

STATTHIS BANAKAS (1)

HARMONISATION OF EUROPEAN CONTRACT LAW
AND GENERAL PRINCIPLES OF CONTRACTS:
A COMMON LAWYER'S LOOK INTO THE FUTURE

'It's tough to make predictions, especially about the future' (2).

Nevertheless, the Law, like everything else, exists in a continuum and it is very much the case that

'Time present and time past
Are both perhaps present in time future,
And time future contained in time past' (3).

I. The broader European Contract Law project has already had a significant past. Indeed, what has been already accomplished is so much that there seems little that is new to be expected in the future. The Lando Principles of European Contract Law have been completed (4); the academic Draft of the Common Frame of Reference (CFR) has just been published (5). And two

(1) School of Law, University of East Anglia, Norwich, England. I am very grateful to Professor Emanuela Navareta for giving me the opportunity to participate in the splendid, and very stimulating Conference that she organised at the University of Pisa. If this paper is occasionally rather critical in its tone, this is certainly nothing to do with that extremely successful and enjoyable meeting!

(2) One of the many quotes attributed to the legendary Yogi Berra.

(3) T.S. ELIOT, *Four Quartets*, 1, Burnt Norton.

(4) *Principles of European Contract Law*, Parts I and II (ed O. Lando and H. Beale) (2000) and PART III (ed O. Lando, E. Clive, A. Prum and R. Zimmermann) (2003).

(5) *Principles, Definitions and Model Rules of European Private Law*, Draft Common

big International projects, the Vienna Convention on the Law of International Sales of Goods and the UNIDROIT Principles of Contract law of 1994 (6) have also been accomplished (7).

And the EU's legislative work? First, the *acquis*: from a modest start in obscure or exotic corners, such time-sharing and package holidays the EU has proceeded to more substantial and heavy-punching legislation, such as the Unfair Terms Directive, the Consumer Sales Directive and the Unlawful Commercial Practices Directive that many observers have seen as having potentially far-reaching implications for National General Contract Law. This, too, is a significant past. And its weight becomes heavier with the declared aim of the new Green Paper on Consumer Policy that announces a potentially enormous project of maximum harmonisation centred on the revision of the 8 Consumer Directives (8).

As the Commission's Green paper shows, member-states have so far transposed these directives with a rather alarming inconsistency. The project of revising them and consolidating them in an EC framework of maximum harmonisation, announced in the Green paper, will require National legislation on an unprecedented scale across the 27 States, and may qualify as the most ambitious transnational harmonisation private law project in legal history. Additionally, the Commission has already declared an intention to use in this revision the forthcoming Common Frame of Ref-

Frame of Reference (DCFR), interim outline edition available online at <http://webh01.ua.ac.be/storme/DCFRInterim.pdf> (last visited 27 febbraio 2008). See also *infra* in fine.

(6) For a comparison see BONELL, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?* 26 *Uniform Law Review* (1996) 229-246.

(7) Among other notable private initiatives is that of the Academy of European Private Lawyers « European Contract Code — Preliminary draft », Universita di Pavia, 2001.

(8) i.e. Doorstep Selling Directive 85/577, Package travel directive 90/314, Unfair Contract Terms Directive 93/13, Timeshare Directive 94/47, Distance Selling Directive 97/7, Price Indication Directive 98/6, Injunctions Directive 98/27 and Sale of Consumer Goods and Guarantees Directive 99/44.

ence (9) (CFR), to provide general principles, general rules and definitions.

Harmonisation of Consumer Contract Law is indeed an ambitious initiative (10). The Commission has responded to the alarm and all the objections, constitutional, political, economic and cultural that were raised against the great European Contract Law project envisaged in its Action Plan of 2003 (11), by affirming undisputed competence and determination to proceed with what appears to be a less controversial and lesser in scope project, the project announced in the green paper. This has created concern, especially among European lawyers in the Civilian tradition, that the comprehensiveness of the proposed revision of EC Consumer legislation, and the determination to impose maximum harmonisation, ie not allow any divergence in National laws, may have a nearly as dramatic an impact on National General Contract Laws in the EU as the original suggestion of a General European Contract Law. Additionally, National General Contract laws may be affected by other sectoral Harmonisation projects that are in progress, such as the Restatement of European Insurance Contract Law now completed and submitted to the CFR group (12), the Commission Green Paper on Succession and Wills (13), and

(9) As announced in the Commission's paper, A more coherent european contract law an action plan, COM(2003) 68 final, also available online at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf (last visited 27.2.2008).

(10) While it is obviously a laudable goal to offer trans-border protection to consumers in the European Single Market, it is at least arguable that the most effective new measure is likely to be the combined effect of the recently introduced the European Consumer Protection Cooperation Regulation (European Parliament and Council Regulation 2006/2004. OJ [2004] L 364/1), which now requires each member state to have a single public liaison office, and provides for certain investigative powers which can be exercised on behalf of other member state enforcers, with the Injunctions Directive (European Parliament and Council Directive 98/27/EC. OJ [1998] L 166/51).

(11) [2003] OJ C 63/1. Available online at: http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/actionplan_en.htm (last visited 27.2.2008).

(12) Available online at: <http://www.restatement.info/cfr/Draft-CFR-Insurance%20Contract-17122007.pdf> (last visited 27.2.2008). The CFR will come with specific rules about both the Contract of Sale and the Contract of Insurance.

(13) Green Paper on Succession and Wills, Presented by the Commission of the European Communities, COM(2005) 65 final, Brussels, 01.03.2005.

the work of the Commission on European Family Law (14), which is looking at, among other things, ‘contractual’ aspects of marriage and divorce.

II. But the concern with which Civilian lawyers contemplate the implications of all this activity for Contractual theory, the so-called General Part of Contract law, a serious concern also for the European Parliament and the Commission, is difficult for Common lawyers to share.

First because, as is well-known, there is generally no general theory in Common law (15), and no Contractual Codification or general theory (16). No significant distinction between General Contract Law and Special Contracts exists. Practitioners do, of course, specialise in the specifics of individual contracts, and the big reference book of Chitty on Contracts is, indeed, divided into two volumes, General Principles and Special Contracts. But this is only a division of material for practical reasons. An example that there is no integral link, from top (General Principles) to bottom (Specific Contracts) is that the doctrine of subrogation, judicially recognised in the case of insurance contracts, does not necessarily apply in other, even similar in function, contractual relations, such as contracts of guarantee, in the absence of express judicial authority (17). That is to say, the recognition of subrogation in insurance contracts cannot be used as inferring a general principle of subrogation, available, with any necessary adjustments, also in

(14) See <http://www2.law.uu.nl/priv/cefl/> (last visited 27.2.2008).

(15) ‘..the [common law] system works as a whole even if we cannot say why it works and what rational purpose the different bits may serve’: P.S. Atiyah, *Pragmatism and Theory in English Law*, London 1987, p. 34.

(16) For a witty defence of the common law’s aversion to Codes of the Civilian style, see Malcolm Clarke, ‘Doubts from the Dark Side-The case against Codes, in *Journal of Business Law*, 2001, 605-615.

(17) A surety has a right to indemnity against principal debtor, but no right of subrogation to creditor’s rights, with the exception of rights to securities held by the creditor: cf Chitty on Contracts II, nos 4455 f., 4463.

other types of Contracts where a principal's liability is discharged by a third party, as would have been the case if subrogation were a General Contractual legal principle (as, indeed, is the case in the Civil law tradition). Similarly, the introduction into English law of the principle of good faith in Consumer Contracts by the transposition of the Unfair Terms Directive (18), cannot be seen as affecting other Contractual relations. In the words of the most senior English judge, Lord Bingham:

'The requirement of good faith in this context is one of fair and open dealing.

Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations.⁹ Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice' (19).

And another English judge, Lord Hope said in the same House of Lords case:

'It has been pointed out that there are considerable differences between the legal systems of the member states as to how extensive and how powerful the penetration has been of the prin-

(18) Council Directive 93/13/EEC. OJ [1993] L 95/29. The Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) and 1999 (SI 1999/2083). The 1999 Regulations replaced those of 1994, without major substantive change, but so as to reflect more closely the wording of the Directive and, in particular, to allow other 'qualifying bodies' to enforce the Regulations alongside the Office of Fair Trading.

(19) In paragraph 17 of the judgment in *Director General of Fair Trading v First National Bank plc*, [2001] UKHL 52.

ciple of good faith and fair dealing [...]. But in the present context there is no need to explore this topic in any depth. The directive provides all the guidance that it needed as to its application' (20).

On this, and more generally on the interpretation of the Unfair Terms Directive, the House of Lords saw no need to refer any issue to the European Court of Justice.

Nevertheless, in a more recent case another interesting issue arose, that of whether the Directive and the UK Unfair Terms in Consumer Contracts Regulations apply to contracts relating to land (e.g. tenancy agreements), and to public authorities such as Borough Councils (21). It is an issue that would affect potentially millions of people in rented accommodation, and provides a good illustration of unpredictable and possibly unintended consequences of broad sectorial Harmonisation projects. Both the High Court and Court of Appeal held that the Directive did apply to contracts relating to land. More interestingly, in the process the courts had to deal, *inter alia*, with the lack of harmonisation of European legal terminology. The Directive applies to consumer contracts that have as their object goods and services. In the French text of the Directive that carries the greater authentic authority, the word equivalent to the English term 'goods', '*biens*', includes immovables, and it does so also in Italian, Spanish and Portuguese property law. Under the principle that European law is to be read as a single whole, this defeated the argument that in English 'goods and services' does not generally embrace land. This case further illustrates how the Directive on unfair terms in consumer contracts can potentially have a far reaching harmonisation effect, despite any underlying diversity not only in Contract law, but also in Property law.

At the same, and because English Contract law does not have a dogmatic coherent structure, the Directive is clearly interpreted as covering what is inside contracts, but not the process of con-

(20) In paragraph 45 of the judgment cited above.

(21) *London Borough of Newham v Khatun and Others* [2004] EWCA Civ 55.

tracting. This is a good example of the way in which the Harmonisation of consumer law relating to a wide range of largely European Consumer law in general cannot affect English Contract law in the way it can, perhaps, affect General Contract Law in the Civilian tradition of Europe.

III. The Civilian tradition in Europe is still dominated by the thinking of the Pandektenwissenschaft, which constructed a formidable dogmatic structure by, among other things, treating Roman law remedies as examples of the application of General Principles- a sort of science, in which remedies as legal facts are explained as empirical evidence of dogmatic principles and rules. In this tradition any innovation or change at the bottom must be made to fit the underlying science, or, to put it differently, the existing underlying theory has to be modified to accommodate the new legal facts. This is why any largely non-systematic interference with Contracts on a European level could have important implications in Continental legal systems. In the absence of a general theory, English law is largely immune from such threats.

But there is one more reason why the Sectorial harmonisation approach, so evident in the CFR Annex provision for a codification of the Law of Sale and the Contract of Insurance, and also in the Green Paper on Consumer law, is foreign to the thinking of the common law (22). As pointed out by Professor Clark in his testimony on behalf of the Confederation of British Industries to the House of Lords hearings on the Harmonisation of European Private Law initiative of the Commission (23), this approach reflect-

(22) It should be added that the Commission's 2003 Action Plan also referred to "service contracts". Thus, first meetings with stakeholders in preparation of the CFR will be concerned with proposed rules for commercial agency, for franchise and for distribution contracts.

(23) Lord Grenfell (chairman, Committee), Lord Scott of Foscote (chairman, Sub-committee E) (editors), European contract law - the way forward?: report with evidence 12th report of session 2004-05 House of Lords papers 95 2004-05, The Stationery Office 2005. Also

ed the civil law approach to classifying types of contract (24). In Professor Clark's experience many modern business contracts defy categorization. As he pointed out:

‘If I were a Continental lawyer I would say it is perfectly feasible to have specific rules but from a common lawyer's perspective I think it is an undesirable development’ (25).

Second, English and Continental Contract laws are worlds apart for two important reasons, one historical and one social (although the two are, of course, interlinked).

Historically, the English Common law of Contract developed from litigation over essentially Commercial or Maritime contracts, with a clear exclusion of non synallagmatic, or gratuitous, promises, which were left to Equity and the law of Trusts to sort out (26). Any general rules about formation, terms, performance, breach and remedies that English law appears to accept are, in fact, rules that the courts worked out in Commercial and Maritime law cases. Sale of Goods, Insurance and Bailment Contracts were early off shoots of special contracts, still remaining, however, entirely Commercial in nature. And the reality of Commercial relations was always a paramount concern of the judges, the pragmatic prevailing over the doctrinal, whatever the latter might mean. A famous example of this is the so-called waiver rule (27)

available online at <http://www.publications.parliament.uk/pa/lld200405/lldselect/ldeu-com/95/95.pdf> (last visited 26.2.2008).

(24) Lawyers in the common law countries of the EU (including now Cyprus and Malta, besides the UK and the Republic of Ireland), generally share the view of the Law Society of England and Wales that there is a need to lobby for due recognition of common law principles in the CFR. It is feared, as put by the Law Society, that the civil law would dominate the CFR to the possible detriment of the common Law: ‘The Law Society mentioned the need for the CFR to take into account “terminology and concepts derived from common law, particularly where these have been used effectively in an international trade context”: *supra*, note, 23, at no. 33.

(25) *Ibid.*, *supra*, note 23, at no. 32.

(26) See the brilliant account by Professor Bernard Rudden, ‘The Domain of Contract’, in *Contract law Today, Anglo-French Comparison*, Donald Harris & Denis Tallon (editors), OUP 1991.

(27) Cf Chitty on Contracts, nos 1495 f.

that defies without any hope of doctrinal explanation the so-called rule of Consideration, which would require fresh Consideration for every voluntary derogation from an agreed Contractual term. Things are radically different in Continental legal systems where a Contractual General Part can only be conceived as encompassing both so-called 'onerous' and 'gratuitous' obligations and where, moreover, Commercial law is in most systems a special status law, applying only on those who are recognised as traders or merchants. Indeed, for such systems an additional problem created by European Contract law horizontal Sectorial harmonisation is that this activity clearly excludes gratuitous obligations (gifts).

In the wider social context, English Contract law has developed as a mechanism of enforcement of non-gratuitous promises, with a very limited wider moral outlook, intended to protect first society's interest in the efficient division of labour and, second, legitimate interests of parties entering into essentially commercial or financial transactions. This has been the only basis on which '*pacta sunt servanda*' in English law. In the Continent, on the contrary, the binding effect of Contracts is normally attributed to the (originally Kantian) principles of personal freedom of will and personal responsibility, principles that, under Natural (Canonical) law came to be regarded as important for the Law to protect by granting private parties law-making powers (28) in freely shaping personal relations, even with no financial or other material counterpart (promises of gifts). Despite its more contemporary language, the EU Commission communication on the content of the CFR is still based, essentially, in this natural law philosophy. The problem is, however, that the EU has no competence to engage into a major all-embracing legislative project of harmonising Pri-

(28) 'Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites': art. 1134, al. 1 of the French Civil Code; cf Laurent Aynés 'Le contrat, loi des parties', *Cahiers du Conseil constitutionnel* N° 17, *Études et doctrine, Loi et contrat*, available online at <http://www.conseil-constitutionnel.fr/cahiers/ccc17/contrat2.htm> (last visited 37.2.2008).

vate law (29), which would have taken due notice of the great Civilian tradition of the Law of Obligations. The failure of the Constitution incorporating the Nice Charter of Constitutional Rights has exposed the stark reality of the EU's limited competence in the Private law field, which, according to articles 94 & 95 of the EU Treaty in combination with art. 5(1), only exists in areas where harmonisation is needed to remove obstacles to the proper functioning of the internal market (30). It is not surprising, therefore, that in the Green Paper all the fanfare of the original EU Contract initiative will now produce only an, albeit gigantic, mouse: the revision of the 8 Consumer law Directives (31). Thus, the proposed horizontal maximum harmonisation of Consumer law will necessarily fail to take place in a broader socio-political context, in which the Union would have the opportunity to express itself on the great principles of private law, the general clauses of the Law of Obligations, in a way that National legal systems in the Continent have done for centuries. These National frameworks of general clauses and principles will remain-some of them being of the hardest variety of *jus cogens*. Indeed, the more general timidity of all European Contract law codification initiatives, official or private, as expressed in the surrender of all *jus cogens* general rules to National systems, or in the idea of an' optional instrument' (32), an idea with which assorted pursuers of European legislative glory believe they can better market their products, are guaranteed to increase the conflict between harmonisation of Consumer law and General Contract law in Continental le-

(29) See the judgment of the European Court of Justice in ECJ Case 376/98 *Germany v Parliament and Council* (Tobacco Advertising Directive).

(30) The Commission does, however, consider differences in National Contract laws to be raising obstacles to the proper function of the Single Market in the case of trans-border transactions: see the Action Plan, *supra*, note 9.

(31) Avoiding, at least, the ' fallacy of the instant, complete solution' or 'the temptation of elegance' of every complete codification: Lord Goff in (1983) Proceedings of the British Academy 169, 172-173.

(32) Included in the Commission's Action Plan, above, note 9.

gal systems (33). Not so in England, however, where, as showed already, no General Contract law of such kind exists and, furthermore, no *jus cogens* general rules.

IV. Nevertheless, European Harmonisation in one specific sector, Competition law (34), has seriously affected English Contract law. Competition law affects Contract law in prohibiting a number of anti-competitive agreements. Article 81 of the EC Treaty and corresponding provisions in domestic law prohibits agreements between undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Indeed, the scope of those provisions goes well beyond Contract law, since the ‘concurrence of wills’ that is necessary for an agreement or concerted practice need not amount to Contract. In a most interesting recent development that offers a good example of the extent to which seemingly detached from Private law European Harmonisation can affect the General private law of Obligations, and, in particular, the Law of Civil (extra-contractual) liability, is the emergence of private competition law actions, that have always been possible under Articles 81 and 82 have only recently emerged in the Court of Justice’s Jurispru-

(33) An undesirable result neatly summarised by the great English lawyer and reformer of English Insurance law Sir Mackenzie Chalmers in the remark ‘It is cheaper to legislate than to litigate’: see Malcolm Clarke, ‘Doubts from the Dark Side-The case against Codes’, *op. cit. supra* note 16.

(34) The Harmonization of European competition law has occurred in three supporting streams.

The first is the enforcement over the last forty years of Articles 81 and 82 (formerly Articles 85 and 86), by the European Commission and Community Courts. The second is the more recent introduction of domestic laws that reflect EC competition law. In the UK, the Competition Act 1998, which came into force in March 2000, prohibits anti-competitive agreements and abuse of dominance in a manner reflecting Articles 81 and 82. And section 60 of the Act requires that the provisions of the Act must be applied consistently with EC jurisprudence. The third is the ‘Modernisation’ Regulation 1/2003, which came into effect on 1 May 2004, and which makes Articles 81 and 82 directly applicable by national competition authorities and courts. It also prevents national competition law going beyond Article 81 in respect of agreements that may affect trade between member states.

dence, last year in the case of *Manfredi* (35). Earlier, in the case of *Crehan* (36), a case involving beer supply agreements, it had been established that, as well as third parties, a party to an agreement in breach of Article 81 may bring a claim for damages arising from it. The UK House of Lords is currently looking into this case, also considering the wider, and also significant in terms of implications for domestic private law systems, question of the scope of the obligation of a national court to adopt findings of fact in a decision of the European Commission (37).

The idea that one can have the pleasure of European Contract law as an ‘option’, without the pain of European jus cogens, is unrealistic: it can only serve to give parties an additional option without teeth, when parties are already familiar with, and can help themselves from, a healthy choice of optional instruments, such as English, Swiss or New York Contract law (38). It is also of doubtful that the EU can claim competence for introducing such an optional instrument under the current Treaties, although it may be argued that such competence could be found in Article 308 of the EC Treaty (the so-called ‘flexibility clause’). One wonders why all this effort, all this scholarly brainpower and financial cost that Europe dedicates to the CFR (39), if the goal only is to

(35) Joined cases 295/04 to 298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (295/04) etc., 13 July 2006 (ECJ) 37-52; see note by Giorgio Afferni in *European Review of Contract law* 2007, 179-190.

(36) *Courage Ltd v Crehan*, [2001] ECR I-6297.

(37) On appeal from the judgment of the Court of Appeal in *Courage Ltd v Crehan* (No. 1), [1999] UKCLR 110.

(38) The Commission is optimistic that the CFR will also be useful to arbitrators. However, Professor Hugh Beale, one of the Editors in Chief of both the Lando Principles and the Draft Common Frame of Reference, has suggested that besides the three systems of choice mentioned here, arbitrators already have a ‘harmonised’ Contract law option in the UNIDROIT principles of Contract law: see evidence presented to the UK House of Lords: *ibid.*, *supra*, note 23, No. 52. They are, therefore, not likely to be very excited by one more version of these principles in the CFR.

(39) As bluntly put in the UK House of Lords European Union Committee Report on the CFR process: ‘the Commission must ensure that the exercise produces value for money’. The report concludes that ‘We detect no political desire or will at the moment to move towards harmonisation of European Contract law. That being so, we cannot avoid the question as to

give parties to Commercial Contracts (as opposed to Consumer Contracts where, of course, different considerations apply) the additional luxury of one more option: if this is what the business community wants, should the business community then, at least, not be asked to pay part of the significant cost to the European taxpayer of subsidising all the working Groups and so-called 'centres of excellence'? But, although there is some evidence that a harmonised set of rules is what some European businesses seem to favour (40), the British Confederation of Industries representing businesses in the UK seems to be clearly opposed to it. In its submission to the House of Lords, the CBI claimed that its own research had shown that differences in contract laws of EU member States were not a problem, or barrier to trade, for their members:

"Knowing what the differences were was more important than necessarily having harmonization" (41). An optional harmonized set of Contract rules would only add to the present difficulties in this connection.

V. It is no surprising that in the era of relentless financial globalisation economic arguments are generally seen as the most persuasive ones, and that the Commission in its various communications, including the latest Green Paper on the revision of Consumer Protection law, makes a mainly economic case for horizontal Sectorial harmonisation, based on the need to reduce the so-

whether it is really a good idea for the substantial resources of time and personnel involved in the Commission's programme to be expended on the CFR and the optional instrument, rather than on what is certainly needed, which is improving the *acquis*. We are sceptical as to whether the potential benefits will outweigh the costs. But the reality is that commitments, political and legal, have already been entered into: *ibid.*, *supra*, note 23, *in fine*.

(40) See, however, the empirical evidence from a Clifford Chance survey, published in Vogenauer & Weatherhill (editors), *Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*, Hart Publishing, Oxford 2006, where it is stated that 83% of business in the survey view the concept of a harmonised contract law favourably.

(41) *Op. cit.*, *supra*, note 23, No. 48.

called additional transaction costs in trans-border transactions caused by diverging National rules (42). But how can this argument hold when National *jus cogens* general rules may be left unaffected, and when the main aim of the Green paper, ie Consumer protection, implies necessarily additional transaction costs in the differentiation between Business to Consumer, Small Business to Big Business and (Big) Business to (Big) Business contracts? And it should be also mentioned that the general perception in the business community is that the most serious additional transaction costs are caused from differences in National systems not in pure Contract law, but in Tax, Administrative and Procedural laws, often in areas largely out of bounds for the Commission to propose harmonisation of National laws. To be economically efficient, horizontal Sectorial Harmonisation of Contract law would have to be superimposed on an indeterminate, possibly vast, amount of national rules and practices, not quite so promising prospect for the economic case made in its favour. The real risks of confusion and of anarchy on the ground are far greater than any perceived risk of damage to the pristine Contractual General theory of national laws. Furthermore, one feels intuitively that an extensive, centralised, bureaucrat-driven plan of horizontal Sectorial maximum Harmonisation, such as the one proposed in the Green Paper for the Consumer Protection laws of the 27 EU countries, has the air of passé and failed Governance models (one is reminded of vast Socialist centralised and centrally regulated economies), and does not inspire much confidence in its potential efficiency. Such large, centralised regulation defies what is increasingly seen as a clear advantage of leaving issues of private life to

(42) However, the idea of a Standard Contract Terms Directive, announced by the Commission in its original Action Plan, described by Professor Hugh Beale in his evidence to the House of Lords as a ‘dump squid’ (*Op. cit., supra*, note 22, No. 102), and now seemingly abandoned, did not appear to serve well the economic argument based on added-on transaction costs: As Professor Geraint Howells pointed out in his evidence ‘business seems to be quite happy to have diversity in its standard terms and to play to the different markets’ different expectations”, *op. cit., supra*, note 23, No. 102.

local regulation, which may achieve better protection of basic individual rights. The Second Rome Regulation on Private International Law (43), in combination with the First Rome Convention on Contractual obligations, could arguably help achieve such a local, and therefore, better, protection, if coupled with a *jus cogens* rule that the law applicable to all trans-border Consumer transactions in the EU will always be the law of the Consumer's country of residence. Far more important to consumers than pan-European rules surely is that the foreign Business that they are dealing with cannot benefit from its greater financial power in the issue of choice of law.

The current legislative programme of the Commission to harmonise the Consumer contracts sector and, in the CFR project, to codify the principles and rules of the General Part and the Contracts of Insurance and Sale, solely based as it is on an unconvincing internal economic argument, does not shows enough understanding of the function of Contracts in a Globalized economy, and the realities of the exercise of financial power in all three types of bargaining relations, B to C, B to SB and B to B. More importantly, it seems to me that the debate on the Harmonisation of Private law and its implications must take place against the wider horizon of financial Globalization, where 'soft' law, arbitration, corporate moral responsibility leading to increased self-regulation of corporate activity accountable to a global public audience (44) play an increasing role in the market place and compete with Contractual regimes. Should European Consumer Protection law also not be integrated into a Global framework of Consumer Protection? (45) Moreover, should our debates on Harmonising Private law in Europe not be informed by the shifting parameters

(43) Regulation (EC) No 864/2007 of the european parliament and of the council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), OJ L 199/40 (2007).

(44) See more in my paper 'A Global Concept of Justice-Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World', 67 Louisiana Law Review 1021 (2007).

(45) Protection, for example, from unethical work and production practices: see N.

of conceptions of Global Social Justice, shaped by experiences of global events of financial hegemony, dependence and exploitation? And how can we ignore the rising importance, in Europe and in the World, of alternative conceptions of economic relations, such as Shariah -compliant Contracts (46)?

The Commission's Green Paper on Consumer Protection harmonization and the revision of the eight Consumer directives shows a clearly sanitised aim of Ueber-regulation from Brussels on a technical level. The CFR project promises a dull, non-contextual summary of principles and rules already rehearsed in the Lando and UNIDROIT Principles and the CISG. From a more partisan Common law point of view, which, however, takes the wider interest of the European Common market, particularly the legal services market, into consideration, the current Contract law programme of the Commission poses more of an economic than a doctrinal threat: Professor Clark has summarised this problem as follows:

“English law is used not only for trade between England and other parts of the Community and the rest of the world, but between people who have no other connection with the UK whatsoever. Effectively it has become a global commodity and parties to contracts, particularly in the Far East, will as readily choose New York law as English law. The slightest suggestion that English law is becoming less certain in its outcome and they can switch very, very rapidly to using New York law with the consequential loss of economic activity for the UK particularly and that is not just lawyers' income, it is the associated income of institutions” (47).

Narayan, 'Colonialism, Informal Sector Work and Issues of Social Justice', in *derecho y justicia en una sociedad global* (Manual Escamilla & Modesto Saavedra eds., 2005).

(46) See, e.g., Rodney Wilson, 'Islamic Finance in Europe', EUI Working Papers, available online at http://www.eui.eu/RSCAS/WP-Texts/07_02p.pdf (last visited 27.2.2008). Kilian Balz, 'Islamic Finance for European Muslims: The Diversity Management of Shariah-compliant Transactions', Symposium: islamic business and commercial law, in 7 Chicago Journal of International Law 379-622 (2007).

(47) *Op. cit.*, *supra*, note 23, No. 120.

I am conscious of the fact that I have not been able to see much that is positive or exciting in the Contract law projects of the Commission. I am afraid that there is more criticism that I cannot enter into in this paper, to be levelled at what appears to be a lack of real concern for a social and political foundation of projects such as the CFR or the review of the Consumer law *acquis* (48). Typical is the text adopted by the European Parliament in its most recent resolution on European Contract law, which:

‘Highlights the importance of taking into account the European social model when harmonising contract law;’

while, at the same time,

‘Calls for differing legal traditions and systems to be respected’! (49)

It is obvious that, apart from a possible irreconcilable conflict between these two aims, assumptions are made in both statements that seem to endorse what are potentially large undertakings, upon which there is little evidence that the EU has at present any political will or authority to embark.

VI. But this paper might still end on a more positive note (50). It was completed, as it happens, at the time of the first publication online of the Interim Outline edition of the Academic Draft Common Frame of Reference (DCFR) (51). The work looks handsome and impressive (52). But, both in its scope and in its content, it goes well beyond the CFR announced in the Commis-

(48) See especially in this connection ‘Social Justice in European Contract Law: a Manifesto’ (2004) 10 European Law Journal 653-674, signed by a group of academics opposed to the purely technical revision of the *acquis* that perpetuates old social and economic models of the past.

(49) European Parliament resolution on European contract law and the revision of the *acquis*: the way forward (2005/2022(INI)).

(50) As it should; and I want to thank you, the reader of an earlier version that must remain anonymous, for this and all your other comments and quiet encouragement.

(51) *Supra*, note 5.

(52) Even this first ‘Interim Outline edition’ runs into 397 pages, with a 45-page index.

sion's Action Plan. This is a Draft of a Common Frame covering a large part the entire Law of Obligations, with the potential of being developed into a European Common Frame for the entire Private Law of patrimonial relations (53). A first, very superficial look at the text and contents reveals a serious effort of comprehensiveness and attention to analytical and systematic correctness. The so-called 'Model Rules' are compared in a table of derivations with the Principles of European Contract Law authored by the Lando Commission that provide most of the substance in the content of the most important Model Rules, and the general ideology of the DCFR. More importantly, a large part of the DCFR consists of definitions, both in the Model Rules and in a special Annex attached to the rules. Although it is desperately early to draw any conclusions, it may well be that in these definitions lies the most important, long-term potential of the CFR to influence convergence and evolution of European Contract Law, and, more generally, European Private Law (54).

It is, indeed, very significant, as the editors of the DCFR make clear that this 'academic' DCFR that has a coverage that is considerably broader 'than what the European Commission seems to have in mind for the coverage of the CFR The 'academic' frame of reference is not subject to the constraints of the 'political' frame of reference. While the DCFR is linked to the CFR, it is conceived as an independent text. The research teams started in the tradition of the Commission on European Contract Law but with the aim of extending its coverage. When this work started there were no political discussions underway on the creation of a CFR of any kind, neither for contract law nor for any other part of the law. Our contract with the Research Directorate-General to receive funding under the sixth European Framework Programme

(53) See *infra*.

(54) Significantly, article I.-1:101 of the DCFR states that: 'These rules are intended to be used primarily in relation to contractual and non-contractual rights and obligations and related property matters'.

on Research reflects this; it obliges us to address all the matters listed in paras. 37-39 above'.

Paragraphs 37-39 define the coverage of the academic DCFR as:

'The DCFR continues this coverage [ie of the Lando Principles of European Law] but it goes further. It also covers (in Book IV) a series of model rules on so-called 'specific contracts' and the rights and obligations arising from them. For their field of application these latter rules expand and make more specific the general provisions (in Books I-III), deviate from them where the context so requires, or address matters not covered by them.... The DCFR also covers rights and obligations arising as the result of an unjustified enrichment, of damage caused to another and of benevolent intervention in another's affairs. It thus embraces non-contractual obligations to a far greater extent than the PECL... In its full and final edition the DCFR will also cover some matters of movable property law, such as transfer of ownership, proprietary security, and trust law' (55).

The DCFR is, therefore, intended eventually to be a Draft European Code of Civil 'patrimonial' Law (a term originating in French legal terminology and no very happily translated into English), something not intended by the Commission's Action plan, but, as it turns out, contractually commissioned and paid for by the Commissions' Research Directorate-General under the sixth European Framework Programme. This cannot be dismissed as work of only 'academic' value. There can be justifiable concern that the Commission, by financing this much larger project, is creating not just a larger database, but a momentum for more ambitious harmonisation initiatives in the immediate future (56).

(55) *Op. cit.*, *supra* note 5, pp. 17-20.

(56) The UK Government seems to be on record as having a 'robust' position against such initiatives: Baroness Ashton on behalf of the Government said at the House of Lords debate on the CFR: "I do not accept that [the CFR] is a Trojan Horse, nor would I accept that we would want to move in any way, shape or form to harmonisation". The House of Lords con-

Furthermore, the DCFR makes no secret of the fact that its provisions are intended to have an impact on both the general part of Contract law and the Specific Contracts law, a number of rules about which are also included (again, by contrast to the Commission's CFR plan that would only include rules for two such contracts, Insurance and Sale). And also states that:

‘There are good reasons for not including only rules on general contract law in the DCFR. These general rules need to be tested to see whether or in what respect they have to be adjusted, amended and revised within the framework of the most important of the specific contracts. Nor can the DCFR contain only rules dealing with consumer contracts. The two Groups (57) concur in the view that consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but cannot be developed without them. And ‘private law’ for this purpose is not confined to the law on contract and contractual obligations. The correct dividing line between contract law (in this wide sense) and some other areas of law is in any event difficult to determine precisely. This DCFR therefore approaches the whole of the law of obligations as an organic entity or unit. In the final edition, some areas of property law with regard to movable property will be dealt with for more or less identical reasons and because some aspects of property law are of great relevance to the good functioning of the internal market’ (58).

This holistic, systematic approach to the ‘the whole of the law of obligations as an organic entity or unit’, also integrating Consumer law into the General Contract law, and emphasising the interplay between those two, may justify a long and serious debate as to its legitimacy, the legitimacy of its financial sponsorship by the Commission, and its impact on national Contract laws in all European legal systems in the Civil law tradition. For the

cluded with some relief (op.cit., supra, note 23, No. 66) that ‘The [UK] Government would not support the establishment of a European contract code’. Vediamo!

(57) The DCFR was jointly prepared by two groups, the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group).

(58) *Ibid.*, p. 20.

common law systems of Europe, it is so alien as to make it more difficult for it to have a direct impact (59). Despite several, mainly academic, efforts to create an organic framework for Private law and the Law of Obligations, starting with Lord Mansfield's fascination in the 19th century with French Contractual theory (60), and culminating more recently in the late Professor Peter Birks's impressive efforts in promoting the concept of an English Private Law (61), the common law of Contract has resisted stubbornly such a reform, drawing its vitality and Cosmopolitan appeal from arbitration awards and settlements of world merchants and corporations, beyond the confines of Continental Europe. But the times may be changing. As the experience of the transnational litigation generated by the Vienna Convention, and the popularity of the UNIDROIT principles among arbitrators have shown, the systematic-dogmatic construction of an organic whole for all Private Law, pioneered in Europe by the German Pandektenwissenschaft of the 19th century, and so impressively carried forward enriched by the common law experience, in the DCFR, may still be the future. And the common law may be the poorer for not catching up.

(59) Nevertheless, the UK Government was sufficiently worried by the more general turn of events in EU legal policy-making, as to publicly include the preservation of the integrity of the common law as one of the UK's 'red lines' in negotiating the new Lisbon Treaty. These red lines, according to the Prime Minister, Gordon Brown, are: The UK's right to decide its own social and labour laws; common law, police and judicial processes; foreign and defence policies and tax and social security systems. Cf the report in the independent newspaper on the day of the official signing of the Treaty in Lisbon, available online at <http://www.independent.co.uk/news/europe/brown-heads-to-lisbon-defending-decision-to-reject-referendum-397150.html> (last visited 27.2.2008).

(60) Examples of the influence of Civilian writers on Lord Mansfield can be found in the cases of *Goss v. Withers* (1758) 2 Burr 683; *Pelly v. Royal Exchange Assurance Co.* (1760) 1 Burr 341; see, generally, WS Holdsworth, a history of english law, London, 1938, vol 12, 467; D Coquillette, 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law' (1987) 67 Boston University Law Review 877, 949-62.

(61) Cf Peter Birks (editor) English Private Law, 2 Volumes plus the Second Cumulative Updating Supplement, Oxford 2004. But this work is more of an exercise in taxonomy rather than an attempt at a coherent dogmatic construction of the kind undertaken by the Pandektenwissenschaft in 19th century Germany.

2M560.HAJ