A European Contract Law: a cuckoo in the nest?

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Hugh Beale
“Hard” contract law

- EU Directives
- Consumer
  - Regulatory
    - Misleading advertising
    - Unfair commercial practices
    - Consumer credit
- Private law
  - Doorstep and distance selling
  - Unfair terms
  - Consumer sales
- Commercial
  - Late payments
  - Commercial agents
- Regulations: Rome I & II, Brussels I
A “Common Frame of Reference”

- A guide (or “toolbox”) for legislators and courts
- An optional regime of contract law
  - Alternative to existing national law
  - Cross-border contracts
  - “28th legal system”
    - (misleading)
- Do we need either? Is either a threat?
Neutral rules for international transactions

- International Conventions
  - Vienna, International Sale of Goods (CISG)

- International “soft law”
  - Unidroit Principles for International Commercial Contracts
European Restatements

- Academy of European Private Lawyers (Gandolfi)
- EC Group on Tort & Insurance Law (PETL)
- Restatement of Insurance Law
- Commission on European Contract Law (Lando)
Principles of European Contract Law

- Parts I & II (2000)
  - Formation, validity, contents & effects, performance, remedies

  - Multiple parties, assignment, set-off, prescription, illegality, conditions

- Functional approach

- Articles, Comments and comparative Notes
Uses for ‘Restatements’

- Cannot replace national law: Rome I Reg
- Express adoption by parties as part of contract
- By arbitrators as *lex mercatoria*
- Models for national laws
- terminology and concepts for EC Law
- translation tool
Study Group on a Euro CC
(von Bar, Osnabrueck)

- sales, services, long term contracts
- leasing, loans, personal security
- unjust enrichment, negotiorum gestio
- tort
- security over moveable property
- title to moveable property, trusts
Aquis Group (Schulte-Noelke, Bielefeld/Osnabrueck)

- Principles of Existing EC Private Law
Action Plan on European Contract Law

- Communication on European Contract Law (2001)
  - Divergences do impose additional costs
  - Improve the *acquis* using a Common Frame of Reference
  - Promote EC-wide contract terms
  - Reflect on an optional instrument

- CFR:
  - assist in revision of the acquis
    - common fundamental principles of contract law
    - definitions of key concepts
    - model rules
  - basis of possible Optional Instrument
- Review of 8 consumer directives
- Use existing research
FP6 Network of Excellence (CoPECL)

- “Principle Drafting Groups”
  - SGECC
  - Acquis group
  - Insurance contracts
  - Terminology in EC contract law (Turin)

- Evaluative groups
  - Law & Economics group
  - Association Henri Capitant/Société de Législation Comparée

- Database, Conferences
The Draft CFR (Sellier, 2009)

- Outline Edition (articles only)
- Full edition (also OUP)
Green Paper 1 July 2010

Options
- Do nothing
- Tool box (various forms)
- Recommendation to MS
- Optional Instrument
- Directive on European Contract Law
- European Civil Code

Useful? Useless? Dangerous?
The real options

☐ NOT a Civil Code
☐ Nor a single European contract law
☐ A “toolbox” CFR
☐ An Optional Instrument
A “toolbox” CFR

- assist in revision of the acquis
  - common fundamental principles of contract law
  - definitions of key concepts
  - model rules

- Principles, definitions, model rules
  - A composite phrase?
  - Reflections of functions of “toolbox”
Definitions

- Terms used without definition
  - “Damage” (Simone Leitner)
  - When a “contract is concluded”
  - “Rescission”

- Interpretation by ECJ / in MS

- Implementation in MS
  - Notes show differences from national laws

- Drafting
  - Recital that CFR meaning unless provided otherwise
Model rules

- “model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged”
- “best solutions found in Member States’ legal orders”
- Explanation of policy choices
“Fundamental Principles”

- Meaning unclear

- Introduction:
  - Underlying principles
  - Freedom of contract, sanctity of contract
  - Need to intervene
    - to protect vulnerable
    - where one party not fully informed
  - Series of “principles” [aims] or discursive?
  - Association Henri Capitant: *Principes Directeurs*
  - Suggestions to legislator on how to balance
“Essential background information”

☐ what is needed in Directives, what is not needed
   ▪ Duty to disclose?
   ▪ Remedies for misrepresentation

☐ To draft Directives that will “fit” national laws
   □ Not all rules are “common core”
      ▪ No general principle of good faith in common law
      ▪ Cannot assume Directive would be supplemented by good faith requirement
      ▪ Therefore should provide one
Content

- The DCFR
  - general contract law
  - consumer rules
  - sales, services, long term contracts
  - leasing, loans, personal security
  - unjust enrichment, negotiorum gestio
  - tort
  - security over moveable property
  - title to moveable property, trusts
Contents of the CFR

- **Way Forward:**
  - Rules of general contract law
  - Consumer contracts
  - Sales
  - Insurance contracts

- **FP6: grant process, not commissioned**
  - What FP6 would fund, not what DG Sanco needed
  - What researchers thought should be included
  - What was already being worked on
    - All SGECC/ Acquis Group work part-funded
Academic vs political CFR

- Academic CFR
- Political CFR may be narrower
  - Council: General and consumer contract law
  - Sales?
- “Toolbox” should be as wide as possible
  - No implication of legislation
Coverage beyond contract

- Unjust enrichment
  - After withdrawal or termination
- Tort
  - Product Liability Directive
  - Pre-contractual duties
    - (Mainly within PECL validity chapter)
- Security over moveables
  - Retention of title (Late Payment Directive)
- Ownership and Possession of Goods
- ? Trusts
- ? Benevolent intervention
Structure of the DCFR

- Broader, more complex than PECL
  - Consumer
  - Special contracts
  - Non-contractual liability
- Compilation and Redaction Team
  - Redactor: Professor Eric Clive
- Book II
  - Rules on contracts in general
- Book III
  - Rules on performance and non-performance of obligations
  - Change in terminology
Concepts and terminology

- **PECL:**
  - Aimed at business persons
  - Simple, “populist” language

- **DCFR**
  - Technically correct
  - PECL: “making of contract”, “termination of contract”
  - DCFR: contract = the agreement
    - “termination of obligations” or of “contractual relationship”
  - Aimed at legislator, draftsmen
Revision of the consumer acquis

- Prioritised after 2005
- Green Paper (Feb 2007)
- Distance & Doorstep selling, Unfair terms, Consumer sales
- “Horizontal instrument”
  - E.g. withdrawal periods
- Some ideas from DCFR but not detailed drafting
- Full harmonisation
  - Shift of emphasis from consumers to businesses
“Full harmonisation”

- Consumer rules
  - Rome I Regulation, article 6
    - Parties may choose law
    - Consumer entitled to mandatory rules of Law of state of habitual residence
      - If directed at that state
    - SMEs selling across borders
      - Must know laws of each country targeted
  - Internet shops
Full harmonisation abandoned?

- FH: MS cannot give additional protection
  - In some MSs, consumer protection reduced
  - But only “within scope” of CRD
    - Too narrow or too broad
    - Uncertain
- pCRD “targeted full harmonisation”
  - Council draft 3 Dec 2010
    - Largely full harmonisation
    - Distance and “off-premises” sales only
- Optional Instrument
  - Governing law to replace national law
  - The “Blue Button” (Schulte-Noelke)
The “Blue Button”

- Business should be required to
  - Provide protection of law of C’s habitual residence; or
  - Supply on terms of optional instrument
    - If C agrees by pressing the “blue button”
- Mandatory consumer protection plus general contract law
Expert Group

- Commission Decision 26 April 2010
- “As if” basis
  - Optional Instrument
  - Toolbox?
- “Workable Optional Instrument”
  - B2B and B2C
  - Sales only but expandable
    - General part: suitable for any contract
The OI and PIL

- Commission decision, not yet taken
- Current thinking:
  - Substantive law approach
  - Regulation introducing into law of each MS
  - Cf CISG but “opt-in”
    - Opt-in = opt-out of CISG
  - Rome I art 6 by-passed
    - OI is part of law of C’s habitual residence
  - ? Exclude use of art 9 for consumer law
B2C sales

- Sales provisions
- General contract law
- Acquis minimum requirements
  - Unfair Terms, Consumer Sales
- Acquis full harmonisation: copy in
  - pCRD (distance & off-premises selling)
- Consumer Credit Directive (instalment sales)?
“High level of consumer protection”

- In MS where protection at minimum level, no loss if choose Blue Button
- In MS where high protection, will reduce protection
  - To make attractive, high enough level that C confident that reasonably protected
  - Higher than minimum harmonisation requirements
  - Not so high as to discourage businesses
“Consumer sub-group” of EG

- Where does DCFR go beyond minimum?
- Where do national laws go beyond minimum on matters within scope?
  - E.g. blacklisted terms
- Where do national laws have rules outside scope of acquis go beyond DCFR?
  - E.g. lesion, Nordic Contracts Act s 36
- Which should we include in the CFR?
Is a Blue Button desirable?

- UK consumers
  - Probably little difference
- MS where higher levels
  - Depends on level in OI
- Trade-offs:
  - Businesses: single system vs higher levels of consumer protection
  - Consumers: protection vs increased competition
- B may offer choice but probably Blue Button or nothing
An OI for domestic use?

- Need not be limited to cross-border contracts
  - Why two systems of law?
  - Difficulty of “locating” buyer
  - If Bs prefer the OI for domestic contracts, why not allow its use?
- Question for national legislator
B2B: who might use it?

- B2B contracts
  - Sales first, then supply of goods and of services
- Non-national ("neutral"), in many languages
- Single “operating system” / platform for businesses across the EU
- Larger firms:
  - Sell c/b via subsidiaries
  - Expertise
  - Higher value contracts
  - Often riskier transactions
- Should aim at SMEs
What do SMEs want?

- More risk averse
- Would like protection if
  - Non-disclosure: Unknown unknowns
  - Surprising or harsh general conditions
  - Behaviour inconsistent with GF and fair dealing
- Could harmonise for SMEs
  - Problems of definition
- Self-selection: Option to choose law
Why would other party agree?

- If SMEs prepared to pay “price”, other businesses will find it worth offering the OI
- If other refuses, SMEs know riskier
- Not all SMEs will want this “insurance”
  - They will not opt for the OI
150 articles: a self-defeating limit?

- Likely coverage
  - Basic general contract law
  - Consumer provisions
  - Sales
  - Not “PECL Book III” matter

- “Single operating platform”
  - Useful only if covers most questions
  - The narrower, the less useful

- Possibly “associated services”
Useful or a cuckoo?

- Optional Instrument
  - Sales and supply of goods and services
  - Cross-border and ?domestic
  - B2C: high level of protection
  - B2B: aimed at SMES
B2C

- No real threat to consumers
  - IF properly done and high level CP
- Also need CFR as a toolbox
  - Definitions
  - Model rules
  - Comparative information
    - If kept up to date
- And improved consumer acquis
  - Limited full harmonisation
  - To cover contracts outside OI
An optional instrument for B2B?

- Different philosophies
- Law shaped by cases
  - English law individualistic
    - No duty of disclosure
    - More left to agreement
    - Reluctance to allow challenge to terms
  - Law for large contracts, sophisticated businesses
- CFR
  - Duties to disclose
  - Detailed supplementary rules
  - Protection against unfair terms
  - Good faith in negotiations
B2B: threat or opportunity?

- The OI would merely provide a different choice of law
  - Designed for SMEs
  - Not suitable for “typical” English cases
  - OI no threat to English law because different market
  - Even if allowed for domestic contracts
    - Freedom of choice
    - More suitable?
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