

Department of Law public lecture

A European Contract Law: a cuckoo in the nest?

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Law lectures 2011

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in the nest?

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“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?
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Neutral rules for international transactions

☐ International Conventions

- Vienna, International Sale of Goods (CISG)

☐ International “soft law”

- Unidroit Principles for International Commercial Contracts
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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)
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Principles of European Contract Law

- Parts I & II (2000)
 - Formation, validity, contents & effects, performance, remedies
 - Part III (2003)
 - Multiple parties, assignment, set-off, prescription, illegality, conditions
 - Functional approach
 - Articles, Comments and comparative Notes
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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
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Aquis Group (Schulte-Noelke, Bielefeld/Osnabrueck)

- Principles of Existing EC Private Law

Action Plan on European Contract Law

- Communication on European Contract Law (2001)
 - Action Plan on A More Coherent European Contract Law (2003)
 - Divergences do impose additional costs
 - Improve the *acquis* using a Common Frame of Reference
 - Promote EC-wide contract terms
 - Reflect on an optional instrument
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The Way Forward (2004)

☐ 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

- Green Paper (2007)

☐ 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
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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”
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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
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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
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“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
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“Essential background information”

- what is needed in Directives, what is not
 - 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
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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
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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
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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
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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
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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
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Revision of the consumer acquis

- ☐ Prioritised after 2005
 - ☐ Green Paper (Feb 2007)
 - ☐ Draft Consumer Rights Directive, October 2008
 - ☐ 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
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“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)
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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
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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
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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
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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)?
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“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?
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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
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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
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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
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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
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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
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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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