

## **THE COMMON FRAME OF REFERENCE FOR EUROPEAN PRIVATE LAW**

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**Helmut Grothe**

Dr. jur. Osnabrück, 1988.

Catedrático y Director del Departamento de Derecho Internacional Privado, Derecho Procesal Civil Internacional y Derecho Comparado

Freie Universität Berlin, Alemania

### **Sección doctrina**

#### **Resumen**

El Proyecto de Marco Común de Referencia<sup>1</sup> comenzó a gestarse ya en el año 1989, cuando el Parlamento Europeo planteó la creación de un Código civil europeo. En el año 2009 se publicó una segunda versión del texto (la primera data de 2007), como resultado fruto del trabajo de dos grupos de expertos, el Study Group on a European Civil Code y el Research Group on EC Private Law (Acquis Group). En buena medida el DCFR está basado en los Principios de derecho europeo de contratos (European Civil Code, 2009), principios elaborados en la década de los años ochenta por un grupo de expertos bajo la coordinación del jurista danés Ole Lando. La revisión presentada en el año 2011, llamada Feasibility Study (estudio de viabilidad) (European contract law), representa el fundamento del trabajo para la elaboración de un futuro Derecho contractual europeo. El DCFR contiene una serie de principios, definiciones y reglas modelo de Derecho privado europeo que pretenden servir como preludio de un Marco Común de Referencia con respaldo político, dejando de ser un trabajo puramente académico.

La idea que ha gobernado en la elaboración del Proyecto de Marco Común de Referencia era el proponer un “instrumento opcional” a nivel europeo, sin pretender imponer una codificación forzada del

Derecho contractual europeo. Así, por ejemplo, las partes, en el momento de concluir un contrato, tendrían la posibilidad de optar por la aplicación de las reglas contenidas en este instrumento en vez de seguir las prescripciones estrictas del Derecho internacional privado, que en la mayoría de los casos enfrenta a una de las partes con sus problemas típicos: aplicación de un ordenamiento jurídico desconocido y disponible solamente en un idioma que esa parte no domina a alto nivel. Pese a que esta configuración como “instrumento opcional” era la idea inicial, lo cierto es que la propuesta actual guarda muchas similitudes con un Código civil.

Si nos adentramos en su contenido, por lo que se refiere al Derecho de contratos, el Proyecto de Marco Común de Referencia contiene reglas para varios tipos contractuales, abarcando facetas como la conclusión del contrato o las obligaciones de las partes, ya sean contractuales o pre-contractuales. Entre otros, se regulan el contrato de compraventa, los contratos de arrendamiento y de servicios, etc.

### **Palabras Clave**

Derecho europeo civil - Derecho de contratos - Marco Común de Referencia - Derecho civil – Acervo.

### **Abstract**

*The work on a Draft of a Common Frame of Reference started in 1989, when the European Parliament proposed the creation of a European Civil Code. A first version was published in 2007 and a second version in 2009, as a result of the combined work of two expert groups: The Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). To a large extent the DCFR is based on the Principles of European Contract Law, elaborated during the eighties under the direction of Ole Lando. The feasibility study presented in 2011 presents the pillars for a future European contract law. The DCFR contains a series of principles, definitions and models of European private Law that pretend to be a framework for a Common Framework Reference with political support, thus ceasing to be a purely academic work.*

*The idea that rules the project of a Common Frame of Reference is to propose an “optional instrument” without imposing a codified European Contract Law. In this way, the parties have the possibility, at the moment of concluding a contract, to opt for the application of the rules contained in this instrument rather than following the*

*strict rule of conflict of laws which –in the majority of the cases- lead one party of the contract to face the usual problems: being subject to a foreign, unknown law at hand only in a language which that party does not master at a very high level. Despite the initial idea being that of an “optional instrument”, the current proposal is very similar to a Civil Code.*

*A closer look at the content of the DCFR, as far as contract law is concerned, indicates various types of contracts, such as a contract for the purchase of goods, a rental contract and for rendering services. Detailed regulation can be found on pre-contractual faith, obligations and remedies etc.*

### **Keywords**

*European civil law, contract law, Common Frame of Reference, civil law, Acquis Group.*

### **Summary**

- I. Historical Overview
- II. The Objectives and Functions of the Common Frame of Reference
- III. A Common Frame of Reference, not a European Civil Code
- IV. Drafting Style and Coverage
- V. Structure of the “Common Frame of Reference”
- VI. Examples of single clauses
- VII. Conclusion



## **THE COMMON FRAME OF REFERENCE FOR EUROPEAN PRIVATE LAW**

### **I. HISTORICAL OVERVIEW**

The Principles of European Contract Law, short “PECL”, were first presented in 1995 (European Contract Law, 2006). They were developed by the Commission on European Contract Law upon request from the European Parliament and are a set of model rules, drawn up by contract law academics in Europe (European Contract Law, 2006). They contain basic rules of contract law and more generally the law of obligations which most legal systems of the Member States of the European Union hold in common (Hellwege). The Academic Draft Common Frame of Reference, presented by the Study Group on a European Legal Code which continues the work of the Commission on European Contract Law, includes the PECL (Bar. C, 2008, pp: 3). To a large extent the DCFR is based on the Principles of European Contract Law, elaborated during the eighties under the direction of Ole Lando. The feasibility study presented in 2011 presents the pillars for a future European contract law. The DCFR contains a series of principles, definitions and models of European private Law that pretend to be a framework for a Common Framework Reference with political support, thus ceasing to be a purely academic work.

The idea that rules the project of a Common Frame of Reference is to propose an “optional instrument” without imposing a codified European Contract Law. In this way, the parties have the possibility, at the moment of concluding a contract, to opt for the application of the rules contained in this instrument rather than following the strict rule of conflict of laws which –in the majority of the cases- lead one party of the

contract to face the usual problems: being subject to a foreign, unknown law at hand only in a language which that party does not master at a very high level. Despite the initial idea being that of an “optional instrument”, the current proposal is very similar to a Civil Code.(Meyer,2007)<sup>2</sup>

The Commission based its actions regarding the DCFR on Art. 114 TFEU. The competence of the EU for the elaboration of a future “European Civil Code” is disputed.<sup>3</sup> The only two articles in scope are Arts 114 and 352 TFEU.<sup>4</sup> Article 114(1) TFEU states that the Union may adopt ‘measures for the approximation of the provisions (...) in Member States which have as their object the establishment and functioning of the internal market’. Art 352 TFEU empowers the adoption of measures where ‘action by the Union should prove necessary (...)to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers’. The wordings of Art 352 TFEU make it clear that the provision is one which may be used when no other legal basis is suitable. This means that the two articles are mutually exclusive, rendering any discussion of dual legal bases unnecessary insofar as this article is concerned (Low, 2012). At the current time, however, the Commission does not envisage a full harmonization of contract law in Europe.<sup>5</sup>

## **II. THE OBJECTIVES AND FUNCTIONS OF THE COMMON FRAME OF REFERENCE**

The “Common Frame of Reference” serves as a source of inspiration for all of those who are confronted with problems of Private Law in Europe, like for example the various legislators or courts with the aim of reducing those problems by presenting them with an adequate solution (*Hesselink. M, 2008, pp: 919-971*). It also can be applied to any international or domestic contract if wished by the parties (*Demeyere. L, 2003, pp. 247*).

The advantages of the “Common Frame of Reference” are numerous: If incorporated into the contract by the parties, it simplifies the cross-boarder exchange for small and medium enterprises since they need not inform themselves about the

legal situation in the other country and consumers don't have to worry about their protection in a specific foreign law (Bar. C, 2008, pp: 2.3). Moreover, the "Common Frame of Reference" can promote the exchange of students and law teachers in Europe, because the law taught in classes will be based on the same text (Bar. C, 2008, pp: 2.3).

On the political side, the priorities are still undefined and the future of the „Common Frame of Reference“ is not completely clear (CCBE). The plenum of the European Parliament never discussed it and the European Commission continues to call it an „Optional Instrument“ with a „toolbox function“, a statement which underlines its existence in addition to the legal systems of the Member States (Bar. C, 2008, pp: 2).

But there are also critical voices (Smits.J, 2008, pp: 145-148) in respect to the intentions of unifying European Private Law: They fear a ruin of the different legal systems in the Member States and propose a solution for the problems emerging of such a diversity of legal cultures in form of a dictionary which contains definitions and explanations of the juridical terminology in the different systems (Bar. C, 2008, pp: 3).

### **III. A COMMON FRAME OF REFERENCE, NOT A EUROPEAN CIVIL CODE**

Yet does the "Common Frame of Reference" already present a European Civil Code? The question can be answered in both a negative and positive way: Negative, because the "Common Frame of Reference" is not a juridical instrument passed by a national parliament like the French Code Civil or the German *Bürgerliches Gesetzbuch* (Bar. C, 2008, pp: 2). It is, thus, lacking the full backing of a duly elected legislative body, which in this case would be the European Parliament. This is certainly one of the main points criticized so far. Further criticism is expressed that the CFR is far removed from the present European acquis. Both in terms of structure and the wording of its provisions, it is comparable to a national civil code. However, the motivation for this project was the European Commission's desire for a revision

of the existing European directives in the field of private law with a view to dealing with their fragmentary, inconsistent and not so effective character. As such, it seems reasonable to judge the Draft-CFR according to the extent to which it improves the existing *acquis* (Smits.J, 2008). Some of the proposed provisions indeed do so (the draft deals with duties to provide information to the consumer, the effects of exercising the right of withdrawal and the creation of a uniform withdrawal period of 14 days). But most of the provisions do not relate to the existing *acquis* at all, is claimed. This is understandable, as it is a clearly academic Code. The question can, however, be answered positive, if it becomes a successful instrument used by the free wish of the parties (Bar. C, 2008, pp: 3). It can be an optional toolbox, by means of opting in. And by the way, the term “Code” has not been defined homogeneously by the different European Member States; this notion is used in many senses (Bar. C, 2008, pp: 3). There is, in other words, no reason against also calling the Common Frame of Reference a “Code”.

#### **IV. DRAFTING STYLE AND COVERAGE**

The common frame of reference follows the general style of the PECL. Without knowing what is *not* contract law it is difficult to determine what *contract law is*. Sometimes, for example, the differentiation between contract law and unjustified enrichment law is unclear and can differ for each Member State. Sometimes contractual obligations and non-contractual obligations are so close to each other, that the separation of both and the resolution of the emerging problems by different law systems would be so unfavourable, that it was decided to regulate non-contractual obligations as well. A clear distinction for example has to be made with regard to *culpa in contrahendo*. Until the introduction of the ROME-II-Regulation, which clarifies the issue in its Art. 12, it was ambiguous at least in conflict-of-law terms across Europe.<sup>6</sup>

#### **V. STRUCTURE OF THE “COMMON FRAME OF REFERENCE”**

The CFR is structured as follows. The whole text is divided into books and each book is subdivided into chapters, sections,



and subsections (where appropriate) and articles (Bar. C, 2008, pp: 3). In addition the book on specific contracts (Book IV) was to be divided, because of its size, into parts, each dealing with a particular type of contract (e.g. Book IV. A: Sales) (Bar. C, 2008, pp: 7).

There are 10 books with the following content (European Civil Code, 2009):

- Book number I with General provisions
- Then Book II - Contracts and other juridical acts
- Book III -Obligations and corresponding rights
- Book IV Specific contracts and the rights and obligations arising from them
- Book V Benevolent intervention in another's affairs
- Book VI Non-contractual liability arising out of damage caused to another
- Book VII Unjustified enrichment
- Book VIII Acquisition and loss of ownership of goods
- Book IX Proprietary security rights in movable assets
- Book X Trusts; and at the end an annex with definitions.

The structure was chosen to incorporate the whole law of obligations in one connected instrument (Bar. C, 2008, pp: 7.8). It is disputed, whether the CFR has too strong a focus on consumer law, including it into the general part of the CFR (*Timothy. Q., Hesselink., M, 2009 pp: 62*). Currently, a Consumer Rights Directive is being drafted in the EU (European Parliament and of the Council, 2011) However, the Draft of the Directive does not refer to the CFR (*Loos, M. 2009*).

The Consumer Rights Directive as promulgated in late 2011 is therefore much reduced in scope, its provisions leaving aside almost entirely change to earlier (minimum harmonization) directives on unfair terms and consumer guarantees in sale (Low, G. 2012). However, a second legislative development of

importance for the present discussion was the new competence established by the Amsterdam Treaty, which allowed the EU to bring existing European private international law instruments on jurisdiction and on applicable law in contract within the framework of EU law and to add to them new instruments on applicable law. As a result, EU law now possesses uniform laws governing the law applicable to cross-border contracts and cross-border torts, whose justification was again the needs of the internal market. It is in this somewhat crowded legislative arena which we must place the recent Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Broadly, the proposal would set up an optional contract law instrument (the 'Common European Sales Law' or 'CESL') governing sales of goods, the supply of digital content and certain related services for contracts between traders (where one is a small or medium size business (SME)) and contracts between traders and consumers. It is another step towards a consumer oriented contract law. Already, consumer specific regulations are included in the DCFR.

According to the authors of the CFR, consumer protection law is included, because they consider it not an independent part of contract law, but rather a specific part that derives from the general principles (Bar. C, 2008, pp: 6).

## **VI. EXAMPLES OF SINGLE CLAUSES**

Several examples of the drafting style shall be given in the following paragraph. The first clause regards *Modification in certain form only*:

II. – 4:105: Modification in certain form only (Bar. C. 2009)

(1) A term in a contract requiring any agreement to modify its terms, or to terminate the relationship resulting from it, to be in a certain form establishes only a presumption that any such agreement is not intended to be legally binding unless it is in that form.

- (2) A party may by statements or conduct be precluded from asserting such a term to the extent that the other party has reasonably relied on such statements or conduct.

It is considered a compromise compared to current legislation across Europe. The so called *no oral modification clauses* (*NOM-clauses*), are treated very differently in many legislations.<sup>7</sup>

A second clause gives a definition of a contract: *A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect- (Art II.-1:101(1) DCFR)*. This is supposed to make clear that, according to the terminology of the DCFR, the agreement itself, so far as it is intended to have the given legal effects, is considered to be a contract, and not either the legal relationship resulting from the contract, or the document usually containing the contract (*Jansen, N. Zimmermann, R 2008 pp:8,*). Some open questions remain: What is a binding as opposed to a not-binding legal relationship? What is an agreement? Must the addition of the term „binding- be taken as ruling out mere extra-legal social arrangements as contracts? But do such arrangements then create a legal relationship – though not a binding one? And as far as the agreement is concerned it hardly seems helpful to define one doctrinal category with another one that remains itself undefined (*Jansen, N. Zimmermann, R 2008 pp:8,*).

A rule on mistake is now found in Art II.-7.201 DCFR which reads:

- (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
- (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
  - (b) the other party
    - (i) caused the mistake;

- (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
- (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or
- (iv) made the same mistake.

(2) However a party may not avoid the contract for mistake if:

- (a) the mistake was inexcusable in the circumstances; or
- (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

In view of the disparate comparative picture of the law of mistake the authors of the DCFR present their rule not as a representative restatement but as an expression of a „fair balance- between the „voluntary nature of contract and protecting reasonable reliance by the other party- (*Jansen, N. Zimmermann, R 2008 pp:11,*).

As a conclusion, the drafting style of the CFR shows clearly that a pan-european approach was taken, carefully examining the legal traditions in most member states and balancing the current tendencies.

## **VII. CONCLUSION**

Despite the influence which the Principles of European Contract Law have had on academic writings and the references which were made by many European supreme courts, it cannot be forgotten that such a draft by experts is not an official, legislative instrument (Bar. C, 2008, pp: 8). However, such large scale projects usually set the grounds for following legislative projects and are then referred to or largely incorporated.<sup>8</sup>

Yet today it seems more probable than ever that Europe will get its Common Frame of Reference (*Busch & Domröse Z*, 2012). The “Common Frame of Reference” has the support of the European Parliament and the Council (Bar. C, 2008, pp: 8). So we shall see what the future holds, if one day we have a unified civil code throughout Europe.

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## Notes

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