-106; II. – 5:105; II. – 5:106; II. – 5:102-103;II. – 5:105;II. – 3:104). This feature has been developed into one of the main pillars of its consumer approach. This is all the more astonishing, as such rights have already existed for a long time, but there is no empirical evidence that they have had any considerable impact on consumers and markets in the past; in consumer credit especially, it has remained unused.

Its merits are more ideological than practical and are not particularly social. The right of withdrawal nourishes the assumption that rational choice would solve most consumer problems, because the market already offers adequate solutions, which only have to be found and selected rationally in due time. But in consumer credit, as in labour and tenant law, neither adequate products (affordable and accessible responsible credit, job offers, affordable homes) nor sufficient access exist for those who need the protection of the law. Problems that arise after conclusion of the contract are seldom a function of foreseeable events which could have been evaded by rational choice.

On the contrary, the right of withdrawal helps the wealthy to monopolise such offers, while, for the less fortunate, the choice remains limited, which again creates exploitation of need and lack of access because of poor quality and high prices, called "risk based pricing." Social policy in the EU is concentrated at DG Employment, Social Affairs and Equal Opportunities, where DG Health and Consumer Protection could easily have asked for cooperation since it renounced dealing with overindebtedness and handed it over to this Department in 2000. Also the enormous amount of anti-usury rules in national law which are not concentrated in the excluded area of consumer credit, but in general contract law, have also been ignored in this Draft.[132]

Its claim to exclude consumer credit does therefore not justify the omission of the general principles of debtors' protection for money claims, which are the core of social consumer protection in consumer credit and tenant law. Absolute rate ceilings, relative ceilings, restrictions on pricing and offers under unfair exploitation and unfair competition, administrative restrictions, regulated default interest rates, restrictions on penalties and fees, rules for interest compounding and limitations for variable rates together with restrictions on lending and borrowing through admission and supervision or restrictions on garnishment and the development of personal bankruptcy are all part of a vast system which has modernised the ancient rules on usury and exploitation.[133] With neglect of social rights of tenants and debtors to be saved from the immediate consequence of income problems, the DCFR states under III. – 3:301: *Enforcement of monetary obligations (1) The creditor is entitled to recover money payment of which is due.* A European contract law which does not even mention price regulations, protection against acceleration of debts or unilateral early termination of rent, labour and credit contracts disregards the importance public interest has gained in modern contract law and reflects the status quo more than 100 years ago. It will not be able to convince people that unification is a valuable goal.

6.3.The Impact for General Contract Law

If consumer and debtors' protection are excluded, together with consumer credit, labour and tenancy law, there is no place left for social contracts within a future contract code. But already in Principle 16 we recognised that the authors do not want to omit these contractual areas in gene-

[132] The forms of usury restrictions in the EU are presently under the scrutiny of a project tender of DG Internal Market n° MARKT/2009/08/H which will lead to a report in 2010.

[133] For an overview see B. Whitford, I. Ramsay, J. Niemi-Kiesiläinen (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Oxford, Hart, 2009) 105-128; U. Reifner, J. Niemi-Kiesilainen, N. Huls, H. Springeneer, *Study of the Legislation relating to Consumer Overindebtedness in all European Union Member States* - Contract Reference No. B5-1000/02/000353 (Brussels, 2003); J. Niemi-Kiesilainen, I. Ramsay, W.C. Whitford (eds), *Consumer Bankruptcy in Global Perspective* (Portland, Hart, 2003); U. Reifner, J. Ford, (eds), *Banking for People*, Vol. 1 Social Banking and New Poverty, Vol. 2 Unemployment and Consumer Debts, (Berlin/New York, de Gruyter, 1992).

ral, but only their socially protective parts. In all other legal questions concerning of social contracts general contract law shall apply.

This is also true if we analyse the technical modernity of the loan regulation. The DCFR defines a loan as *a contract by which one party, the lender, is obliged to provide the other party, the borrower, with credit of any amount for a definite or indefinite period (the loan period), in the form of a monetary loan or of an overdraft facility and by which the borrower is obliged to repay the money obtained under the credit, whether or not the borrower is obliged to pay interest or any other kind of remuneration the parties have agreed upon.*

This definition keeps consumer credit away from the other social contracts by using an outdated definition (see the old Article 607 BGB, abandoned in 2002) in which the main obligation of the creditor is *to provide the borrower with credit for the amount, in the manner and for the period determinable from the contract.* (IV.F. – 1:102). Instead in labour and tenant law the obligation is to make the *use* of the labour force, as well as of the leased goods available to the other party and keep them in a usable form. While the Draft does not even recognise these elements in its definition of the lease of goods (IV. B. – 1:101), guaranteeing the use of an item is one of the core elements which have historically marked the obligations of the lessor.

The misunderstanding of credit as a spot contract where money is exchanged with money (*pay and repay*) has already been abandoned in Directive 87/104/EEC and now in Article 3 of Directive 2008/48/EC. The return to an outdated definition threatens the core element of social contracts: lifetime. In social contracts concerning labour, tenant and consumer credit, creditors and debtors have to deal with human life time, which again is dependent on needs and social circumstances.[134] If time is only seen as accessory, the social dimension of human life has no anchor in contractual relationships, i.e. the genetic synallagma.

In the French civil code, loans are already divided into loans for use, which would be called a lease, and loans for consumption (Art. 1874 CC) which include money loans. (Art. 1895) In both instances the lender has to guarantee the use. According to Art. 1891, which is applicable to both forms of a loan (Art. 1898), the lender has also the obligation to protect the borrower from *such defects that it may cause harm to the person who uses it, ... where he knew of the defects and did not warn the borrower."*

Thus French law had already developed the renting of labour and things into the use of money, which offers the basis for what in this essay is called a social contract. But the deviating

[134] L. Nogler and U. Reifner, *Lifetime Contracts – Rediscovering the Social Dimension of the Sales Contract Model*, Jubilee Thomas Wilhelmsson, Helsinki JFT 3–4/2009, 437–455; L. Nogler and U. Reifner, *Der menschliche Makel – Principles of European Contract Law zwischen Merkantil- und Dienstleistungsgesellschaft*, in T. Dieterich, K. Kezuka, M. LeFriant, L. Nogler and H. Pfarr, *Festschrift Ulrich Zachert* (Baden-Baden, Nomos, 2009) 54-74.

defintion in the DCFR relates to old German law, which again took up a distinction in Roman law between money lending and renting of other things. While labour contracts and rent contracts were already mutual contracts in Byzantine and Roman law (*locatio conductio operarum and rei*), "renting" money was seen as a form of usury.[135] This is why loan contracts (Darlehen, mutuum, prêt, prestito) were contracts with unilateral obligations only. In Roman law, interest was not due unless it was stipulated in a separate contract[136] a rule which is still visible in French law (see Art. 1905 ff) The Code reflects the restrictions on interest when it says in Art. 1907: *"Interest is statutory or conventional. Statutory interest is fixed by statute. Conventional interest may exceed statutory interest whenever a statute does not so prohibit." Interest,* just as rent or wages are not just a product of the synallagma, but depend on external factors which show its social dimension.

Instead, the DCFR creates an even automatic obligation of paying interest independently from the contractual synallagma.

IV.F. – 1:104: Interest (1) The borrower is obliged to pay interest or any other kind of remuneration according to the terms of the contract. (2) If the contract does not specify the interest payable, interest is payable unless both parties are consumers.

It even aggravates the situation for the borrower with respect to national law when it creates certain assumptions, such as:

(3) Interest accrues day by day from the date the borrower takes up the monetary loan or makes use of the overdraft facility but is payable at the end of the loan period or annually, whichever occurs earlier.

The DCFR even abandons the historical principle of anatocism, which prevails in most continental jurisdictions (see Art. 248, 289 BGB[137]; Art. 1154 and 1155 Code Civil; Art. 1283 Codice Civile[138]).

(4) Interest payable according to the preceding paragraph is added to the outstanding capital every 12 months.

These are only randomly selected examples of how this DCFR will affect the system of consumer credit regulation in Europe.

6.4. The Failure to Provide Answers for Responsible Credit

The DCFR is loquacious in so far it regulates new forms of contracts, important for some

[135] But already the *locatio conductio specialis* incorporated the rent of such items which were interchangeable and therefore could be repaid by an equal amount from the same genus. In so far the *locatio conductio* is also the model for money loans.
[136] D.19.5.24 (Africanus).
[137] See U. Reifner, *Das Zinseszinsverbot im Verbraucherkredit* (1992) NJW 227 ff.
[138] See for its rigorous application in Italy, Supreme Court decision of 17 October 2000, n. 425.

areas of the economy but not for consumers. It also goes into detail where, for example, duties of borrowers are defined: *(1) Where the credit takes the form of a monetary loan, the borrower is obliged to take up the loan in the manner and for the period determinable from the contract. (2) If the time the borrower is to take up the loan is not determinable from the contract, the borrower is obliged to take up the loan a reasonable time after the lender's demand(IV.F. – 1:103:)*

But with respect to issues concerning social contracts the DCFR is tacit. We would like to demonstrate this with respect to the principles of responsible credit, which the international coalition for responsible credit has developed world-wide in order to create a system of adequate consumer credit regulation. The DCFR does not even match with one of its obligations and even fails to address those social problems and situations which have already attracted attention within national regulation.[139]

The first principle of responsible credit states: *Responsible and affordable credit must be provided for all. It* concludes that *banks should not discriminate and should provide real access to credit and be supervised*. While the DCFR has anti-discrimination rules, none of these rules touch on the core problem of discrimination in credit relations, which is social discrimination for existing debt or a lack of liquid assets and income.

The second principle requires that *credit relations have to be transparent and understandable*. The DCFR, so proud of its informational consumer protection model, is astonishingly silent on this matter. The principles enumerate several instruments: the "one-price" disclosure, which in consumer credit would require an APRC, which covers all cost (including those of annexed services) and social transparency in which the burden derived from the obligation is made visible with respect to future income.

Further effective reflection time is required which would need a binding offer, instead of right of withdrawal whose execution is hindered by the duty to repay, since it is only effective after the credit has already been received.

The fourth element of this principle, *independent advice*, is only granted once in the Draft, namely to a security provider in order to protect himself from a borrower's and not from a creditor's behaviour (Art. IV. G. – 4:103 (3)).

An obligation of seeking advice is imposed on investment agencies if they have been entrusted but lack, the necessary professional skills (X. – 6:107 1 b)).

The duty of advice is the core element of effective consumer protection in the informational model. Its omission takes credibility from its legitimacy. Ordinary consumers do not use blank information, but have to have it transformed into a usable form, through advice. But the Draft,

[139] See U. Reifner, J. Niemi-Kiesilainen, N. Huls and H. Springeneer, *Study of the Legislation relating to Consumer Overindebtedness in all European Union Member States* - Contract Reference No. B5-1000/02/000353 2003.

which sees such necessities only in the special case of wealthy investors, provides rights and duties only for those who have already had the benefit of advice. Only in this case, a regime of strict liability has been introduced (VI. – 2:207).

The third principle requires what has been called responsible lending: *lending has at all times to be cautious, responsible and fair*. In this principle, *credit and its servicing must be productive for the borrower. No lender should be allowed to exploit the weakness, need or naivety of borrowers. Early repayment, without penalty, must be possible. The conditions under which consumers can refinance or reschedule their debt should be regulated.*

The Draft, instead, has much regard for the rights of the creditor in default, for early repayment, but lacks any interest for those who have problems repaying their debts.

Principle 4 contains one of the core elements of social contracts: *Adaptation should be preferred to credit cancellation and destruction. There is a need for effective protection against unfair credit cancellation. Default charges should be adequate to cover losses only.*

The Draft contains something which could be labelled as a form of the *clausula rebus sic stantibus,* which have been used in the history of long-term relations to adapt contractual duties to changing living conditions, in old age pensions or in case of divorce. Instead, the Draft again reduces this right of the weaker party to money claims in which the duty of the debtor becomes *so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation.* The word "adaptation" is then used also for filling holes in cases of misunderstanding (II. – 7:203). While the *clausula rebus sic stantibus,* starting with cases of high inflation, has been developed into a whole system of remedies, workers, tenants and borrowers can apply to adapt social contracts to the requirements of their lives, the DCFR has reduced it to a quantitative adaptation in cases of error.

With respect to Principle 5, which states that *Protective legislation has to be effective i.e. cover all non-commercial users, all commercial forms of credit provision, the whole process of credit extension, as experienced by its users and encourage efficient social and economic effects of credit extension,* nothing can be found in this DCFR, although the authors claim to base their system on consumer protection. It is common ground that real consumers have difficulties in enforcing their rights, that in social contracts, collective elements such as class actions or representation by collective organisations is necessary. Protection of the weaker parties in social contracts has been managed quite often by a redistribution of the duties to provide evidence and a limitation of possibilities for out-of-court enforcement remedies for suppliers, landlords and employers.

The sixth principle stating that *Overindebtedness should be a public concern,* is neglected

in the same way, as unemployment and homelessness are not considered to be worth mentioning in a European civil code for the future.

The same is true for the effectiveness of redress mechanisms, which should be offered to the weaker parties in a contractual system. No 7 of the principles of responsible credit says: *Borrowers must have adequate means to defend their rights and be free to voice their concerns* requires *adequate individual as well as collective legal procedures to enforce borrowers' rights* and means to create public concern and *awareness for a fair and responsible distribution of credit.*

Procedural provision have indeed been excluded explicitly from the scope of the DCFR. But this is a misrepresentation of its contents. For example the right of withdrawal as well as the burden of prove and many other rules of the civil codes are in fact procedural decisions build on the structure of how substantive rights are construed. The questions of enforcement of rights should have therefore been addressed more openly and directly.

7. Conclusion

If the DCFR – as was originally the case with the German BGB – is only functional with regard to the market principle and is not oriented towards protecting the personality of the debtor and his or her *lifetime,* the logic of social contracts such as labour contracts, tenancy and consumer credit contracts will have difficulty resisting the pressure for deregulation. If Martin Hesselink is right when he states in his expert report for the European parliament[140] in § 2.3 that «the CFR could become a model law for legislators across Europe», we should not hesitate to revise and complete this Draft which presently is not much more than a European Sales Law based on a special and questionable form of informational consumer protection, where the market is supposed to provide all solutions for everything that social problems can cause.

Lawyers, especially in the civil law countries, using those languages in which their social system has been developed, defined and morally underpinned, should start a joint endeavour to formulate a second DCFR, the Draft Common Frame of Reference for a European Social Contract law, covering long-term contracts in labour, housing, credit and consumption. This law would have to focus on the lifetime of the contract rather than on its conclusion, provide means

[140] M. Hesselink, *The Values underlying the Draft Common Frame of Reference: What role for Fairness and "Social Justice"*, Study for the European Parliament 2008 PE 408 312 IP/A/IMCO/ST/2008-11 - IP/C/JURI/FWC/2006-211/Lot3/C1/SC2.

of adaptation instead of withdrawal and protect human beings against market mechanisms which ignore the changes in life and their social environment.

For this task, the research team will have to show quite different skills and abilities, including sociological, historical and cultural wisdom, social-mindedness and experience with collective elements in law. Trade unions, consumer and tenants organisations, as well as those political parties which support social responsibility of the market economy, should guarantee that such a process can be started and the pressure of quick and one-sided economic integration of the common market does not encourage a blind implementation of the present Draft.

Concluding Remarks

The Common Core factual analysis of the Draft Common Frame of Reference delivers two kinds of results. The case-based assessment produces comparative data that are closely linked with specific topics and legal problems underlying the cases formulated by the authors. At first sight, this could lead to a certain degree of fragmentation in the outcome of the research[1]. Yet, the 'piecemeal dimension' of this type of research is an unavoidable trait of any effort aimed at verifying the potential applicability of a given set of rules to actual legal problems. On the other hand, the gathering of the information resulting from the factual evaluation allows one to make a series of general remarks concerning virtues and deficiencies of the DCFR, at least regarding the rules analysed by the contributors in carrying out their problem-solving effort. This twofold nature of the outcome of the study is reflected in this part, containing some concluding remarks, which is structured in two parts. It begins by spelling out analytically the comparative data emerging from the cases, according to the systematic order of the DCFR (Part I), and concludes focusing on broader generalizations on problems and advantages that may result from the application of the DCFR (Part II).

Part I

Comparative Factual Results

First of all, and prior to getting to the details, a preliminary observation on the method of the legal analysis performed by the contributors is needed. The authors were asked to adhere as much as possible to the Common Core method, which consists in answering the legal problems underlying the factual situation through a subdivision of all the elements (legal formants) influencing the outcome in the three categories of (i) operative formants (ii) descriptive formants and (iii) metalegal formants[2], a structure that has been largely (although not completely) followed by

[1] See above, *Introduction*, n. IV.4.
[2] See above, *Introduction*, n. IV.5.

the reporters. The remaining gaps are due in most cases to the absence of comments and national notes accompanying the text of the DCFR rules up to the Outline Edition II, which has been used in drafting the reports; the lack of any law-in-action dimension of the DCFR – which is partially remedied by the publication of the comments in the final Edition of October 2009 – has been a major obstacle for an effective and reliable application of the Common Core method. Almost all the papers show that this has led to difficulties in the definition of descriptive and (especially) metalegal formants, i.e. the *rationes* underlying the rules of the DCFR and the process that leads to (and necessarily impacts on) adjudication. However, a number of noteworthy results emerging from the factual comparison of the DCFR rules with national laws emerge.

(1) The rules on Unfair Terms (contained in Book II, Contracts and other juridical acts; Chapter 9, Contents and effects of contracts, Section 4) have been analyzed by Prof. Chris Willett. Among these rules, the author has selected three main issues: (a) whether or not controls apply to individually negotiated terms; (b) whether or not controls apply to the amount charged for goods and services and (c) the approach of the DCFR to price variation terms. The assessment has been carried out considering the regimes of the DCFR and U.K. law, but the EU Directive on Unfair Terms in Consumer Contracts, the proposal for a Consumer Rights Directive and some examples drawn from other national regimes have also been used for comparison.

(A) Case 1 focuses on terms excluding or limiting liability in B2C and B2B contracts, and in particular on the relevance of the classification of those terms as "individually negotiated" or "standard" for unfairness control. The issue is examined in relation to defective goods and defective services.

With regard to defective goods, in U.K. law it does not matter whether the terms are individually negotiated or not: they are ineffective in B2C contracts and undergo a test of reasonableness in B2B contracts (UCTA 1977, s. 6(2) and (3)). The regime of the DCFR is the same for B2C contracts, i.e. those terms are ineffective (Articles IV. A. – 2:301; IV. A. – 2:309; moreover, they are in line with EU legislation on the point: see Sales Directive and proposed consumer Rights Directive). Differences exist for B2B contracts, because in this context the DCFR provides that terms excluding or limiting liability are subject to a test of unfairness only if they are "standard", i.e. formulated in advance for several transactions and not individually negotiated (Art. II. – 9:405; definition of "standard term" in the Annex).

In case of defective services, under U.K. law it does not matter whether the terms are negotiated or not and whether the contract is a B2C or a B2B contract. When defective services cause

death or personal injury, the terms are wholly ineffective (UCTA, s. 2 (1)). In case of other losses, they are subject to a test of reasonableness (UCTA, s. 2 (2)).

The DCFR rules reflect the impossibility of reaching an agreement between the Study Group and the Acquis Group on this point and codify two alternative approaches: a more protective rule for consumers, according to which terms (including those excluding or restricting liability for negligence) are subject to the test of unfairness if they have been supplied by the trader (Art. II. 9:403 in the version with brackets). The slightly less protective rule provides that terms are only subject to the test of unfairness, not only where they have been supplied by the trader, but also where they have not been individually negotiated (Art. II. 9:403 in the version without brackets); this, like the UTD, depends primarily on whether the consumer was able to influence the 'content' of the term (see Definition in Annex). Therefore, it appears that a term limiting or excluding liability might be supplied by the trader and then be subject to some negotiation. Under the first rule, such a term will be covered by the test of unfairness. However, under the second rule, if the negotiation is sufficient to satisfy the definition provided, the term finally agreed will not be subject to the test of unfairness. To B2B contracts Art. II. 9:405 applies, according to which the unfairness test applies only to standard terms. The validity of clauses excluding or limiting liability for delay in performance is also examined in case 1. Under U.K. law, in B2C contracts those clauses are subject to a reasonableness test, whether they are negotiated or not (UCTA s. 3); in B2B contracts the test of reasonableness applies only for standard terms. Under the DCFR, for both B2C and B2B contracts the test of unfairness applies only to non-negotiated terms (Art. II. 9:405).

Comparison shows that in general, both for B2C and B2B contracts, the DCFR approach is less protective than the current one existing in U.K. Willett calls the former the "right to protection approach": it subjects contract terms to scrutiny, irrespective of whether they have been negotiated or not. The latter is termed the "freedom of contract approach": it provides for control only when terms have not been individually negotiated, leaving aside the problem of disparity in bargaining power.

(B) Case 2 deals with contracts establishing a price higher than the market price. Under the DCFR regimes this issue is covered by Art. II. 9:406 (ii): there is no unfairness control if the terms are written in a plain and intelligible language for B2C and B2B contracts. The solution is the same as in UTD and therefore as in U.K. for B2C contracts, according to the national transposition of the directive in UTCCR (Reg. 6 (2)). For B2B contracts, U.K. law provides for no statutory control. The only possible limit to the adequacy of the price can be found in the equitable

doctrine of unconscionability, which, however, implies relevant substantial and procedural unfairness.

Comparison demonstrates that on the issue at stake the most liberal approach is the U.K. one for B2B contracts, where control does not exist both for substantive and procedural fairness. In the context of B2C contracts, the DCFR and U.K. regimes are fundamentally similar: they require transparency of the contract term as procedural means to ensure freedom of contract at a substantial level. In Europe, the exclusion of core terms of a contract from the test of unfairness is shared by the civilian tradition, but not by the Nordic countries, which have chosen to go beyond the minimum clause in the UTD and extend the test to ensure that the price is in line with the average price of the specific market. As Willett points out, at the EU level the perspectives of development of the law on this aspect are problematic: the proposed CRD is intended to be a maximum harmonization directive and in its current version it does not provide for control on core terms of the contract, such as price. The adoption of this solution would prohibit this control in national laws, thereby conflicting with current domestic policy choices related to social justice.

(C) Unilateral price variation clauses are the object of case 3. The factual situation is different from the one analyzed under case 2, since the question under consideration is not the adequacy of the price agreed by the parties, but the unfairness of an increase in the price originally stipulated for, on the basis of a term of the contract allowing such variation. Under the DCFR regime, price variation clauses are included in the list of terms that are "presumed to be unfair" in B2C contracts (Art. II. 9:410, (1), lit. (k)). Under the U.K. regime, for B2C contracts such clauses are expressly mentioned by UTCCR (Schedule 2, para. 1 (1)) as clauses that may be regarded as unfair, but for which no presumption is established, as it is in the DCFR. The proposed CRD, on the other hand, contains such a presumption, as does the DCFR. The difference between U.K. law and DCFR lies on the burden of proof: in the U.K. it lies on the consumer, whereas under the DCFR the presumption of unfairness favours the consumer and imposes on the business the burden of showing the fairness of the clause. In case of B2B contracts, there is no control of price variation clauses under U.K. law, whereas under the DCFR such terms undergo the general test of unfairness of Art. II. 9:405.

The analysis proves that for B2C contracts the DCFR is slightly more protective than U.K. law as regards price variation clauses; however, substantial convergence of consumer protection can be detected in the two systems. There is a difference is the solution for B2B contracts, since in U.K. law price variation clauses are not subject to any control – and this is criticized by the Law Commission as a gap that needs to be filled to protect small businesses that have a lower

bargaining power – whereas under the DCFR they are subject to the general test of unfairness, based on the reasonable expectations of businesses in a given sector (Art. II. – 9:405).

(2) The effect of an unforeseen and fundamental change after the conclusion of the contract, which makes performance of the obligation significantly more onerous (hardship) or impossible (force majeure), regulated in Book III: Obligations and corresponding Rights; Chapter 1, art. 1:110, has been studied by Valentina Bineva, in comparison especially with Bulgarian law. In this field, some national systems are reluctant to admit variation, others only admit termination, and others admit both variation and termination.

(A) The first factual situation exemplifies the well-known case of the fate of a contract for the shipment of goods through the Suez Canal when the canal is subsequently closed. This change of circumstances renders the performance of a contract of shipment of goods still possible, but substantially more onerous. According to the relevant provision of the DCFR (Art. III. – 1:110), the seller must try to negotiate, "reasonably and in good faith", a "reasonable and equitable" adjustment of the contract with the buyer (Art. III. – 1:110 (2) (d)). Only if the negotiation fails can he ask to a court to vary or terminate the contract (Art. III. – 1:110 (2) (a) and (b)). It is not clear, however, whether termination is prospective or retroactive. These remedies can be granted if the claimant proves that there was an "exceptional change of circumstances" and the increase of costs is "manifestly unjust" (Art. III. – 1:110 (2)). It must be stressed that these concepts are not defined in the DCFR. If the goods are not perishable, this is a case of hardship, i.e. performance is still possible even if more expensive. If, on the contrary, the goods are perishable, or a definite date for performance has been established and it cannot be fulfilled, it is a case of force majeure, in which case non-performance is excused due to an impediment, and consequently the debtor will not have to pay damages and the creditor will not be allowed to claim specific performance. According to Art. III. – 3:104 (5), the debtor will have to notify the creditor within a reasonable time. In the situation sketched out in case 1 the contract will be terminated (Arts. III. – 3:104(3) and III. – 3:502) and it can be argued from Art. III. – 3:104 (3) and III. 3:511 (1) that termination will have retrospective effect.

Under Bulgarian law a contract can be terminated (with prospective effect) or modified if the supervening circumstances were unforeseeable at the time of conclusion, and performance would be against good faith and fairness (art. 307 Commercial Law); the burden of proof is on the claimant. If the goods are perishable or a definite for performance is established, it is a case of force majeure (art. 306 (3) Commercial Law) and either party can terminate the contract with

prospective effect (art. 306 (4) Commercial Law). Both the DCFR and Bulgarian law provide that only exceptionally will a subsequent change of circumstances justify unilateral variation or termination of the contract. They are also similar on the issue of burden of proof and remedies. However, the DCFR requires that the parties try to reach an agreement before asking for variation or termination of the contract, differently from Bulgarian law. Moreover, there are some differences concerning the effects of termination: according to Bulgarian law they are prospective, while for the DCFR the situation is unclear, but probably, according to the rules on restitution in case of termination, it has retroactive effects. If the goods are perishable or there is a definite time for performance, in both systems non-performance is excused due to an impediment beyond the debtor's control (force majeure), with a duty to notify the creditor.

(B) Case 2 relates to impossibility of performance of a contract of sale of a rare kind of apples to several buyers, after a storm has destroyed the apples at the seller's place. Different situations are considered. In one case the amount of apples is agreed and paid for, but the apples are not identified; in another the apples are identified, paid for and taken away; in the last variation they are identified, put in boxes, but left in the orchard and destroyed by the storm.

According to the DCFR, since in the first situation the subject matter of the contract was not identified, the risk of loss of the goods has not passed to the buyer (Art. IV. A. – 5:102 (2)), therefore if the buyer has paid the price, he can recover it (Art. III. – 3:104 (4) and III. 3:511 (2)), unless the seller is able to provide him with the same amount of equivalent goods. Yet, this is difficult, since these are rare apples, and therefore this obligation can be considered to be discharged (Art. III. 3:104 (4)). In the second contract the apples are identified and carried away by the buyer, therefore the contract has been completely performed, and the supervening events do not affect it (Art. III. – 2:114). In the third situation, the risk of loss has passed to the buyer, therefore he is still under an obligation to pay the price (Art. IV. A. – 5:102 (2)). Bulgarian law provides for the same solutions as the DCFR in all the three variations of the case.

The outcome of the case for all three contracts depends both in the DCFR and Bulgarian law on whether the goods were individually identified or not when the storm occurred, which determines the moment in which ownership and the risk of loss pass from the seller to the buyer. The only difference is that in case of termination this has clearly retrospective effects in Bulgarian law, while this matter is not fully clear under the DCFR.

(C) The third case involves a contract for the transfer of ownership of a house in exchange for a right to live in the house until the death of the seller and an obligation of the buyer to pro-

vide for care and financial support to the seller. After the conclusion of the contract, the house is destroyed by a fire, which also determines a worsening of the health conditions of the seller. The issue arises whether the buyer can terminate the contract on the basis of the new circumstances. A variation of the factual situation provides that the buyer can no longer provide care and financial support due to an accident. As already mentioned, under the DCFR (Art. III. – 1:110) variation or termination of this "atypical" contract can only be allowed if the change of circumstances is exceptional and renders performance manifestly unjust. Before asking for a variation or termination, the debtor has to try and negotiate an adjustment with the creditor. Furthermore, the DCFR requires that (a) the change of circumstances occurred after the time when the obligation was created; (b) the debtor did not, at that time, take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and could not reasonably be regarded as having assumed, the risk of that change of circumstances (III. – 1:110 (3) (a) (b) (c)). In this case, the obligation of the seller has been completely performed (the ownership of the house has passed), so the change of circumstances only affects the buyer's position. Performance of his obligation is still possible, but more onerous. On the basis of the facts of the case, it seems unlikely that the buyer had not foreseen that the obligation might become more onerous due to a worsening of the health condition of the seller, and did not take the risk of it, which are two of the requirements in order to ask for a variation or termination of the contract. Therefore, it seems likely that the contract will stand. If, however, the debtor is no longer capable of providing care and financial help, the solution depends on whether the obligation can be performed by a third party, or whether it is of a strictly personal nature. In the first case, it must still be performed (Art. III. – 2:107 (b)); in the second it is discharged by giving notice to the creditor, and each party has to return the performance received (Art. III. – 3:104 (4) and (5)).

The same practical outcome is reached under Bulgarian law in both variations of the case. Both in the DCFR and Bulgarian law the type of contract is not specifically regulated, and will therefore be disciplined by general rules. It has an aleatory character, because, while the seller's obligation is defined, the content of the buyer's obligation can vary depending on the state of health of the seller. As a consequence, a variation due to supervening circumstances does not affect the validity of the contract, which cannot be varied or terminated, unless both parties agree (assumption of risk by the buyer). In case of impossibility for the buyer to provide care and financial help due to an accident, the solution in both the DCFR and Bulgarian law depends on whether the obligation can be performed by a third party or whether it is strictly of a personal character: in the first case the contract stands, in the second it can be terminated.

The factual analysis shows that problematic issues in the application of Art. III. – 1:110 DCFR can arise due to the vagueness of several key-concepts of the provision. No guide-line is specified in the text as to the definition of "exceptional" change of circumstances and "manifestly unjust" for the obligation to be performed by the debtor. Moreover, the DCFR does not specify whether the effects of termination of the contract according to Art. 3:104 (3) are retroactive or prospective. Finally, it is not clear whether differences exist between "extinction" of the obligation according to Art. III. – 3:104 (4) and "termination" (Book III, Chapter III, Section 5).

(3) The assessment by Dr. Sonja Meier of the rules on Plurality of debtors (Book III, Obligations and other corresponding rights, Chapter 4) has focused on (i) the various forms of plurality and the time when they arise, (ii) the external relationship between the debtors and the creditor, and (iii) recourse between the debtors. These aspects are analyzed taking into account German and French law, compared to the DCFR.

(A) Case 1 concerns the construction of a country cottage, with a plurality of debtors obliging themselves towards the creditor with one common contract. The agreement does not expressly state the form of liability that the debtors intend to assume. In cases as this, under national law regimes as well as under the DCFR, the determination of what form of liability is intended by the parties is a matter of construction of the contract. In the legal systems analyzed by the contributor there is, beside the classical alternative between divided obligation (each debtor is liable only for a part of the performance) and solidary obligation (each debtor is obliged for the whole performance), a third category of plurality of debtors, which is difficult to distinguish from solidarity and whose rules are not always clear, especially if applied in a case concerning liability for breach of contract. It is the case of the German category – not regulated by the code, but applied by courts and some authors – of the common obligation (*gemeinschaftliche Schuld*); it is also the case of the French indivisible obligation, which seems a weaker form of solidarity. English law distinguishes between joint obligations and joint and several obligations: whereas originally the difference was that joint debtors had to be sued together, this is no longer required. The DCFR, trying to adhere to national distinctions, regulates three forms of plurality of debtors, namely solidary, divided and joint obligations (Art. III. – 4:102), the only difference between solidary and joint obligation being that in the latter the debtors must be sued together. This third category of plurality of debtors is very similar to the German "common obligation". However, since this category is not shared by the other countries and the only difference between this and solidary obligation is of a procedural nature, Meier wonders why this distinction has been adopted by the

DCFR, whose scope of application is not intended to cover procedural matters (Art. I. – 1:101 (2) (h)). The author stresses how dangerous this third category of plurality of debtors may be when applied in different European countries: a French lawyer will probably be inclined to read in it the French category of *indivisibilité*, the German lawyer the equivalent to the German *gemeischaftliche Schuld* and the English lawyer will interpret it as the English joint obligation, although these categories do not coincide.

(B) Case 2, related to a loss due to defective building work, concerns contractual liability for different contracts, where the debtors are liable for the same damage. The legal problem focuses on whether recourse by the paying debtor is possible against a co-debtor whose liability towards the creditor is barred by prescription. This matter is vigourously debated in national legal systems, which offer different solutions.

Under German law, solidary liability is acknowledged according to § 412 BGB, even though liability of the debtors rests on different contracts. Prescription of one debtor's liability does not affect the other debtor's liability (§ 425 BGB), who is obliged to pay but has a right of recourse against the other debtor (§ 426 (1) BGB) and is subrogated into the creditor's claim against the released debtor (§ 426 (2) BGB). Whereas subrogation according to § 426 (2) BGB would be barred by prescription of the creditor's claim, proceedings grounded on § 426 (1) BGB are not affected by prescription of the creditor's claim.

In France this case cannot be considered as implying a solidary liability, since according to art. 1202 C.c. *solidarité* has to be expressly agreed by the parties. However, where several debtors are liable for the same damage, and even if liability arises from different contracts, they are liable *in solidum*, i.e. every debtor is responsible for the whole loss and the creditor cannot recover damages more than once. This means that if one debtor pays, the others are discharged. According to *obligations in solidum,* the paying debtor has only a right of subrogation in the creditor's claim (art. 1252 n. 3 C.c.), but this right under the circumstances of the case is barred by prescription. Sometimes the harshness of the outcome for the paying debtor is tempered by case law founding a remedy for the paying debtor *via* tort law. According to the general rule of *neminem laedere* of art. 1382 C.c., the breach of contract against the creditor is seen as a delict towards the other debtor not privy to the broken contract. The delictual action is not barred by prescription of the creditor's claim. However, the outcome of the case under French law is not fully clear and could lead to a different solution than the German one.

The English common law grants recourse to the paying debtor if the other debtor's obligation is not enforceable because of limitation, but is not substantially extinguished by lapse of time.

Everywhere in Europe, scholars debate the possibility of reducing the creditor's claim against the remaining debtor when his/her recourse against the other debtor is barred by prescription, the main argument in favour of this solution being that prescription is a sanction for the delay of the creditor in pursuing his/her claim and therefore should work against the creditor.

The DCFR opts for solidary liability according to Art. III. – 4. 103 (2) and grants a claim for contribution to the paying debtor against the discharged debtor according to Art. III. – 4:106-107. In particular, according to Art. III. – 4:107 (2) and III. – 4:111 (b), this claim of contribution is not barred by the prescription of the creditor's claim against the discharged debtor. The DCFR thereby adopts the German solution. However, the DCFR is based on an abstract concept of unity of obligation: Art. III. – 4:101 determines the scope of application of the whole Section on Plurality of debtors, stating that this section applies "when two or more debtors are bound to perform one obligation". This rule is unsuitable and could prevent the applicability of the DCFR to the case under discussion. This outcome could undermine the quality of the European rules in the light of their effectiveness in solving practical legal problems.

(C) Factual situation 3 concerns external and internal relationships in the case of two dependent personal security contracts on the basis of which there is solidary liability between debtor and security providers. The problem focuses on the effect of a release by the creditor in favour of just one of the security providers.

Meier shows that the French and Italian Civil codes (respectively art. 1285 and art. 1301 C.c.), as well as the DCFR (Art. III. – 4:109 is not applicable because the matter is covered by art. IV. – G. 1:110 and IV. – G. 2:110), discharge the other debtor for the released debtor's share. The other solution, chosen by the German (§ 423 and § 776 BGB, the latter interpreted restrictively by case law), Austrian (§§ 894, 896), Spanish (art. 1146) and Dutch (art. 6:14) Civil codes, is to leave the liabilities of the other debtor intact and to maintain the duty of the released debtor's obligation to contribute. The practical outcome of the case, however, is the same according to both the positions emerging in European legal systems, therefore the DCFR solutions in this case seem appropriate.

From the factual evaluation several general remarks on the suitability of the DCFR rules on plurality of debtors can be made. As far as the forms of plurality of debtors are concerned, the DCFR should have better focused on the two categories of divided and solidary obligations only, leaving aside the fuzzy category of joint obligations, which seems useless and leading to uncertainties in the application of the law. With respect to both the external relationship between debtors and creditor and the internal relationship between co-debtors, unless there is a release, the events concerning one debtor do not affect the relationship between the other debtors and the

creditor. This solution is in line with national laws, however a European regulation meant to adhere closely to factual situations should have regulated differently the frequent situation in which there is a contractual relationship between the debtors, on the basis of which a different outcome could be reasonably reached.

(4) The law on Sale (Book IV, Specific Contracts, Part A) has been evaluated by Dr. Roberta Peleggi in comparison with Italian law.

A) Case 1 deals with a contract for the supply and installation of windows in the buyer's premises. The buyer expressly asks for windows ensuring a high degree of sound isolation. After installation and payment in full the buyer discovers that the windows are not fit for the intended purpose. The case therefore focuses on the lack of qualities of the goods sold and the remedies available to the buyer and contains a variation according to the qualification of the buyer as business or consumer.

The fist element to be ascertained is the qualification of the contract as a contract of sale (of goods). The answer to this is affirmative under both the DCFR and Italian law. However, slight differences mark the coverage of the rules of the DCFR on the Sale of goods and the corresponding Italian rules on sale contracts. While the DCFR does not cover sale of immovable property (Art. IV.A. – 1:101; but this derives already from Art. I. 1:101 (2) (f)), the Italian rules (art. 1470 C.c. ff.) do. More significantly, under Italian law a problem of qualification of the contract may arise when the goods are to be manufactured or produced (future goods). Indeed, where, for instance, the value of the work carried out or the services rendered to produce or manufacture the goods to be sold is higher than the value of the goods, or the work or services concerned are the purpose the parties have intended to achieve by entering into the contract, the contract will be qualified by Italian case law as a contract to perform a piece of work or to render a service (art. 1655 C.c. ff.). On the contrary, the DCFR expressly qualifies such contract as "primarily a contract for the sale of goods" (Art. IV.A. – 1:102).

For B2B contracts, unlike the DCFR, the Italian Civil code provides neither for a unitary notion of lack of conformity nor for a unitary system of remedies for lack of conformity. This means that the applicable rules and the remedies available to the buyer may vary – despite the legal scholars' attempts to achieve uniformity - depending on what kind of defect is found in the goods sold (arts 1490, 1497). This is particularly clear where the qualities (essential or promised) are lacking. There is a significant divergence between the Italian Civil code and the DCFR also in the remedies available to the buyer. Indeed, as a general principle, under Italian law the buyer is

entitled to ask neither for repair, nor for replacement of the goods, as is the case in the DCFR (Arts. IV.A. – 2:101 (d), IV.A. – 2:301 f., III. – 3:301 ff.). According to the Italian c.c. the buyer is entitled to termination of the contract if the promised qualities are lacking and the defects exceed what is tolerable according to usages, provided the buyer has notified the seller of the lack of quality within eight days from discovery (arts 1497 (1) and (2) and 1495). In case of lack of essential or promised qualities, the buyer can also ask for the reduction of the price (art. 1492 C.c., interpreted by analogy, because this remedy is expressly provided only for defects in the goods sold). The choice between termination of the contract and reduction of the price is irrevocable when asked in a judicial action (art. 1492 (2) C.c.). If termination is asked for, a restitutionary remedy will apply for both parties (art. 1493); the buyer will be granted a right to recover damages suffered as a result of the lack of qualities of the goods sold, unless the seller demonstrates that the buyer has ignored the defects without fault of the seller (art. 1494 (1) C.c.).

Closer similarities between DCFR and Italian law exist in the area of B2C contracts. Following implementation of EU legislation (Directive 1999/44/EC), in Italy consumer contracts for sale are governed by special rules (Consumer code, arts. 128 ff.) that are closer to the ones to be found in the DCFR. This is true not only with respect to the coverage of the contract (if goods to be manufactured or produced are involved, these are in any case covered by the Consumer code: art. 128 (1)), but also concerning the buyer's obligation to deliver goods conforming to the contract (art. 129 (1)) and the remedies the buyer can rely on in case of the seller's non-performance, i.e. repair or replacement free from charge, when this is possible and not too burdensome; otherwise, termination of the contract or reduction of the price will be available (art. 130 (1)). Damages to the buyer are recognized under both the DCFR and Italian law, yet in somewhat different ways.

(B) Case 2 concerns a contract between two Italian businesses for the sale of a certain amount of cheese to be handed over to a carrier in a specific city and from there redirected to other destinations. An inspection carried out by the buyer upon arrival of the cheese at the final destinations reveals that the cheese has partly deteriorated due to a defective packaging by the seller. However, the seller has been informed thereof only ten days after discovery. The main issue at stake is the moment of the passing of risk from the seller to the buyer. The case shows that under both the Italian Civil code (art. 1510) and the DCFR (Art. IV.A. – 2:201), in a sale contract involving carriage of goods the risk is transferred to the buyer upon handing over of the goods to the carrier. However, the seller is not released from his obligations if damage or loss to the goods is due to his act or omission. The buyer loses the right to claim the remedies against

defects in the goods sold if he fails to notify the seller. The period within which such a notice must be given is eight days under the Italian civil code (art. 1495 and 1511 C.c.), whereas it is a "reasonable time" under the DCFR (Art. III. – 3:107 (1)). It follows that the same situation can lead to different results in the two systems.

The variation of the factual situation – in which the buyer has its business seat in Germany – shows that if the contract is qualified as international for the purpose of application of the CISG, the rules provided in the Italian Civil code are replaced by the provisions of the Convention (arts. 66 and 67), which correspond to a large extent to the ones to be found in the DCFR. In particular, notice of lack of conformity must be given within a reasonable time after the buyer has discovered (or ought to have discovered) the defects (art. 39 CISG). However, this is an example showing that sometimes the same statutory provisions may lead to different practical results. Peleggi points out that in the application of art. 39 CISG courts are bound to determine the reasonableness of the time of notification taking into consideration usages and practices of the parties and usages widely known in international trade (art. 9 CISG). These may be different from usages and practices known under national laws, therefore national judges could reach different solution when applying the DCFR or the CISG.

(C) Factual situation 3 concerns a standard contract between businesses for the sale of two fax machines, containing terms excluding the liability of the seller for any lack of conformity of the goods sold. Shortly after the sale it turns out that the machines are severely malfunctioning due to some obsolete components. The case also contains a variation in which the buyer is a consumer.

In principle, under both the Italian Civil code and the DCFR, the parties are free to derogate from the rules governing defects or lack of qualities in the goods sold and related remedies, as far as B2B are concerned. However, under Italian law such a derogation is ineffective if the seller has in bad faith omitted to disclose the defects to the buyer (art. 1490 (2) c.c.). Moreover, in order to be valid the derogating clause must be specifically accepted (and signed) by the buyer if it is part of a standard contract (art. 1341 (2) C.c.). Limits to party autonomy in B2B contracts can be found also under the DCFR, since the general unfairness test set out by Art. II. – 9:402 (1) and II. – 9:405) would apply, as well as Art. III. – 3:105 (2), according to which a term like this "even if valid and otherwise effective having regard in particular to the rules on unfair contract terms [...], may nevertheless be invoked if it would be contrary to good faith and fair dealing to do so".

Furthermore, under both Italian law (art. 134 Consumer code) and the DCFR (Arts. IV.A. – 2:309, IV.A. – 4:101 and Art. II. – 9:404, II. – 9:411 (1) lit. (b)), in consumer sale contracts a

term or agreement excluding or limiting the buyer's rights, even indirectly, concluded before notice of lack of conformity is brought to the seller's attention, is ineffective. The question of the validity of such terms when concluded after notice of lack of conformity is given to the seller is more uncertain under both systems. Italian scholars are divided between validity and invalidity, while the DCFR rules on unfair terms (Arts II-9:404, II-9:411(1), lit. (b)) seem to lead to a negative answer.

(5) The assessment of the rules on Lease of goods (Book IV, Specific Contracts, Part B) by Grzegorz Panek has been performed mainly by comparison with Polish law.

(A) Case 1 involves the problems related to the determination of the lease period, definite or indefinite, and the corresponding rules applicable to termination, when no specific terms on duration of the lease and the period of notice for termination are to be found in the contract.

The basic rules under the DCFR and national law are very similar. They establish that for leases of definite duration, the contract cannot be terminated unilaterally in advance by giving notice. This is stated by Art. IV.B. – 2:102 (1) of the DCFR and the same principle underlies arts 664 (2) and 673 (3) of the Polish Civil code, which however provide for specific and exceptional circumstances under which such a termination can be granted (the same model of establishing exceptional circumstances for termination of leases for definite period is followed by the German BGB, §§ 542 and 543). On the contrary, in cases of contracts for indefinite period, the general rule is that either party can terminate the contract by giving notice within a reasonable time (Art. IV.B. – 2:102 (2) and (3)). When no express term on duration can be found in the parties' agreement, the period has to be determined by way of interpretation. Specific criteria applicable by courts for establishing whether the lease is for a definite or indefinite period have been developed under Polish law. It is acknowledged that duration can be implied in the contract, and depends on the circumstances of the case. In particular, a lease for a definite period does not need to be expressly stipulated for a particular period, but may be determined by reference to a future event, whose occurrence is predictable and relatively certain. Under the DCFR there is no definition of what is a determinable length (Art. IV.B. – 2:102 only states that "a definite lease period ends at the time determinable from the terms agreed by the parties") and therefore there is no guidance for national judges in the interpretation of the parties' agreement. In Polish law application of the DCFR would probably imply the use of national criteria for the interpretation of the European rules and would consequently lead to the same result as in national law.

(B) A case of financial leasing is the subject matter of the second hypothetical. It involves a lease of recording equipment for a definite period with a financing purpose, where the rent is calculated in order to guarantee amortization of the cost of the equipment. After expiry of the period, the contract continues tacitly, but the lessee unilaterally diminishes the rent. Under Polish law, financial lease is regulated separately from other kind of leases (arts 709-1 to 709-19, inserted in the C.c. in 2000); it can only be for a definite period, and tacit prolongation is not allowed (art. 709-1 C.c.: definite period is an essential element of the contract). Even terminology in the text of the specific code provisions stresses the differences. For instance, payment in a financial lease is not named "rent", but "remuneration" for a total sum, though divided in instalments (art. 709-1 C.c.). As a consequence of the impossibility of tacitly prolonging the contract, rent/remuneration should no longer be paid, and the goods must be returned according to art. 675 C.c., unless there is a sale option in the contract. The lessee retaining the goods after expiration of the contract can be sued for damages.

In contrast to Polish law, the DCFR regulates financial lease as a subtype of lease, devoting to it just a few specific rules (e.g. Arts IV.B. – 1:101 (4), IV.B. – 2:103 (1), IV.B. – 3:104 (2), IV.B. – 4:104). Art. IV.B. – 2:103 (1) provides that the lease (including financial leasing) can be prolonged for an indefinite period, according to Art. III. – 1:111. In this case, if "the rent prior to prolongation was calculated so as to take into account amortisation of the cost of the goods by the lessee, the rent payable following prolongation is limited to what is reasonable having regard to the amount already paid". It must be pointed out that the DCFR regime and the national one share no similarity and lead to opposite outcomes in practice. Furthermore, the vague formulation of Art. IV:B. – 2:103 (1), referring to the criterion of reasonableness, gives rise to uncertainty on how to determine the proper rent and causes a risk of conflict between the parties.

To all this it can be added that with regard to financial lease, the DCFR codifies what is acknowledged in most European countries, i.e. that where the leased goods furnished by a supplier are acquired by the latter on the basis of the lessee's instructions and the lessor exercises a merely financing function, the remedies available to the lessor against the supplier can be invoked directly by the lessee against the supplier (Art. IV.B. – 4:104). This is acknowledged, e.g., by Polish law art. 709-8 C.c., by case law in France and Italy and by art. 10 of the Unidroit Convention.

(C) Case 3 handles the issue of lack of conformity of an excavator specifically suggested by the lessor to the lessee. The lessor is acquainted with the construction plans of the work to be carried out by the lessee and therefore with the purpose of the lease. However, the delivered ex-

cavator turns out to be unfit for the work. The problem is whether the lessee can ask for substitution of the good and damages for the delay in the performance of the work.

According to Polish law, in a lease contract there is a duty to deliver goods fit for the agreed purpose, which, however, must be determined according to the terms of the contract (art. 662 C.c.). If this is not regulated by the contract, according to scholarly writings the object should be fit for a normal use of a good of that kind. In that case, the excavator should be regarded as conforming to the construction work. On the contrary, if a lack of conformity can be found according to the contract terms at the beginning of the lease period, the contract can be terminated without notice, unless the defect has been remedied by the lessor in due time (art. 664 (2) C.c.). While it is unclear whether a lack of conformity could be identified under Polish law, the DCFR contains a broader notion of lack of conformity in lease contracts. According to the DCFR, conformity of leased goods implies fitness for any purpose made known by the lessee to the lessor at the time of conclusion of the contract (Arts IV.B. – 3:102 and IV.B. – 3:103), therefore in this case there is such a lack and the lessee, pursuant to Art. IV.B. – 4:101, "may have any lack of conformity of the goods remedied and recover any expenses reasonably incurred [...]".

Comparison shows that DCFR rules are more protective of the lessee than the Polish rules on lease, and can be more similar to the Polish rules on conformity in contracts of sale. The DCFR's solution on the issue seems different from what is recognized in other European legal systems (e.g. Germany). The rationale behind this new trend is probably the policy choice of protecting a party presumed to be weak, i.e. the lessee.

(6) The rules on Mandate contracts (Book IV, Specific contracts, Part D) have been analyzed by Prof. Carlos Gómez Ligüerre. The factual situations chosen by the author deal with three issues for which the DCFR regime contains innovative solutions as compared with European national laws: irrevocable mandate, liability of the agent acting beyond mandate and conflict of interest between principal and agent. In this area, sometimes due to the silence of the codes, case law and legal scholars have tried to reach solutions which sometimes differ one from another and from the DCFR option.

(A) In case 1 there is a mandate to sell goods in the case of default by the principal of the obligation to repay a loan to the agent. The principal dies insolvent. The problem is to determine the effects of the irrevocable mandate after the death of the principal. According to the DCFR, since the mandate is given to protect an interest of the representative, it is irrevocable even after the death of the principal (Arts IV.D. – 1:105 and IV.D. – 7:102). In some national systems, the

mandate is based on a fiduciary relationship, therefore when the principal dies, it ends, even if it is an irrevocable mandate. This is – at first sight – the solution in Spain and France, given the lack of specific code provisions on irrevocable mandate. However, scholars and case law have introduced many exceptions to the general principle, especially in order to adapt the regime of mandate to business transactions. In more recent civil codifications, like Italy, the case is expressly regulated in line with the solution of the DCFR: art. 1723 (2) Civil code states that an irrevocable mandate is not extinguished by the death of the principal.

(B) Case 2 deals with the legal effects of acts of the agent beyond the limits of the mandate: a debtor concludes a mandate contract with an agent to sell a piece of land, in order to get fresh money to pay his debts. Subsequently, in a letter the principal expresses a wish to the agent that the property be leased, and not sold. Yet, after receiving the letter, the agent sells the property for a high price. The agent considers it a good bargain for the principal, as well as for himself, since he will be paid a percentage of the price of the mandate.

The DCFR rules admitting acts by the agent beyond authorization are generous. Art. IV.D. – 3:201 regulates the internal relationship between principal and agent and states that the agent may act beyond mandate if he has a reasonable ground to do so, if he has no reasonable opportunity to discover the principal's will, or if he does not know and could not reasonably be expected to know that the act in the specific circumstances is against the principal's wishes. In such cases, the agents' acts are regarded as covered by the mandate. If the act is not among the ones that are admitted beyond mandate, the agent is liable for non-performance *vis-à-vis* the principal, unless the principal ratifies his acts (Art. IV.D. – 3:202). The DCFR rules admitting acts beyond mandate seem wider than the rules of most national systems, which tend to protect more extensively the interests of the principal and therefore provides that acts beyond mandate do not bind the principal and/or that the agent is liable *vis-à-vis* the third party (cp., e.g., arts. 1989 French C.c., 1727 Spanish C.c.; 1398 Italian C.c. on representation). However, the approach chosen by the general clause admitting acts beyond mandate in the DCFR can be considerably reduced by the rule of Art. IV.D. – 4:102, imposing on the agent a duty to request directions to the principal in order to make a decision pertaining to the performance of the mandate. This duty reduces the possibility that the agent may not be reasonably expected to know the wishes of the principal.

The application of national and DCFR rules to the factual situation of the case could, however, lead to different results. Taking into consideration Art. IV.D. – 4:104 regulating the need to act when the agent has no time to wait for instructions, under the circumstances of the case the

agent's acts could be justified and regarded as covered by the mandate in the DCFR regime. It seems that the opposite solution would be reached in some national legal systems.

(C) Case 3 examines the conflict of interests between the agent and the principal: a lawyer represents both the buyer and the seller of real estate (with their consent) and is paid by both. After the transaction is concluded, the lawyer represents one of the parties in a lawsuit for breach of the contract of sale of that estate.

In the DCFR conflict of interests are envisaged in two general situations: when the agent can self-contract (Art. IV.D. – 5:101) and when – like in the factual situation under analysis – there is a double mandate by the parties involved in the contract (principal and third party; Art. IV.D. – 5:102). The double mandate is not permitted unless the principal or the principals involved expressly agrees (Art. IV.D. – 5:102 (2) (a)). Other situations of lawful double mandate are regulated, like the case in which the content of the prospective contract is so precisely determined in the mandate that there is no risk that the interests of the principal may be disregarded (Art. IV.D. – 5:102 (2) (d)).

At the level of national legal systems, some distinguish the rules on conflict of interests according to the kind of mandate and the aims of the principal (e.g. broking contracts for the sale of immovables, like in Germany according to §§ 652 ff. BGB). The DCFR rules seem very general, and do not distinguish among different kinds of mandate or the aims of the principal. Moreover, there is no express provision concerning the duty of the agent to act in good faith in admissible cases of conflict of interest, even though this is clearly a fiduciary relationship.

According to the contributor, a wider analysis of the general features of the DCFR regime on mandate shows that the DCFR clearly adopts a classical civil law model of this contract. Firstly, the DCFR distinguishes between "representation" (external relationship between the principal and the representative) and "mandate" (internal relationship between the principal and the representative), following the continental tradition, differently from the English common law. This approach is also different from that employed in other supra-national instruments of legal unification, like the Unidroit Convention on Agency in the International Sale of Goods (signed in Geneva in 1983), where such distinction has been blurred. In the DCFR, representation and mandate are regulated in different parts of the DCFR – the former are set out in Book II, Chapter 6 (Arts. 6:101 – 6:112). The continental influence on the DCFR regime emerges also from the size of the rules dedicated to mandate in Book IV, as compared with those on representation: the former are much more detailed than the latter. Also, the DCFR distinguishes between direct representation (representative acting in the name of the principal) and indirect representation (repre-

sentative acting in his own name), again in line with continental models (Art. IV.D. – 1:102 (d) and (e)). Moreover, the rules governing indirect representation concerning the rights and actions that the third party may invoke against the principal are very similar to the solutions adopted by continental civil codes (cp. Art. II. – 6:106 DCFR with arts. 1717 Spanish C.c.; 1388 Italian C.c.; 1984 French C.c.). This distinction is also used in the PECL (Chapter 3); on the contrary, the Unidroit Convention on Agency in the International Sale of Goods is closer to the common law categories of disclosed and undisclosed agency.

Other distinctive traits of the DCFR regulation on mandate are the adoption of a broad notion of mandate, covering both civil and commercial relationships (Art. I. – 1:101, with the exception of mandate contracts pertaining to investment services and activities: Art. IV.D. – 1:101 (6)) and the rule according to which mandate can be gratuitous or onerous (Art. IV.D. – 1:101 (3)), while many continental codifications have a presumption of gratuity (arts 1711 Spanish C.c., 1986 French C.c., § 662 German BGB; but for the contrary presumption see art. 1709 Italian C.c.). This is a logical consequence of the unification of the civil and commercial concept of mandate. The same rationale seems to be at the basis of the rule according to which the death of the principal does not extinguish the mandate (Art. IV.D. – 7:102), differently from what is codified in many continental laws (e.g., arts 1732 Spanish C.c., 2003 French C.c.). This is also in agreement with the rule providing that the source of mandate may be not only the will of the principal, expressed in a unilateral or bilateral juridical act, but also a series of factual circumstances (Art. IV.D. – 1:101 (2)).

(7) The DCFR regime on Personal Security (Book IV, Specific contracts, Part G) has been assessed by Dr. Sophie Vigneron and Dr. Simone Wong with a comparison with English and French law.

(A) Under case 1, husband and wife are shareholders and directors of a limited company, to which a bank lends money, secured by proprietary security over the business premises granted by the debtor company. Yet, the bank fails to register the proprietary security. In addition, in order to secure the same obligation, the bank requires personal security establishing solidary liability from husband and wife and sends them a letter recommending them to procure personal advice before signing the security contract. Although reluctant to provide such an additional security, they sign it. Thereafter they divorce and the former wife sells her share and stops working in the business. Subsequently the bank claims from both a sum almost equal to that granted by the loan. A variation of the case requires determining how the situation would be resolved, had the business been

managed solely by the husband and had the wife had no input or share in it. A plurality of legal issues are at stake here, the most relevant being (i) the binding character of the personal security in relation with the freedom of consent expressed by the security providers; (ii) the security provider's subrogation into the creditor's rights; (iii) the effects of divorce – if any – on the security providers' liability.

Under English law the security is binding on both security providers. Their reluctance in signing the contract amounts to a vitiating factor of their consent neither under the equitable rules of unconscionability and undue influence nor under the rule of *Etridge* (No. 2). The latter is a judge-made rule according to which the creditor must take care that the security provider securing a non-commercial obligation receives independent legal advice before signing the security. If the debtor-security provider relationship is of a commercial nature, as it is in this case, since husband and wife are shareholders and directors of the company, then English law requires no particular control over the freedom of consent of the security providers, except from the general rules on unconscionability and undue influence, which however apply only under strict requirements, which are not fulfilled in the case. On the contrary, if the debtor-security provider relationship is not commercial, as it is for the wife in the variation to the case, according to which she is not part of the business, the validity of her consent is subject to a requirement that the bank takes reasonable steps to ensure the security provider's consent is properly obtained. This requirement is fulfilled in this case.

In England, a security provider who pays the debt is usually subrogated in all the creditor's rights towards the debtor, including other security rights provided by the latter. The loss of (proprietary) security granted by the debtor to the creditor without the (personal) security providers' consent results in a partial relief of the personal security providers to the extent of the loss. However, under the circumstances of the case, husband and wife would not be released, being the directors of the company and therefore under a duty to register the security for the company. Moreover, under English law a proprietary security which is not registered is effective under equitable rules and is – within certain limits – valid as such as against third parties. The divorce has no effect on the liability of the security providers.

French law has developed more stringent requirements to ensure that the consent of personal security providers is duly obtained, consisting in extensive information duties on creditors in cases of professional as well as consumer secured obligations. In the case the security provided by the couple would be valid, provided husband and wife have signed the contract and written by hand the statement set out in art. L341-2 Consumer code, confirming the secured amount both in

letter and numbers. Formalism, therefore, is the French way to make sure that the consent of the security providers is freely given.

Furthermore, and in contrast to English law, French law recognizes a principle of proportionality between security provider's assets and liability under the security. It applies to all natural persons providing security, in consumer as well as in professional contexts (art. 341-4 Consumer code). However, the application of such a general rule being left to courts, differences in judicial decisions have created uncertainty as to the proper method of calculating a security provider's income; moreover, it is uncertain whether this calculation is a question of fact to be left to lower courts, or a question of law to be dealt with by the *Cour de cassation*.

As to the subrogation of the personal security providers in the creditor's rights (art. 2306 C.c.), under French law the lack of registration of the proprietary security deprives it of its effects against third parties. Under the facts of the case subrogation will be ineffective without the personal security providers' consent, therefore they will be released to the extent of the value of the security (art. 2314 C.c.).

In contrast to English law, in French law divorce produces some effects in favour of the wife. According to art. 1387-1 C.c., the courts can decide that after divorce personal securities previously stipulated – jointly or separately – by the spouses be continued only by someone who after divorce continues to be qualified as a professional. Therefore, the wife could be released from her liability for the secured debt.

Under the DCFR regime, the security assumed by husband and wife is a dependent personal security, governed by Chapter 1 and 2 of Book IV.G. The security providers are not entitled to the special protection granted to consumers security providers according to Chapter 4 of the same Part, the requirements of application of these consumer protection rules not being fulfilled in this case (husband and wife are both shareholders and directors of the company: see Art. IV.G. – 4:101). Since the security is a professional one, there is no rule under the DCFR on pre-contractual duties of information from the creditor to the security provider, or on proportionality in the assumption of liability under the security. There are only provisions regulating the development of the contractual relationship, imposing certain duties of notification from the creditor to the security provider in case of debtor's non-performance (Art. IV.G. 2:107).

According to Art. IV.G. – 2:105, the default rule is that a dependent personal security creates solidary liability among co-providers of security, therefore the creditor is free to demand payment from the debtor or from one or all of the security providers. In some national systems, especially in the context of personal security for non professional obligations, the default rule is one of subsidiary liability (see, e.g., France, art. 2298 C.c., and England; but see the contrary de-

fault rule in Italy, art. 1944 C.c., established after the unification of civil and commercial law in the Civil code of 1942).

Regarding the loss of proprietary security, Art. IV.G. – 2:110 establishes that the liability of the security provider is reduced to the extent that subrogation into creditor's rights is impossible due to the creditor's conduct. The DCFR does not contain any provision on the effects of divorce on the ex-spouse's liability, nor of protection of the marital home, since it does not deal with family relationships, nor with immovable property law (Art. I. – 1:101 (2) (c) (f)).

If the wife is neither shareholder nor director of the company, she would be considered as a consumer provider of security according to Art. IV.G. – 4:101 (2) (b), because she would be regarded as unable to exercise influence on the debtor. In this case, the whole of Chapter 4 would apply – which is the most considerable novelty in the European regime for personal security contracts – and with it Art. IV.G. – 4:103. According to this provision, the security is valid only if the creditor acts in accordance with the pre-contractual duties of information to the consumer security provider, modelled on the basis of English case law requirements, although with some changes. In particular, the creditor has to provide the security provider with an explanation of the nature, effect and risks of the security agreement. If the creditor knows or has reason to know that due to a relationship of trust and confidence between the debtor and the security provider there is a significant risk that the security provider is not acting freely or with adequate information, s/he has to ascertain that the security provider has received independent legal advice five days before the signing of the contract. Failure to do so within that period would entitle the security provider to avoid the agreement at any time.

The analysis shows that the rules of the DCFR are more in line with English law than with French law, the latter regime having the strongest requirements in order to protect the security provider's freedom of consent, including in a professional context.

(B) Case 2 deals with a bank loan for the consumer acquisition of a car assumed to be brand new, secured by personal security granted by the father of the debtor. The security provider is informed by the debtor that the security is limited to a specific amount (10,000) and to the duration of one year only. Thereafter the car breaks down and cannot be fixed, but meanwhile the debtor has lost her job and is unemployed. After more than one year from the date of the security, the bank sues her father to pay the outstanding debt, which amounts to a sum of 15,000. The father, security provider, is retired and his only asset is a low annual pension.

Under English law the agreement between debtor and the bank falls within the scope of application of the Consumer Credit Act 1974 (CCA), which lays down procedural requirements in

order for the agreement to be enforceable by the creditor, such as signature by the debtor, legibility of the form, prescribed terms and conditions, provision of copies of the credit agreement and relevant information in case of arrears.

Sec. 105(1) CCA 1974 requires any security provided in relation to a regulated credit agreement to be in writing and properly executed. A security agreement which is not in writing or improperly executed can only be enforced by the creditor through a court order (sec. 105 (7) CCA 1974). In any case, to enforce the security, a default notice must be served first to the debtor and then to the security provider, otherwise the security will be enforceable only by a court order (sect. 111 CCA 1974). When the court is asked to enforce the security, it will do so only if considers the enforcement just (sec. 127 (1) CCA 1974). Moreover, in the case under study the doctrine of *Etridge* (No. 2) could also apply, the relationship being non-commercial. The misrepresentation of the debtor could be imputed to the creditor, unless he proves that he has taken reasonable steps properly to obtain the security provider's consent.

A further control on the transaction is provided by English law, which, contrary to the procedural fairness discussed above, concerns substantial fairness. According to sec. 140A CCA 1974, an agreement may be deemed to be "unfair" because of any terms in the agreement or any related agreement, the way in which the creditor has exercised or enforced any of its rights or any other thing done, or not done, by the creditor before or after entering into the agreement. This section could be applied in order to check the proportionality between assets and liabilities assumed by both the debtor and the creditor.

In France, the general rules on *dol* cannot be applied to protect the security provider, since the misrepresentation by the debtor is not regarded as a vitiating factor of the contractual relationship between security provider and creditor (art. 1116 C.c.). The rules on consumer security agreements laid down in the *Code de la consommation* provide a series of pre-contractual and contractual information duties in favour of the creditor (arts L313-3 ff.). Art. 2293 C.c. establishes annual contractual information duties to the security provider on the amount of his liability when the security is unlimited in time. The issue of proportionality between assets and liabilities incurred by the security provider is particularly relevant under French law and is addressed by art. L313-10 Consumer code. This rule bars the enforceability of a security that at the time of the making of the contract was "manifestly disproportionate to the [security provider's] property and income", unless the net value of the secured debt at the time of enforcement can be met. The provision introduces an objective test: a difference in value is not sufficient; the disproportion must be so evident that a creditor should have reasonably known that the security provider would not

have been able to pay. Evidence of this disproportion must be written (art. 1315 C.c.). In the case under scrutiny, the security could be challenged on the basis of this proportionality rule.

The DCFR contains in Chapter 4 mandatory procedural and formal requirements to security provided by consumers. Besides the ban on oral agreements (Art. IV.G. – 4:104), the core provision of this Chapter is Art. IV.G. – 4:103, imposing pre-contractual duties on the creditor, whose breach allows the setting aside of the security at any time (see *supra*). The duty to make sure that the security provider got independent legal advice before entering into the contract could be established in this case, because there is a father-child relationship between security provider and debtor. However, liability arising in personal security provided by consumers is subsidiary in nature, unless otherwise agreed by the parties (Art. IV.G. – 4:105 (b)). Therefore, in the absence of an agreement expressly establishing solidary liability, in the present case the creditor should first take appropriate steps to obtain payment from the debtor (Art. IV.G. – 2:106). On the issue of the argued time limit of the security, general rules are established for dependent personal securities with or without time limit. According to Art. IV.G. – 2:108 (2), the security provider will be discharged of his obligations at the expiry of the time limit, unless the creditor, before its expiry, informs the security provider of its intention to demand payment and of commencement of an attempt to recover the debt from the debtor, keeping him informed every six months about the status of such attempts. If no time limit has been agreed, then Art. IV.G. – 2:109 (1) allows the scope of the security to be limited by each party by giving a minimum three months' notice to the other party, unless the security covers specific obligations or obligations arising from specific contracts. Furthermore, the special rule of Art. IV.G. – 4:107 in the consumer protection context deserves particular attention, since it establishes that consumer security contracts agreed for a time limit may nevertheless be limited by the security provider three years after the security became effective, with three months' notice, unless the security covers specific obligations or obligations arising from specific contracts. In the case it seems that the security covers a specific obligation or an obligation arising from a specific contract, therefore Arts. IV.G. – 2:109 (1) and IV.G. – 4:107 would probably not apply.

(C) In case 3 the wife of a shareholder and director of a company provides an independent personal security to the debtor company. She agrees to that security believing that she would be liable only in the event of the company's default and inability to repay the loan. After the worsening of the financial conditions of the company (which, however, has not fallen into arrears in the repayment of the loan), the bank demands from the security provider payment of the outstanding balance.

The distinction between dependent and independent personal security is unanimously recognized in the European legal systems, as it is under the DCFR (Art. IV:G. – 1:101 (b)) and it is based on the fact that an independent security does not depend on the validity of an underlying obligation, nor on debtor's default (art. 2321 French C.c.). Independent personal security contracts determine primary liability of the security provider. Under English law, the debtor being a corporation, the situation falls outside the CCA 1974 and is regulated by general common law rules. The question requires establishing whether demanding payment to the security provider is premature, given that the debtor has not fallen into arrears for the obligations arising from the underlying relationship. The outcome of the case depends on how the contract is drafted. It is common practice to agree to acceleration clauses, according to which the debtor's or the security provider's liability is accelerated, i.e. their obligations become due, if certain events occur that could undermine the prospects of creditor's satisfaction. In such a case the notice demanding payment to the security provider would be lawful. The only possible control on the security provider's freedom of consent is left to the common law rules on mistake. In raising the *plea non est factum*, the security provider must show that she has not acted negligently and this is not easy to prove for a person of full age and capacity. Yet, the security provider could try to claim the non-commercial nature of her relationship with the company, based on the lack of her involvement in the decision-making of the company. In this case, the rules under *Etridge* (No. 2), mentioned above, would apply.

In France, the liability of the provider of independent security is limited only to the abuse or fraud by the creditor (*exceptio doli*; art. 2321 C.c.). Otherwise, the security provider is bound by the contract, as it seems in this case. The Consumer code excludes the provision of independent security for consumer credit (art. L313-10-1), but in the case under analysis according to French law we are outside the consumer credit context.

The DCFR devotes to independent personal security Chapter 3 of Book IV.G., which introduces a regime largely similar to those existing in EU countries. However, Art. IV.G. – 4:105 (c), in the section on consumer security, states that when a security is provided by a consumer and the rules of Chapter 4 find application, an independent personal security is regarded as dependent security, when the requirement of the latter are met. This is due to protective reasons towards the consumer security provider. Contrary to what is assumed by the authors of the evaluation, in case three it could be argued that Chapter 4 of Book IV.G. can be applied, given the status of consumer of the security provider, who is a natural person unable to exercise substantial influence on the debtor company (Art. IV.G. – 4:101 (2) (b)). Therefore, the creditor's demand for payment

would be rejected, the security provider's liability – if any – being dependent on the debtor's default.

On the basis of the comparative comments formulated by the contributors, and taking into consideration also the rich apparatus of comparative notes published in the Book on Personal Security by U. Drobnig for the PECL series of the Study Group, some further observations can be made. Firstly, comparison shows that there are some differences as to definitional issues: the DCFR adopts a broader notion of dependent personal security than EU countries, because it covers also binding comfort letters (Art. IV.G. – 2:101), which in France and England, but also in Spain and Italy, according to the majority of case law and scholarly writings, cannot be gathered under the category of dependent security. Secondly, the protective rules for consumers apply on a different basis than that required under most EU countries and even EU case law: under the DCFR, Chapter 4 on consumers applies when the security provider is a consumer, unless the creditor is also a consumer, and unless the consumer security provider can exercise substantial influence over a debtor different from a natural person (Art. IV.G. – 4:101). This choice is made by the DCFR in order to enlarge the area of protection granted in Europe to the frequent cases in which a wife of the manager of a company provides personal security and is unaware and not involved in the business of the company.

In the DCFR consumer protection is entrusted to procedural and formal requirements (see the duties of pre-contractual and contractual information), as it is in English law and in other EU countries. French law – and to some extent also English law for securities for commercial obligations – has a higher standard of protection of consumers, because it also introduces a substantial test of the fairness of security agreements, based on the proportionality of the security provider's assets and the liabilities the security provider assumes under the security.

(8) Prof. Mónika Józon has assessed the DCFR rules on Non-contractual liability arising out of damages caused to another (Book VI) through a broad comparison with several national laws of Western and Eastern Europe.

(A) Case 1 concerns the traditional distinction between fault-based and strict liability in a situation concerning damage caused by an immovable. While driving on an icy road the plaintiff hits the guardrail of the road and crashes into a tree. As a consequence of the impact the ice on the tree falls down and damages the plaintiff's car. The case involves the right to compensation of the plaintiff.

Under the DCFR this case is covered by Art. VI-3:202 on accountability for damage caused by the unsafe state of an immovable, regulated in Section 2 of Book VI, on Accountability with-

out intention or negligence. According to the general approach of EU law on strict liability, this rule is based on the reasonable safety expectations of the injured person, which are defined with reference to three elements: (i) the characteristics of the immovable, (ii) access to it, and (iii) the cost of avoiding the immovable being in that state (para (1)). An analysis of these requirements shows that there is a shift of emphasis in the rule from strict liability to a less strict standard of liability. Indeed, on a closer look the requirement (ii) of access to the immovable refers to the reasonable expectation of the owner of the immovable concerning the behaviour of potential injured persons, thereby sharing the risk of liability between the owner and the potential victims. Furthermore, the cost element (iii) refines the standard of liability by balancing the victim's expectations with the economic affordability of the expected level of safety. According to Józon this demonstrates that liability for damage caused by an immovable under the DCFR is a less strict form of liability than that hinted by the label of the rule. It is even more so if one considers that Art. VI-5:302 of the DCFR allows the owner of the road a defense in case of an event beyond his control. All this shows that the standard of liability required by Art. VI-3:202 moves from strictness, imposed by the label of the rule, to a fault-based liability. In this respect the DCFR is in line with European domestic tort laws, where liability for damages caused by immovables is typically an example of the overlap of fault and strict liability.

European national laws on the relevant point can be grouped as follows: on the one hand, French (art. 1386 and 1384 C.c.), Italian (art. 2053 C.c.), Romanian (art. 1000 Old C.c. and art. 1379 New C.c. of 2009) and Czech law (Land Road Act n. 13/1997) regulate this situation as a case of strict liability, normally avoidable only by a defense of *force majeure*. On the other hand, German (§ 823 and 839 BGB), Austrian (§ 1319 ABGB), Hungarian (art. 339(1) Old C.c. and art. 5:558 and 5:559 New C.c. of 2009) and Estonian law (art. 1059 Law of Obligations, LOA) regard this kind of liability as fault-based, with a reversal of the burden of proof. However, differences in the practical outcomes of these seemingly opposite labels are blurred, due to the availability of defences. In dealing with defences, national judges consider subjective criteria – such as the personal attitude of the defendant and the feasibility for him to remove the danger – in strict-liability regimes (like the Czech one), and objective criteria – such as the reasonable expectations of the road users and the state of the road – in fault-base systems (like Austria).

According to the assessment, the focus of courts on the state of the road and the reasonable expectations of the road users shows a convergence among European legal systems, a convergence that appears in the elements used by judges to evaluate this criterion: nature, purpose, state of maintenance, geographical situation, use and risk. The DCFR also adheres to these elements, with the only novelty the introduction of a cost-benefit analysis.

(B) Under the facts of case 2 the plaintiff, stuck in a traffic jam caused by a motorway accident, cannot attend a business meeting and misses the chance to conclude a contract worth 30 million Euro. The analysis tests whether a claim for compensation for the economic loss caused by the loss of the chance to conclude the contract is available to him. Józon chooses to consider pure economic loss and loss of chance under the same hypothetical, since in some jurisdictions the two forms of compensations are treated under the same heading, as in Hungary; on the contrary, it is known that in France a clear distinction is made between the two and different standards apply.

Since the DCFR does not expressly regulate the issues of pure economic loss and loss of a chance, the question must be solved under the general rule of the legally relevant damage (Art. VI. – 2:101), which requires (i) the infringement of an absolute right or legitimate interest and (ii) "fairness and reasonableness" of compensation. Especially the first requirement makes it hard to award compensation for pure economic loss in this case.

Under most national laws analyzed in the report the plaintiff's action would fail as well. The reasons for this outcome may vary, but they can be grouped as follows: in some countries (e.g., Estonia, Hungary and Romania) this is because the courts treat pure economic loss and loss of chance as a causation issue, and under national judge-made rules on causation, the causal relation is extremely difficult to prove in cases of future damage. In a second group of legal systems (e.g., Germany, Austria, Italy), beside causality issues, pure economic loss and loss of a chance are not among the absolute rights protected in the Civil codes and compensation would fail primarily for this reason. A third category of countries (such as France) opts for an intermediate solution, since they admit such a possibility, but condition the compensation of loss of chance on the proof of certainty of the future damage.

A closer look at Hungary as an example of the countries that approach the issue from the point of view of causation shows that, although Hungarian law does not condition compensation on foreseeability, interestingly courts apply this test in cases of pure economic loss. The report shows that Hungarian courts tend to question the causation link and use the concept of accountability to reduce the tortfeasor's liability for foreseeable losses, or solve the problem by shifting the burden of proof regarding the causal link and the amount of damages. However, in a fairly recent decision the Supreme Court (BH no. 2001/273) awarded damages to the employer of a sales representative who could not conclude a contract drafted in the name of his employer, because of a car accident caused by another driver on the way to sign the contract. The New Civil Code, enacted in November 2009, does not mention pure economic loss and loss of a chance.

From the provisions on the extent of compensation (art. 5:502) and elements of harm (art. 5:503) it follows that under the new regime it will be difficult to award compensation for such damage. This is because the tortfeasor is exonerated from compensation for the damage that was not foreseeable at the moment of the tortious action (art. 5:502 para. 2).

Among the countries that employ the absolute rights approach, German law awards compensation for pure economic loss on the basis of § 823 (1) BGB only if it derives from an injury related to an absolute right specified in that provision. If the economic damage is unrelated to one of those absolute rights, no damages can be awarded, although theoretically pure economic loss could be claimed under §§ 823(1), 824 and 826 BGB. The same limited room for recovery of pure economic loss can be found under Austrian law, where this kind of loss is dealt with as a problem of unlawfulness. Purely financial interest is not included in the categories of absolute rights protected and, due to the definition of compensatory damages under § 1295 ABGB, the concept is almost unknown to Austrian law. Courts rather employ other concepts, such as "indirect damage" or "damage to third persons", when awarding damages which are functionally equivalent to pure economic loss.

The French mixed approach makes compensation for pure economic loss dependent on whether there is a sufficient causal link and the loss is sufficiently direct. However, courts apply the causal requirement in a restrictive way, in order to limit the award of damages for pure economic loss. It is admitted by courts for cases of strict liability for damages caused by defective things on the basis of Article 1384 (1) Civil Code. Compensation for loss of chance (*perte d'une chance*) is awarded under Article 1382 Civil Code, yet the loss is only recoverable if the plaintiff proves that there was a serious and real chance for the plaintiff to obtain a profit. According to Article 1346 of the French *Avant-projet de réforme du droit des obligations et de la prescription* (*Avant-projet Catala*) of 2005, loss of a chance is a compensable damage.

The analysis shows that under national laws neither the doctrinal foundation nor the legal policy background of pure economic loss and loss of chance are sufficiently developed and courts find it difficult to award compensation for such losses under the traditional concepts and headings of liability. Moreover, the causation test is often a difficult – and decisive – test for the outcome of the cases. The reporter underlines that in this respect the DCFR has missed the opportunity to help national laws clarify the issue at stake. Considering the high number of cases of pure economic loss and loss of a chance decided by European national courts, the DCFR could have served as a model law identifying specific requirements of compensation. A possible explanation of the approach chosen by the DCFR is the difficulty of identifying commonalities on such issues among European systems. The results of the DCFR may be considered a step backwards when

compared with most reform projects or new civil codes that contain specific provisions on pure economic loss, such as the French Avant-projet, the Romanian New Civil Code (Art. 1385) and the Austrian Proposal for a New Law of Obligations (Draft of 2007). However, one should not ignore that there is another group of countries which do not leave much room for pure economic loss in their new codes (Hungary) or reform project (Switzerland). The author concludes that continental Europe is (and is probably going to remain) divided on this issue.

(C) Factual situation 3 deals with prevention and mitigation of damage. Under the facts the plaintiff contracts for a protective wall to be built around his property for protection against future flooding. In the past he experienced two floods caused by construction works on the neighbouring property and had his claim for damages rejected due to lack of mitigation of damages. He now wants the cost of the wall to be compensated by the neighbour.

In the DCFR this is a recoverable cost under Section 3 of Book VI, on Prevention. The basis for this liability is found in Arts VI. – 6:301 (Right to prevention) and VI. – 6:302 (Liability for loss in preventing damage). Under the first rule the right to prevention exists only if and insofar as reparation would not be an adequate alternative remedy and it is reasonable for the person who would be accountable for the causation of the damage to prevent it from occurring. The second rule qualifies reasonable expenditure for preventing a loss as a recoverable damage.

National laws are more reluctant in awarding damages for prevention of loss. Well-established French case law on Art. 1386 C.c. refuses the award of such compensation, especially after the Court of Cassation recently denied the recoverability of hypothetical damage and affirmed that damages must be measured solely by reference to the entire objective loss of the victim and should be equivalent to the entire loss suffered.

Under German law mitigation of damage is acknowledged under § 254(2) BGB. However the BGH distinguishes between expenses incurred with regard to the specific event which is expected to cause damage in the future, and measures taken to prevent the damage in general. Costs incurred in the latter case are considered to be outside the causation link and are not recoverable. The same approach is followed by the Austrian Supreme Court and a similar view seems to be adopted by Estonian law, where the supreme court rejected a claim for compensation for preventive loss consisting of expenses for an insurance contract which the plaintiff concluded after being threatened with murder by the defendant. The decision held that the cost of the insurance contract was not causally linked to the defendant's conduct, but was an investment for future benefits. Yet, recoverability of such damages in Germany and Austria is not impossible, since in some

cases the same result has been achieved under the rules of unjustified enrichment or benevolent intervention in another's affairs.

In contrast, in Hungary and Switzerland preventive damages are awarded by courts on the basis of *ad hoc* provisions of the Civil code. Art. 679 of the Swiss C.c. establishes explicitly the right to compensation for preventive measures against the damage to property, whereas art. 340 of the Hungarian C.c. establishes an obligation for the injured party to mitigate the damage. A specific right to compensation for costs deriving from prevention of damage is acknowledged by the New Hungarian C.c., art. 5:503, in case of a pending danger of damage. Moreover, the new art. 5:500 provides a risk-sharing system between victim and tortfeasor, with an obligation for the damaged person to act under the given circumstance to prevent or mitigate the damage. If the plaintiff does not act in accordance with this obligation, the tortfeasor will not have to compensate for the damage resulting from such omission.

The assessment reveals that the legal systems of continental Europe are reluctant to award damages for prevention and mitigation of loss, although the same result is sometimes achieved under different rules, such as the rules on unjustified enrichment or benevolent intervention in others' affairs. The author analyses the arguments employed in the systems running against compensation in such cases, but it is clear that in this issue acceptance or rejection of compensation ultimately depends on the policy option for full compensation as opposed to deterrence.

With respect to national laws, the DCFR represents a significant step forward in codifying a right to prevention of damage and provides further guidance when making the right to prevention subject to an affordability test common to both the injured person and the potential tortfeasor. Yet, the author stresses that the approach of the DCFR is to some extent softened in Art. VI-2:101 on legally relevant damage, which defines fairness and reasonableness of damage in a restrictive way: "for there to be a right for reparation or prevention, regard is to be had to (…) the proximity of damage or impending damage". Thus, it seems that the causation test to be applied by national courts on the ground of the DCFR rules could continue to determine the outcome of the case on compensation for prevention and mitigation costs.

The findings of the study allow the author to formulate a series of remarks on the value of the DCFR in the context of the developments in European tort law. Given the judge-led architecture of European tort law, the function of guidance to courts seems to be the most relevant among the various aims and purposes of the DCFR in the field of non-contractual liability. European tort law shows an internal conflict between codifications and reform projects, on the one hand, which tend to employ a subjective standard in tort law, and case law, on the other, which favours an objective standard of liability. The DCFR appears to be more in line with codifications than with

national case law. The analysis of the factual situations reveals that the DCFR could have served better the purpose of offering new tools for judges in order to handle new rights and provide for more legal certainty for weaker parties and for the market. There is a risk that this gap will be filled by recourse to national theories on causation – a topic left outside the DCFR – that will lead to different outcomes, as the case on pure economic loss shows. In fact, on the issue of causation there is no convergence among legal systems.

With regard to the conceptual structure of the DCFR, there is little novelty. The model rules are a sort of restatement of existing case law as a minimal common denominator. The main rule remains liability for fault according to a reasonable care standard. This seems to be at first sight in line with the traditional concept of an objective standard of care. However, this standard is softened by a cost-benefit analysis and by a new concept of making the individual responsible for his activities, based on cost-sharing. As to strict liability, the DCFR does not remedy the lack of a unitary approach in Europe and regulates strict liability in a manner close to German law. It codifies an exhaustive list of no-fault based liability cases, instead of a general rule that would work as an integrating element approximating national approaches. Strict liability mainly concerns only dangerous activities and there is no room for new concepts. It seems that no agreement could be found on how to modernize strict liability and this is a major gap of the DCFR, despite its achievements. The core questions for the future of European tort law have not been fully answered: (i) should private law be primarily about individual responsibility, regardless of fault or non-fault liability?, and (ii) is it still desirable to attach different values to fault-based and strict liability now that the development of domestic case law in Europe shows that there is no clear-cut distinction between them, but rather that there is one tort liability with different degrees of strictness?

(9) Book VII on Unjustified enrichment has been analyzed by Prof. Jan Smits and Dr. Vanessa Mak in a broad comparative perspective, with particular reference to Dutch, French and German law. Their study underlines the significant differences on unjustified enrichment existing among national legal systems regarding the legal basis for such a claim, in spite of the fact that the underlying principle is the same, i.e. no one can be enriched at someone else's expense. National laws are divided in two main categories: civil law systems, which draw a distinction between undue payment (*condictio indebiti*) and unjustified enrichment (Italy, France, Spain, the Netherlands); systems that do not have a general category of unjustified enrichment, but a series of specific cases giving rise to specific claims: Germany (based on the lack of a legal basis, *sine*

causa: mainly, performance or transfer without legal base and encroach on property) and England (unjust factors, such as mistake, duress, failure of consideration, illegality).

Leaving aside all the technical differences existing at the national level, the DCFR tries to build on the basic principle underlying the various national regimes and formulates a general rule, according to which "a person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment" (Art. VII. – 1:101 (1)). The requirements of these rules are that (i) there has been an enrichment, that (ii) can be attributed to (iii) another's disadvantage and (iv) that qualifies as unjust. The DCFR does not distinguish between undue payment and unjust enrichment.

The factual analysis of the DCFR is based on three situations which are representative of unjustified enrichment law in Europe and deal with the problem of whether a restitutionary claim exists or not.

(A) The first case focuses on a contract for constructing some buildings on a piece of land, apparently owned by the client. The buildings are constructed by the contractor, but are not paid for by the client. Later, it turns out that the land belongs to a different owner and the buildings belong to the landowner, according to the general rules on property. It must be ascertained whether a restitutionary claim can be raised by the constructor against the true owner for the increase in value of the land.

The 1992 Dutch civil code (differently from the previous one) contains a general rule on unjust enrichment (art. 6:212), stating that a person who has been unjustly enriched at the expense of another is obliged, so far as reasonable, to make good the other's loss, up to the amount of his enrichment. The application of this general rule is subject to detailed provisions of national law. The code also regulates a specific action for unjustified enrichment for a possessor or a lessee, where no proof of their good faith is required (arts 3:121 (2) and 7:216 (3)). Therefore, the claim would probably be allowed. Under German law the claim of the case may be covered by one of the various specific instances of unjustified enrichment, namely improvement of another's property (§§ 951, 946 and 994 BGB). However, this only covers necessary expenses, which is not the case here. Therefore, the claim would probably fail. English law recognizes as an unjust factor the total failure of consideration for the enrichment and therefore the claim would probably succeed.

In the DCFR, beside the general rule, there is a list of circumstances in which enrichment is considered to be unjust, similar to the English unjust factors approach, but with a more abstract character (Art. VII. – 2:101). In the case, the criteria qualifying the enrichment as unjust seem to

be fulfilled: there is an enrichment in the form of an increase in the assets, according to Art. VII. – 3:101 (1) and a detriment to the constructor, and both elements seem sufficiently linked one to another. However, since the DCFR explicitly excludes from its scope of application issues of ownership of immovable property (Art. I. – 1:101 (2) (f)), the solution of the case will probably be regulated by national law. The comparative analysis illustrates that the differences among national legal systems are probably due to the fact that unjust enrichment is a residual category in relation to the general law of obligations, and the gaps are different in the various systems. Yet, the underlying principle is the same everywhere, i.e. no one should be enriched at another's expense. Because of the many differences, it may be too early to try and harmonize this branch of the law at the European level.

(B) In case 2, an insurance company pays money to a widow on her deceased husband's life insurance policy, but discovers later that payment was not due because the policy had lapsed. It must be established whether it may claim back the money. French, Italian and Dutch law have a specific action for undue payment, which is the paradigm case of unjust enrichment (arts 1235 and 1376 French C.c.; 2033 Italian C.c.; art. 6:203 (1) Dutch C.c.). Therefore, the claim would succeed. Some systems require that the party affected is in error on the fact that performance was due (Austria, § 1431 ABGB); in others this is irrelevant (Germany, the Netherlands) or it is disputed (France). Under German law, mistaken payment is a typical case of an act without legal cause, therefore performance can be recovered (§ 812 (1) BGB). In England, mistaken payment is a specific kind of unjustified enrichment (as in the action for money had and received). A specific unjust factor, such as mistake (in fact or of law), must be proven.

In the DCFR regime, since there is no distinction between undue payment and unjustified enrichment, undue payment comes under the general rule of unjust enrichment, and all its requirements must be met. The only problematic factor is the one of classifying it as "unjustified"; on this point the rule in the DCFR (Art. VII. – 2:101) is very complex and abstract, and gives little useful guidance. Yet, in this case it seems clear that the enrichment can be considered as unjustified. Even though taxonomies vary, the result is the same in all systems considered. The DCFR rules are in line with them, but its formulation is complex and obscure, and does not seem to foster harmonization.

(C) The third case concerns a supply of goods or services without a contract. After negotiations for renting a building, one party uses the building for some months, claiming to be waiting for approval of the board in order to conclude the contract. In fact, after some time the party finds

another building and moves there, and the other party raises a claim for compensation for the use of the first building.

English case law recognizes a claim for unjustified enrichment (similarly to Scots law). Dutch case law recognizes that there is a contractual claim for which compensation can be granted. In the DCFR the enrichment is unjustified if the purpose is not achieved or the expectation is not realized, the enriched person knew or could be reasonably expected to know of the purpose of the expectation and the enriched party knew that in this case the enrichment would have to be given back (Art. VII. – 2:101 (4)). The last mentioned requirement that the enriched party knew that in this case the enrichment would have to be given back, is the more problematic issue, because the DCFR does not make clear what are the factors to be taken into consideration when applying this rule. Therefore, it seems likely that in this case the claim will succeed also under the DCFR regime, but it is not certain. The comparison demonstrates that all systems recognize a claim for compensation, but some base it on unjustified enrichment, while others use a contractual basis. In fact, the issue is a mixture of both aspects: there is an element of reliance and one of benefit, and both are required: reliance and enrichment *per se* would not be enough to justify a remedy. The DCFR rules could have made this situation clearer, helping in this way to achieve harmonization.

A critical evaluation by the authors points out some issues as to taxonomy, as to whether the DCFR fulfil the function of unjust enrichment and, finally, as to the function of the DCFR and its impact on the law of unjustified enrichment. With regard to the first aspect, the DCFR does not follow any national system, but offers an integrated system, with a single set of requirements (with the exception of restitution for avoidance and termination of contracts, set out in Art. III. – 3:511 ff.). Yet, this new taxonomy is not satisfactory, since it is too abstract and complex. Moreover, the scope of unjustified enrichment is very broad, more than national legal systems, since any increase in assets or decrease in liabilities amounts to an enrichment (Art. VII. – 3:101). To all this it must be added that the unjust factors approach borrowed from English law does not seem the best solution for European-wide harmonization, because it has been heavily criticized even by distinguished English scholars (like Prof. Birks).

As to the function of unjustified enrichment law, the authors emphasize that this field of the law is much less coherent than other parts of the law of obligations, i.e. tort and contract, because it has a residual character in order to fill remaining gaps. Since the DCFR is not aimed at full harmonization, it means that this residual character of unjustified enrichment can best be fulfilled by national rules. As a consequence, the DCFR rules should be limited to the general principle of unjustified enrichment, rather than drafting detailed rules. To be sure, there remains a need to

deal with the restitutionary effects of avoidance and termination of contracts, but these rules are laid separately placed, under Art. III. – 3:511 ff.

The DCFR, considered as a "toolbox", may serve several purposes: it can be used by the EU institutions in drafting and revising EC legislation; it may influence national judges and legislators; it may be used as a reference for teaching and research. Nevertheless, because of its soft law character, this will be possible only if its rules are persuasive for those who must apply them. Yet, the authors question whether the present structure and content of Book VII can be a successful source of inspiration for its addressees.

(10) The assessment of Book VIII of the DCFR on Acquisition and loss of ownership of goods has been carried out by Dr. Lars van Vliet in comparison with English, Dutch, German and French law.

(A) Case 1 deals with a bulk sales of a certain amount of wheat contained in an identified silo. The buyer pays in advance half of the purchase price. Before transfer of possession of the goods the seller becomes insolvent, so that all the wheat contained in his silo belongs to the insolvent's estate. The issue at stake here concerns the passing of ownership of a bulk before physical segregation and appropriation to the buyer.

While Art. VIII-2:101(3) of the DCFR codifies the general rule according to which ownership of an unspecified quantity of generic things cannot pass, Art. VIII-2:305 contains a special rule, inspired by the UK Sale of Goods Act 1979, establishing that when a mass or mixture of fungible things is identified as contained in a defined space or area it is a "bulk" (para (1)), and the sale of a bulk which fails to take effect because the goods have not been identified gives to the buyer a co-ownership right (para (2)). The rules of the DCFR on this point differ from the English ones in two respects: first, the DCFR acknowledges co-ownership of the buyer irrespective of payment, whereas in the UK Sale of Goods Act the buyer acquires co-ownership only if and insofar as he has paid for the goods (secs 20A and 20B). Second, the DCFR rules apply in the context of a *traditio* system (i.e. delivery is required for the transfer of ownership, unless the parties agree otherwise: Art. VIII-2:101(1)(e)), whereas the UK Sale of Goods Act applies in a consensual system, where in principle no delivery is required to transfer ownership (sec. 18 Rule 1 and sec. 17(1)). Especially this last point is relevant for the interpretation of the DCFR rule. According to the author, from the default rule of the DCFR it should be inferred that Art. VIII-2:305(2) operates only if the parties have opted out the transfer system. This should have an impact on the outcome of the case, because if the parties have not modified the transfer system, the

buyer does not acquire co-ownership of the bulk under the DCFR rules, whereas under the UK rules he acquires co-ownership in proportion to the price paid. Under Dutch and German law the case is solved in the same way, since both systems are *traditio* systems, where the requirement of delivery could be set aside only if the parties opt for a *constitutum possessorium* in the sale contract. In these systems the buyer does not acquire ownership of generic goods without identification, despite the payment of half of the price.

The outcome of the case does not change under French law, despite the different default rule operating there. French law is a consensual transfer system, but the principle of specificity – constantly applied by courts – requires identification of generic things to transfer ownership in a bulk.

The assessment shows that the DCFR regime on the passing of ownership of a bulk has incorporated – with some changes – the English rule, whose origins are related to peculiarities of the local business practice. According to van Vliet, the application of the co-ownership rule under the DCFR could be complicated by the fact that here – unlike under English law - an agreement of the parties is needed in order to change the transfer system. Since parties usually do not regulate in the contract the time when ownership passes and there is often uncertainty on this point, the task to solve the conflict passes to the judge, and national judges may generally not be willing to acknowledge a delivery via *constitutum possessorium* without an express clause in the contract.

(B) In factual situation 2 the buyer of a drilling machine acquires it under a retention of ownership clause and before full payment of the price he resells it to a third party by way of *constitutum possessorium* (i.e., the machine remains under the buyer's control) without the seller's consent. The case focuses on a sale through *constitutum possessorium* by a non-owner to a bona fide purchaser.

The DCFR requires delivery of the good sold to protect the bona fide purchaser of a movable from a non-owner (Art. VIII-3:101(1)(a)), therefore the bona fide purchaser in this the case would not be protected.

Under English law sec. 25 of the Sale of Goods Act 1979 – as interpreted by case law – lays down an exception to the *nemo dat* rule and establishes that where a person having bought goods obtains, with the consent of the seller, possession of the goods, the delivery by that person of the goods under a sale to any person receiving the same in good faith and without notice of any right of the original seller on of the goods, it has the same effect as if the person making the delivery were a mercantile agent in possession of the goods with the consent of the owner. Since case law regards *constitutum possessorium* as constructive delivery, which is sufficient for the

applicability of sec. 25 SGA, the third party bona fide purchaser of case 2 would be protected and acquire ownership, differently than under the DCFR regime.

French, German and Dutch law require that the third party should have acquired "real possession" (i.e. actual power over the thing) in order to protect his acquisition (arts 2276 and 1141 French C.c.; § 933 BGB; by way of interpretation under Dutch law). Therefore, protection of the third party in case 2 would start from the time of his acquiring control over the goods, provided that at that time he is still in good faith.

The author examines critically the reasons that in the continental legal systems analyzed support the choice to require transfer of actual possession to the third party in order to protect his acquisition. Under French law it seems that actual possession is required by reference to the requirements for acquisitive prescription (art. 2261 C.c.). The official explanations to the German BGB (Motive and Protokolle) refer to the need to protect the owner from being deprived of his right without notice (this argument is also reported in the Comments to Art. VIII-3:101 DCFR) and to the position that a third party not insisting on acquiring actual power over the thing does not deserve protection. Yet, these reasons seem unconvincing to van Vliet. He points out that the function of protecting the owner from a loss of his right connected to the requirement of possession is not useful, because when this transfer takes place it is too late, since he has already lost his right. With regard to the argument that a third party that does not insist on actual possession does not deserve protection, van Vliet stresses that what really matters is not possession by the third party acquirer, but possession by the transferor, since this determines the degree of good faith of the third party acquirer. The innocence of the latter, in fact, depends on him relying on the false impression of ownership due to possession by the transferor.

(C) Case 3 focuses on a sale under retention of ownership of cotton cloth where the buyer is a manufacturer producing cotton shirts. The retention of ownership clause provides that until full payment of the price the seller becomes owner of the shirts produced from the seller's cloth. The buyer is unable to pay the full price and afterwards becomes insolvent. The issue of the case is the right of the seller to revindicate the shirts produced from his cloth. The outcome of the case is linked to the admissibility in the national legal systems of extensive retention of ownership clauses, which deviate from the rules on *specificatio*.

On this issue the DCFR sets up a regime which results from the interconnection between the rules of Book VIII and those of Book IX on Proprietary security in movable assets. According to Art. VIII-1:103(1) the rules of Book IX have priority if production involves goods delivered under a retention of ownership clause. A problematic feature of this system of rules is that Book

IX requires retention of ownership clauses to be registered under a European register of proprietary security in order to be effective against third parties (see Sec. 3, Ch. 3, Book IX). This requirement alone is sufficient to determine the outcome of the case: since no registration has taken place – the European register, of course, exists only in the text of the DCFR – the retention of ownership clause is ineffective as against the buyer's creditors, and valid only as a security between the parties. Turning to Book VIII, Art. VIII-5:101 provides that the proprietary consequences of production can be regulated by parties' agreement, so that parties can agree on extended clauses of retention of ownership. However, Art. VIII-5:201(1) establishes that where the buyer produces new goods himself, the seller has a claim for the value of the goods secured by a security right. This implies that the extended retention of ownership clause cannot give the seller ownership of the new products, but merely a claim for their value, secured by a security right (Art. IX-2:308); this security right – again – should be registered in the European register in order to be effective. Therefore, the clause of case 3 would be impossible under the DCFR (it should confer ownership of the new products on the seller). The author points out that under the DCFR regime contracts containing extended clauses of retention of ownership would need to be rewritten to fit the system.

Art. 5:16(2) of the Dutch Civil code establishes that the producer of new goods from materials belonging, even partly, to others is to be regarded as the owner of these new products, unless the costs of production are trivial compared to the materials. According to Dutch case law this is a mandatory rule that cannot be opted out from or modified by the parties. The buyer of case 3 would be considered as the owner of the shirts, which would fall in the insolvent's estate, and the seller would have an unsecured claim as against the insolvent's estate.

Also in Germany it is the producer who normally acquires ownership in the new products by way of specification (§ 950 BGB). However, German case law interprets the Civil code rules differently from Dutch case law. The producer or manufacturer according to the meaning of § 950 BGB is not necessarily the buyer. It can also be the supplier if it is agreed that the supply of the materials to the buyer and its productions are made for the benefit of the supplier. Therefore, the parties can agree on who is to be regarded as the manufacturer – and therefore owner – of the new products.

English case law adopts an approach to the problem of *specificatio* that is similar to Dutch law: *specificatio* is mandatory and cannot be opted out or derogated from by the parties. For a sale under retention of title where the clause provides that the new goods produced with the sup-

plied materials belong to the seller, a court has held that the clause creates a charge which, however, is void under sec. 874 of the Companies Act 2006 because it is not registered[3].

In France art. 571 C.c. contains a provision on *specificatio* according to which the manufacturer becomes the owner of the new goods, provided that the cost of his work clearly exceeds the value of the materials sold. However, this provision can be derogated from by the parties, so that under French law extended retention of ownership clauses establishing that the seller becomes owner of the new goods are possible and effective not only between the parties, but also as against third parties. In case of insolvency special mandatory provisions apply: art. L624-16(2) C. comm. establishes that goods sold under retention of ownership can be revindicated, if they are in their "natural state" at the time of the opening of the insolvency procedure. The requirement of the "natural state" (*existence en nature*) is interpreted broadly in favour of the seller. Furthermore, art. 2372 C.c. and art. L624-18 C. comm. allow the seller to revindicate the purchase price from a sub-sale, provided that certain conditions are met and case law regards this right as a result of real subrogation.

The author stresses that the reason behind the mandatory nature of the rules on *specificatio* is that they confer property rights on third parties, therefore it should not be allowed to modify them by way of contract, and parties should be able to rely on the factual situation showing who owns the goods. This argument is also supported by German scholars, who criticize the different approach adopted by German case law.

From a general point of view the assessment concludes that the rules of the DCFR on acquisition and loss of ownership of goods prove that Book VIII has been drafted with a clear and preponderant influence of Austrian and German law – as it is witnessed by the fundamental choice on the transfer system – and that thorough knowledge of these legal system is essential for a full understanding of the DCFR rules. However, as it is shown by the rules on transfer of ownership in a bulk (case 1), the drafters have sometimes been open to elements coming from English law. In the light of the outcomes of cases 1 and 3, one could add to van Vliet that it is doubtful how useful for the needs of European law this cherry picking of common law rules, as well as the interconnection of Book VIII with the new system of Book IX, will be in practice.

[3] *Modelboard Ltd* v *Outer Box Ltd (in liquidation)*, Chancery Division 22 September 1992 [1992] BCC 945. See also *Borden (U.K.) Ltd.* v *Scottish Timber Products Ltd. and Another*, Court of Appeal 10 July 1979 [1981] Ch 25.

Part II

Comparative Comments

From the factual assessment by the contributors a few remarks can be made regarding (i) the incorporation into the DCFR of the two conflicting principles of freedom of contract and justice, i.e. on the approach chosen by the DCFR, whether more market-oriented or more related to social justice; (ii) the drafting style, which makes extensive use of broad concepts such as "reasonableness" and "good faith"; (iii) values and limits of the systematic coherence of the DCFR; (iv) the prospects of application of the DCFR; and (v) terminology.

(i) The DCFR extends to B2B contracts certain limits to the freedom of contract that are not recognized in many EU countries and that derive from consumer protection law. This is the case of the general test of unfairness, to which non-negotiated contract terms, even between professionals, are subject according to Art. II. – 9:405. As to the B2C field, the limits to the principle of freedom of contract in the DCFR are almost always in line with those existing in national systems, due to the incorporation of the EC *acquis* in the model rules. Yet, sometimes the DCFR protects consumers less than some national laws. We see this in the case of contract terms limiting or excluding liability for the sale of defective goods and services, where the DCFR is less protective than English law in both B2C and B2B contracts. The same happens for contract terms establishing a price higher than market price, for which Art. II. – 9:406 (II) establishes that there is no unfairness control, if the terms are written in a plain and intelligible language. On the contrary, the Nordic countries extend the test to ensure that the price is in line with the price of the given market segment.

The assessment of consumer protection in personal security contracts shows that consumer protection rules are extended beyond the limits existing in national laws. The rules of Chapter 4 of Book IV.G apply when the security provider is a natural person that is unable to exercise substantial influence on the debtor (Art. IV.G. – 4:101). The result is that protective rules are extended to cover cases in which the consumer secures a professional obligation of a company, without being directly involved in the management and decision-making of the business. This is contrary to what is normally the rule in many member States and reveals the DCFR policy choice to introduce more "social justice" in the context of security contracts provided by family members to secure credits to small and medium enterprises directed by other family members.

With reference to the extent of the controls in order to ensure consumer security providers' protection, the DCFR follows the technique of procedural controls and formal requirements that is common in most European systems, and rejects substantial fairness controls that exist only in a few countries, e.g. France (for both professionals and non professionals), or England (only for the non professionals).

It is not possible to draw any definitive conclusion on the effectiveness and desirability of the balance achieved by the DCFR between freedom of contract and the protection of weak parties, i.e. between market and social justice, first because the scope of the review is partial, but even more because this is a judgement that depends on the values that are considered to be fundamental and paramount. The DCFR contains reference to both values, but their relationship is not fully spelled out, and as a consequence there is no clear guidance in case of a clash between them. The examples produced in this analysis show that the DCFR is largely based on the principle of freedom of contract, but at the same time in some important areas it clearly recognizes the need of mechanisms protecting weak parties, usually consumers, but sometimes also other categories. Yet, the extension of rules originally drafted in EC law for the protection of consumers does not necessarily suit other situations of weakness, particularly in commercial contexts, and it may prove problematic.

(ii) As regards the drafting style, the extensive use of general clauses, such as "reasonable", or "reasonably and in good faith", or "manifestly unjust", leads to serious difficulties and shortcomings in the application of the DCFR rules.

There is evidence of this, firstly, in the factual assessment of Art. III. – 1:110, which addresses the effects of unforeseen circumstances on the performance of a contract. The rule allows for variation or termination by a court order if performance of a contractual obligation or of an obligation arising from unilateral juridical act becomes so onerous because of an "exceptional" change of circumstances that it would be "manifestly unjust" to hold the debtor to the obligation. The application of this rule will be extremely problematic in countries where the issue of unforeseen circumstances is not regulated by similarly broad rules, especially if precise guidelines for national application of the rules are not provided by the drafters.

Further problems of this kind have been detected in the cases of sale contracts and the combination of the special rules of Book IV.A on sales with the general provisions of Book III on the duty of notification of non-conformity of goods, other assets or services (Art. III. - 3:107). While national rules may establish a specific period for serving notice of the defects of the goods sold in order for the buyer to invoke the remedies provided by the system, Art. III. – 3:107 (I) states that the creditor cannot rely on the non-conformity unless s/he gives notice to the debtor "within a

reasonable time", specifying the nature of the lack of conformity. For instance, Italian law provides that the buyer must serve such notice within eight days (art. 1495 C.c.). In theory, the application of the DCFR provision in Italy could lead to the use of the Italian standards in determining a "reasonable time" and this could differ from the period of notice usually provided in other countries. The consequence could be that the application of the DCFR rule to the same factual situation could lead to different or even opposite outcomes in different countries. In this way the prospects of success of the European harmonization effort would be limited.

Another example of the same difficulty can be found from the rules on Lease of goods (Book IV.B.), that cover also financial leasing of goods. In some countries (e.g. Poland) a financial leasing of goods can be agreed only for a definite period and cannot be tacitly prolonged. A different rule in Art. IV.B. – 2:103 (1) states that where the contract is tacitly prolonged according to Art. III. – 1:111 and where the rent prior to prolongation was calculated so as to take into account amortisation of the cost of the goods by the lessee, the rent payable following prolongation is limited to "what is reasonable", having regard to the amount already paid. Given the different rule under Polish law, an application of the DCFR provision in Poland could lead to confusion and to increased conflicts.

The use of general clauses, such as reasonableness and good faith, is problematic also in national contexts, because their content is difficult to define, causing uncertainty, and also because, due to their vagueness, they imply a significant shift from statutory law to case law, since it is generally judges who must define the content of the concepts when deciding their application, as the example of the concept of *Treu und Glauben* in German law shows. At the European level, this vagueness causes a further problem, which is linked to the characteristics of this specific setting: if the aim of the DCFR is to foster legal harmonization, this aim is particularly hard to reach by employing general clauses, because their meaning and scope cannot be defined a priori, and it is very likely that national interpreters will rely on the rules applied in their own system, which they know best, thereby reproducing at the European level the discrepancies that exist among national legal systems. On the other hand, general clauses fulfil a useful role, because their very vagueness allows flexibility in the system, which is consequently able to adjust to changing needs and different circumstances, a role that is as useful at the European level as in national laws. Yet, this objective can be attained only if the use of the margins of flexibility is kept under control by interpreters that share a common legal culture and working methods. As long as this element is missing in Europe (and this is clearly the case today), the risk of uncertainty and disparity is very high.

(iii) The structure of the DCFR is clearly designed to build a systematic set of rules. To some extent, this is also declared by the drafters, who underline that matters related to contracts strictly depend on problems of restitution or property[4]. They have created a set of rules intended to become an autonomous body of law; yet they declare that the Draft has not been elaborated on an "everything or nothing" basis: the EU Institutions will be free to "cherry pick" single rules to be included in their "political" CFR[5].

The Common Core assessment demonstrates the existence of a systematic approach influenced by the German model in several occasions, but this strive for the creation of a system in the model rules often leads to confusion and it can therefore be harmful for the purpose of legal harmonization.

This result can be found, for example, in the analysis of the rules on Plurality of debtors. Art. III. – 4:102 regulates three forms of plurality of debtors, namely solidary, divided and joint obligations. The only difference between solidary and joint obligation is that in the latter the debtors must be sued together; this is a procedural point, which as such should be not considered in the DCFR. The category of the joint obligation derives from the German *gemeinschaftliche Schuld*, not regulated in the BGB, but acknowledged by scholars and case law. The factual evaluation has shown how the inclusion of this third category in the DCFR is dangerous for the purpose of legal harmonization, because it will probably be interpreted in different ways by national laws, and thereby national differences will be preserved. Another significant example is the law of unjustified enrichment. Notwithstanding the many differences existing in Europe in this area of the law, the DCFR tries to build on the very broad common principle underlying this institution, but in so doing it creates a very abstract system, complex and difficult to apply to concrete situations. Major deficiencies are the lack of a specific category (or rule) for undue payment, which everywhere is a classical example of a situation giving rise to restitutionary claims; reference to undue payment in the DCFR could have made this set of rules more user-friendly. In addition, the DCFR does not make clear the situations in which restitutionary and contractual claims may overlap. Finally, there are some doubts as to the real need for a codification of this branch of the law in a separate Book, particularly if one takes into consideration that the relevant restitutionary effects of termination of contracts have been regulated separately, in Book III (Art. III. – 3:511 ff.). The rules on unjustified enrichment, being formulated as an abstract system, quite different from any national model, are a significant example of the difficulties that the EU Institutions, or national legislators, could experience when using the DCFR as a model for new

[4] See above, *Introduction*, n. II.3.
[5] See DCFR, Outline Edition II, pt. 74, p. 44.

legislation. The rules of the DCFR are made to be adopted as a full body of law, and are not suitable for an easy selection of individual rules.

While it is not possible to extend the results of the analysis of the reports to the whole DCFR, they provide some evidence for the general idea, exposed also in the Introduction of this work, that the structure of the DCFR should be dependent on its use: if it is going to be a toolbox, the choice of a highly complex and systematic structure is going to be a hindrance rather than a virtue. If, on the other hand, its model is that of an optional code, then the systematic structure is justified, even though different and possibly less complex models could be employed.

(iv) This leads to the problem of the functions that the DCFR will be called on to perform. On this subject, it can be pointed out that the success of this instrument is dependent on its use, which, in its turn, depends on the persuasive authority of its content.

Again, it must be stressed that the findings of this analysis cannot automatically be extended to the whole of the subject matters covered by the DCFR. Nevertheless, the partial results that can be derived by the reports show that the usefulness and effectiveness of the DCFR solutions varies in the different areas covered: in some cases they manage to synthesize the common core of all national systems, in others they diverge from it. This is not necessarily negative in itself, since it often happens that legal systems do not reach common results, and consequently the DCFR rules have to make a selective choice (and the important issue becomes what is the best solution among the different national ones, and how to select it).

(v) Finally, from the linguistic point of view the results of the reports do not show any significant problem: the English terminology is easily understandable (even if sometimes it may sound odd), and where it diverges from usual English legal terminology, this is justified by the need to mark the distance from the meaning of the term that relates to the common law systems. Yet, it must be underlined that the prevalence in the DCFR of a codification-like instrument and particularly the influence of the German model also has an impact on terminology, as demonstrated by the central role of the term “juridical act” as an overarching legal category. This German-style terminology clearly goes beyond existing EC law, and it must be tested how much it is compatible with all European systems.

Of course, any assessment of the terminology of the DCFR must stand the test of translation into the other European languages. This is a huge task, and a very complex one, since homogeneity in the application of the (D)CFR will also depend to a significant extent to the quality of the translation of the concepts and rules. As the critical essay by Elena Ioriatti points out, the experience related to the translation of legal texts in the EC/EU is very important, and the difficul-

ties faced there should make everybody aware of the crucial role of this task for the DCFR, whatever use will be made of it in the final CFR.

Abbreviations

AcP: Archiv für die civilistische Praxis

All ER: All England Law Reports

Am. J. Comp. L.: American Journal of Comparative Law

App Cas or AC: Appeal Cases (Law Reports)

BauR: Zeitschrift für das gesamte öffentliche und private Baurecht

BCC: British Company Cases

BGE: Entscheidungen des Bundesgerichts (Swiss Supreme Court)

BGHZ: Entscheidungen des Bundesgerichtshofs in Zivilsachen

BLR.: Building Law Reports

Bull. civ.: Bulletin civil de la Cour de cassation

Bull.: Bulletin

Burr.: Burrow

Cardozo J. Int'l Comp. L.: Cardozo Journal of International and Comparative Law

Ch: Chancery Division (Law Reports)

CLC: Commercial Law Cases

CLJ: Cambridge Law Journal

CLLPJ: Comparative Labor Law and Policy Journal

CLR: Commonwealth Law Reports (Australia)

CML Rev: Common Market Law Review

Col. JEL: The Columbia Journal of European Law

Contrats, Conc. Cons.: Contrats, concurrence, consommation

CPD: Law Reports, Common Pleas Division

CYELS: The Cambridge Year Book of European Legal Studies

D. Chron.: Recueil Dalloz, Chronique

D.: Recueil Dalloz

Defrénois: Répertoire du notariat Defrénois

DH: Recueil Dalloz, hebdomadaire

Duke J. Comp. Int. L.: Duke Journal of Comparative & International Law

E.B.L.R.: European Business Law Review

EdinLR: Edinburgh Law Review

ELJ: European Law Journal

ER: English Reports

ERCL: European Review of Contract Law

ERPL: European Review of Private Law

Eur. dir. priv.: Europa e diritto privato

Eur. J. Law & Economics: European Journal of Law and Economics

EuZW: Europäische Zeitschrift für Wirtschaftsrecht

EWCA Civ.: Court of Appeal Civil (England and Wales)

FLR: Family Law Reports

FSR: Fleet Street Reports

Gaz. Pal.: Gazette du Palais

Giornale dir. lav. rel. ind.: Giornale di diritto del lavoro e delle relazioni industriali

Hastings Int'l & Comp. L. Rev.: Hastings International and Comparative Law Review

ICLQ: International and Comparative Law Quarterly

ILJ: Industrial Law Journal

Int'l & Comp LQ: International and Comparative Law Quarterly

JBL: Journal of Business Law

JBl: Juristische Blätter (Austria)

JCMS: Journal of Common Market Studies

JCP: Juris Classeur Périodique

JLE: Journal of Law and Economics

Jur. Rev.: Juridical Review (Scotland)

JZ: Juristenzeitung

KB: King's Bench Division (Law Reports)

L.T.: Law Times Reports (England)

Lloyd's Rep: Lloyd's List Law Reports

LQR: Law Quarterly Review

LSG: Law Society's Gazette

M&W: Meeson & Welsby

MJECL: Maastricht Journal of European and Comparative Law

MLR: Modern Law Review

New England L. Rev.: New England Law Review

NJ: Netherlandse Jurisprudentie

NJW: Neue Juristische Wochenschrift

NJW-RR: Neue Juristische Wochenschrift Rechtsprechungs-Report

NLJ: New Law Journal

OJLS: Oxford Journal of Legal Studies

QB or QBD: Queen's Bench Division (Law Reports)

Resp. civ. prev.: Responsabilità civile e previdenza

Rev. int. dr. comp.: Revue internationale de droit comparé

Rev. trim. dr. civ. or RTD Civ.: Revue Trimestrielle de Droit Civil

Rev. trim. dr. eur.: Revue Trimestrielle de Droit Européen

Riv. dir. civ.: Rivista di diritto civile

Riv. dir. comm.: Rivista di diritto commerciale

Riv. dir. priv.: Rivista di diritto privato

Riv. società: Rivista delle società

Riv. trim. dir. proc. civ.: Rivista trimestrale di diritto e procedura civile

S&S: Schip en Schade

SC: Sessions Cases (Scotland)

SZ: Entscheidungen des Österreichischen Obersten Gerichtshofs in Zivil- und Justizverwaltungs-sachen

Taunt.: Taunton Reports

Tul. L. Rev.: Tulane Law Review

Vermont L. Rev.: Vermont Law Review

VersR: Versicherungsrecht

Wheat.: Wheatons Supreme Court Reports (USA)

WLR: Weekly Law Reports

WM: Wertpapier-Mitteilungen

WPNR: Weekblad voor Privaatrecht, Notariaat en Registratie

Y.B.Eur.L.: Yearbook of European Law

Yale L.J.: The Yale Law Journal

ZEup: Zeitschrift für Europäisches Privatrecht

ZSchwR: Zeitschrift für Schweizerisches Recht

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