Comparative Law in Eastern and Central Europe

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Edited by

Bronisław Sitek, Jakub J. Szczerbowski
and Aleksander W. Bauknecht

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INTRODUCTION

Comparative law is a research methodology that has been increasingly fashionable in recent decades. Comparisons between common law and civil law dominated the comparative law landscape. Many methods of comparative law were in use: comparison of legal rules, comparison of cases, comparison of legal theories. Each of them had strong proponents and opponents. Dogmatic comparisons of rules were criticized for not giving the whole picture of law in action, but praised for being the first and the only truly legal step in comparative research. Case-based comparisons were praised for enabling us to compare the true understanding of rules by courts, yet the critics of this method pointed out that only the higher courts' decisions are the subject of comparison, and most cases do not reach this stage. Comparisons of legal theories were praised for enabling us to know the spirit of the laws, yet the opponents would argue that many countries sharing the same theory would draw opposite conclusions from it.

The problems of comparative law did not stop it from becoming a mainstream method and subject in legal research. The objectives of comparative law varied from researcher to researcher. For Christian von Bar, unification of law by creation of just, efficient, secure, freedom-promoting private law was the aim of comparative research. For Tomasz Giaro, comparative law was a tool for acquiring deep knowledge about how the law works, and questioning the classical divisions between common and civil law. The whole spectrum of views on the purpose of comparative law varies greatly, from enthusiasts seeing in it the solution to all legal problems, by transplanting the best rules, to critics viewing it as a waste of time and money that has neither practical application, nor theoretical value. The scope of this book is, irrespective of your view of comparative law, unprecedented and useful. The science of comparative law in the East was extremely underdeveloped due to the Iron Curtain. Many areas of law, although known to the eastern academics, constitute an uncharted territory from the comparative point of view.

This book is a result of the attempted (and successful) introduction of comparative law into the region of Eastern and Central Europe. The subject has induced interest beyond expectations. It opens with a chapter on the unification of law, both from the perspective of institutional unification by such supra-state organizations, spontaneous and

institutionalized unifications between two or more legal systems, and the methods of choosing the right rules in the unification process. Chapters two and three follow the classical division of private and public law, proposed by the brilliant Roman lawyer Ulpian. The chapters comment on the current topics discussed in by academics in Eastern and Central Europe.

UNIFICATION OF LAW

THE STRUGGLE FOR A EUROPEAN LAW OF CONTRACT

CHRISTIAN VON BAR

UNIVERSITY OF OSNABRÜCK, GERMANY

It means a lot to me to be able to stand here before you today in Olsztyn to speak about a European project, which looks likely to assume historical importance. Where, if not here in the former Allenstein, can the impetus driving the creation of the European Union and the purposes served by the creation of a zone of freedom, security and justice be more evidently grasped? We, and especially those of us who are from Germany, which brought so much misfortune to this part of the world, should always remember this. I am extremely grateful for your hospitality and if I may, I would like to proudly advert to the fact that for many years, my home town of Osnabrück and Olsztyn have enjoyed a warm and fruitful partnership.

In the second half of 2011, the Republic of Poland will assume the Presidency of the European Council. Ensuring that the project that I wish to discuss today, namely the creation of a European Law of Contract and a common frame of reference (extending beyond contract law), will be lent a receptive ear by the European polity, and legislature thus hinges on Polish prowess! For the first time in its history, it appears that the European Union is about to create its own -European- contract law. Moreover, the creation of a tool box for the European legislature that would perhaps exist alongside a European Law of Contract is also mooted. As a minimum, this option constitutes a viable alternative provided that the consultations on this matter go well. This would create a set of European model rules possessing a terminological and systematical coherence, which would in all likelihood be referred to by the European and national legislature when drafting new laws involving private law.

However, we have not yet reached this stage. The struggle for a common European law of contract is not yet over. The Vice-President of the Commission and Commissioner for Justice, Mrs. Viviane Reding, will deliver a speech on the 3rd of June in Leuven detailing the initial findings and recommendations of the consultation process and outline the

legislative instrument that the Commission has in mind to implement a European law of contract. We reckon that by October or November there will be a proposal to implement an Optional Instrument in the form of a Regulation. However, much can happen in the meantime. The political tug-of-war continues to play a significant role in this process; not all European Ministries of Justice are visionaries. The never-ending back and forth, the untold prejudices and particular national interests of some stakeholders, the attempts to lobby members of the national parliament, the fear that European jurists have of the unknown, the palaver about the competition between the various legal systems and the ignorance of what has already been achieved – all of the foregoing is not only an annoyance and depletes energy, but in the worst case scenario, may also be effective. The world already looks towards Europe in the hope of seeing a clear signal from the continent that gave birth to private law. The Union should not fail to grasp this historic opportunity!

The conference in Olsztyn is a conference on comparative law. In the light of this, may I first of all state that the fact that so many are currently discussing the drafting of a new European private law is a veritable triumph for modern comparative law. Almost thirty years to the day have passed since a plan was hatched to establish the Commission on European Contract Law under the leadership of its Danish chairman Ole Lando; almost twelve years have passed since the founding of the Study Group on a European Civil Code; and six years since the Study Group joined forces with another research group, the Acquis-Group. Meanwhile, the establishment of a European Law Institute is just around the corner; we hope to put the finishing touches on the necessary documents in Athens in April and then establish it in Paris in the month of June.

The matrix of issues raised during today's discussions originated from or were proposed by scholars from the centre of European legal science, and everything so far is the product of research projects on comparative law. At the European level, the traditional lone legal researcher has been replaced by a research team. Teamwork encourages new insights. For me personally, the decisive point is that we once again, become conscious of our common private law heritage and we have attempted to bring this to light in the fundamental principles, definitions and in commentaries and annotations on the Model Rules. Whether one agrees with every aspect of the texts drafted is not that important. Neither this project nor an academic career will hinge on the outcome of the endless academic discussion on some detail in sales law. For Europe as a whole, this is of secondary importance. By contrast, it is paramount for Europe and its people that the internal market functions smoothly, not only the internal market for goods

but also that for services, which even today remains a problem area. The Euro can only remain strong and secure in the long term if it is the currency of a genuine internal market, if it matches the economic performance of the actors on the internal market and if everyone can do what they can best, unimpeded, and receiving adequate recompense for their services.

Perhaps, this economic aspect is not pivotal; instead cultural aspects may be more significant. We must take decisive steps towards creating a European culture of communality, especially we lawyers. We should not be deterred by opponents, who state that this project will sound the death-knell for competition between legal systems and will result in the loss of national legal cultures. This is because contract law (quoting Ole Lando) is not the stuff of folklore, and legal orders can neither run nor jump. Legal systems are not competing to win beauty pageants or to earn money. Their point of reference is solely justice as an absolute value; without this they would not be legal orders. I shudder to think that I should speak of legal systems in terms of winners and losers. If their respective triumphs and failures should be seriously evaluated, i.e. by means of statistical data, then at the very most, only where party autonomy under the conflict of laws permits choice of law. The yardstick would then be the frequency by which the parties chose a legal system designed to govern cross border transactions. The winner would be the system that was most frequently chosen to govern contracts. However, we are not in the possession of such numerical data and therefore will never know who has won this race. Moreover, we have no chance of discovering such information. We can only surmise that the legal systems of countries with large populations are statistically more likely to be chosen over legal systems of countries with smaller populations. Who or what will prove this conjecture? It serves to demonstrate that only economies and companies compete with one another, not legal systems. Any indicator of quality, however framed, cannot be derived on this basis. The Estonian private law is, for example, a monumental testament to intellectual prowess - only, who would choose it?

So where do we stand today? I think I may assume that you are all well-versed with the genesis of the Draft Common Frame of Reference (DCFR) as well as with the key parameters of the 20 year long political debate surrounding the creation of a European law of contract. If you recall, initially, there was even talk of creating a wholesale European private law and in the Parliament, even talk of a European Civil Code; therefore, the latter idea is mentioned in the Green Paper to which I will turn in a minute. Moreover, the Study Group on a European Civil Code,

on whose work a major part of the Draft Common Frame of Reference is based, also examined the entire law of obligations, i.e. contract law in its entirety, extra contractual obligations and even ventured into areas of property law, relevant to the internal market. Even today, it remains hard for me to comprehend why this work of the Study Group, especially the proposed rules on proprietary security rights in movable assets has been side-lined in recent debates. I also do not see any genuine political movement on this issue.

It is true that the Vice President and EU Justice Commissioner, Mrs. Reding, did opt to limit the substantive scope to contract law, but politically speaking the term 'contract law' also permits an array of other interpretations and could potentially include the regime of proprietary security rights within its remit and could certainly also include the law on dissolution of contracts. We find ourselves in the midst of a complex political process, in which the proponents of a European private law must finally speak out loud and clear. It is, in my view, quite straightforward: companies and their umbrella associations, who wish to trade unimpeded by extraneous legal barriers within the internal market in their economic sector, should now become more vocal. There is no good reason to confine this project to sales law; no legitimate reason to exclude the service sector entirely. Vice President Reding tentatively supported this view in an article written for the German newspaper 'Handelsblatt'. In the article, to illustrate an argument, she spoke pointedly of 'a … medium sized company that manufactures and offers, if necessary, repairs of washing machines'.[1] The noteworthy aspect of this example is the mention of a repair service; the mention of this, we must deduce, was not simply a matter of chance.

In the Green Paper mentioned earlier, entitled 'Policy options for progress towards a European Contract law for Consumers and Businesses', the Commission has identified seven (or indeed nine, depending on interpretation) possible means of making contract law in the EU more cohesive:

(i) The online publication of **model contract clauses** (non-binding) which be employed in contracts within the internal market.

(ii) A (binding or non-binding) *toolbox*, to which the EU legislator would have access when drafting new legislative proposals having a bearing on EU contract law, the aim here being to ensure consistency and coherence in legislation.

[1] Viviane Reding, *We don't have an Internal Market*, 5/6 Handelsblatt 72 (2010).

(iii) A **Commission Recommendation on Contract Law**, addressed to Member States encouraging them to incorporate 'an instrument on European Contract law into their national laws' based on the model of the Uniform Commercial Code.

(iv) An **optional instrument for European Contract law** (…), which might be chosen voluntarily by consumers and businesses. This optional instrument is conceived as an alternative to the existing national regimes of contract law and would be available in all of the official languages. The optional instrument might be applicable to cross border transactions only, or in both cross border and domestic contracts. The optional instrument would need to guarantee a high level of consumer protection and offer legal certainty for the entire duration of the contract.

(v) **Harmonisation of national contract law** pursuant to an EU Directive.

(vi) **Wholesale harmonisation of national contract law** on the basis of a EU Regulation, and,

(vii) The introduction of a **European Civil Code**, which would replace national contract law.[2]

It will have immediately been apparent to anyone keenly following the discussions of the past few years that this list contains all the options which have already featured in the cut and thrust of this debate. The Commission appears to have taken all of them into consideration, if one discounts a further theoretical option that two or three States would adopt a uniform contract law to regulate factual matrixes with cross-border elements, which are of interest to them, with reference to a text drafted in Brussels and invited other States to participate. However such a project would not make much sense in the realm of contract law, as to have nationality as the connecting factor would be completely unacceptable. Therefore, this option was befittingly left out of the Commission's compendium of options.

Yet, several of the proposals put forward by the Commission do not appear to embody particularly realistic options. Right from the outset I have been of the view that the Commission is unlikely to simply make do with option (i) (model contractual clauses published on the Internet), nor do I believe that a strong political will exists for option (vii) (European Civil Code). One option is too restrictive whereas the other is too expansive. A 'European Civil Code' which would only take the place of national **contract law**, would, in reality, not amount to a 'Civil Code', owing to its narrow substantive scope. Without further elaboration, I

[2] See also http://tinyurl.com/2cesa5b.

cannot readily grasp the distinction between Option (vii) (European Civil Code) and Option (vi) (Regulation establishing a European Contract Law). Option (v) (Directive on European Contract Law), in my view, does not seem to constitute an appropriate instrument. A directive would not address an array of issues in the national legal systems and would therefore, not bring about reform where reform is needed. Indeed, a directive would only serve to heighten the complexity of contractual negotiations rather than diminish them, because lawyers from both sides would have to deal with the numerous national variations on the same area of law.[3]

The policy option inspired by the American experience with the **Uniform Commercial Code** (Option iii) is original, and has, to date, not featured significantly in academic discussion. However, it must also, in all probability, be dismissed as a non-viable option. In my view, this solely constitutes an interesting theoretical experiment, and does not constitute a workable option as it has little chance of being realised, owing to the different challenges faced by America and Europe. Based on a recommendation from Brussels, the Member States would not set in motion, on their own initiative and, to a certain extent, at their own risk, the necessary legislative machinery. For such a proposal, Europe has 'too many Louisianas';[4] few Member States would subscribe to such a massive harmonisation project.

It is now more than likely that the next phase on the way to a European contract law will not take the form of any measure of harmonization in the strict sense. The harmonisation idea has, temporarily at any rate, been put on the back burner, and has given way to a new trend. The signs have been evident for quite some time that for the foreseeable future, it will not be possible to harmonise or unify the contract law regimes of the Member States by way of EU legislation. The political as well as practical complexities associated with such a task still present huge obstacles. Therefore, other solutions are required. Fundamentally, there are two options that present themselves: the gradual incorporation of European

[3] Simon James correctly points out this problematic in a Clifford Chance Client Briefing, *European Contract Law: Coming out* (July 2010), available at http://tinyurl.com/43cbzob.

[4] The Uniform Commercial Code has been adopted by all of the US States. However, Louisiana has not adopted a number of important articles on sales law and leases owing to the fact that they were inconsistent with its civil law tradition (see further http://tinyurl.com/l2dc9).

texts into the national legal systems by the Member States themselves, or the creation of a new additional system of law.[5]

In this respect, the alternatives are (ii) (**toolbox**) and (iv) (optional instrument for contract law). The **toolbox**-solution (Option ii) has been debated for a long time and was, for a time, the frontrunner. The wording of the Commission Decision setting up the Expert Group also speaks of a common frame of reference. It states: 'the Group should assist the Commission in preparing a proposal for a Common Frame of Reference for European Contract Law which should include consumer and business contract law using the Draft Common Frame of Reference as a starting point […]. In particular, the Expert Group should assist the Commission in selecting parts of the Draft Common Frame of Reference, which are of direct or indirect relevance for contract law, restructure, revise and supplement the selected parts'.[6] Only the appointees themselves are cognisant of whether the Expert Group had indeed freedom to choose the relevant parts of the DCFR, or whether in fact, the Group's remit was already defined by others. At any rate, nowadays, one may perhaps cautiously, and fully conscious of the fact that nothing final has been decided yet, state that the Common Frame of References has turned out to be a project beset with both political and practical challenges. Most likely, it is not an objective that may be easily described in political terms and easily championed publicly, nor is it one that can be straightforwardly implemented given the multifarious resistance to the project. I personally am nonetheless persuaded that the concept of a Common Frame of Reference or tool box is right and proper. The fact that the political scales are weighted in favour of an Optional Instrument does not automatically connote that the idea of a common frame of reference will be dropped. Favouring one approach does not mean adieu to another. National and European legislatures are beginning to cite the DCFR, which is purely an academic text. It is easy to appreciate just how much more influential a political CFR, extending beyond the narrow confines of contract law, would be!

I ought to emphasise once again: that nothing has been decided yet in the political realm. As I speak, 300 responses from governments, national parliaments, professional bodies and lobby groups are being evaluated by

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[5] It is, for example, complete nonsense for the general press to claim that the Commission is hell-bent on 'unifying contract law on a European wide basis'. (according to Laurenz Schmitt & Stephan Balthasar, *Pläne für ein europäisches Vertragsrecht haben erhebliche Mängel*, Frankfurter Allgemeine Zeitung (August 11th, 2010).

[6] Clifford Chance Client Briefing, *European Contract Law...* (July 2010).

the Commission. However, material decisions need to be taken before long. The mandate that has been given to the Expert Group did not extend beyond the remit of a feasibility study. Therefore, the text which will soon be submitted by the Expert Group is not at all conclusive and the Commission will amend parts of that text. Therefore, some time shall pass before a final text will be laid before the Council and Parliament (which will entail, as is well known, that the Commission shall lose sovereignty over the text). Nonetheless, it may be inferred that the optional instrument for European contract law, that is Option (iv), has the best chance of being implemented, and I wish to stress the importance of it being a success. The idea of an optional instrument, that is, an optional legal system tailored to meet European requirements, offers, strategically, greater potential for expansion into other legal fields extending far beyond the narrow remit of contract law. For example, it could also lead to the creation of an optional instrument for European family law or securities over immovable property.

With that, I have nearly come full circle. I am convinced that the Optional Instrument can only be a success when its field of application is sufficiently broad. In my view, three decisions are imperative: firstly, that the Optional Instrument is not restricted to intra-Union cross-border contracts, rather that it shall also apply in purely national or domestic cases. Second of all, that its ambit is not merely confined to sales or even to consumer sales contracts. Instead, a core area ought to embrace services relevant to the internal market. Thirdly, the Optional Instrument ought not to be limited to B2C-contracts and ought, primarily to serve the interests of SMEs, to encompass B2B contracts. The private law within the internal market needs its own profile, otherwise it cannot in the long run develop into a self-contained composite alongside UN Sales Law and the law based on EU Directives. Additionally, from its inception, it must be so structured that it can organically extend into areas that are not as yet within its remit.

Finally, if it is to be implemented as *lex contractus*, it must be made clear that the optional instrument is truly law and not simply a set of standard term and conditions. The legislative instrument required to create such a law is a Regulation. In turn, opting for a Regulation will raise the thorny issue of the relationship between the law laid down by the Regulation and the national law in the Member States. The narrower the scope of application of the Optional Instrument, the more scope for the ensuing void to be filled by the national laws of the Member States. It is therefore essential to clearly prescribe the parameters between European law and national law. This is an issue that is currently being carefully

addressed by the responsible working unit within the Commission's DG Justice. In my view, the crucial point is that the Optional Instrument does not really deal with a type of 28th legal system as is often inferred; rather, it stands on its own and is completely innovative. A '28th legal system' would stand, like all other 27 legal systems, **under** the regime created by the Rome-I-Regulation; the Optional Instrument however, must rightly stand above it, i.e. only subject to its own rules on the choice of law.

Allow me to conclude by saying that I am still concerned about the eventual composition and indeed the territorial scope of application of the grandiose sounding 'European contract law', which is currently the hot topic of conversation. It behoves all those involved, representatives from academia, industry, consumer agencies, the legal profession, officials from the Department of Justice and above all, political representatives to ensure that this ambitious and worthwhile project intended to facilitate creating a true internal market does not fail on account of a small number of 'know it alls'.

CONSIDERATIONS ABOUT THE DCFR IN THE LIGHT OF THE EUROPEAN LEGAL TRADITION

ALDO PETRUCCI

UNIVERSITY OF PISA, ITALY

Preliminary observations on reasons for creation of the Draft Common Frame of Reference (DCFR), its structure and content

As we all know, the year 2003 was crucial in planning a reappraisal of part of patrimonial private law of the Member States of the European Union, as in that year it started the process leading to the publication of the Draft Common Frame of Reference, concluded by an interim outline edition in January 2008, and followed by the final edition in 2009.[1]

In the Communication of February the 12th, 2003, the European Commission, based on information obtained as responses to the Communication of July the 11th, 2001, activated a more precise plan. The aim was to achieve a better coherence in European contract law, recognizing a fundamental role in such development to a Common Frame of Reference (CFR), in which principles, concepts and common terms relating to this part of law might have been included.[2]

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[1] The current version first appeared online (February 2009) under the title Christian von Bar et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (2009), limited to the text of the Project preceded by a brief introduction; in October the full version was published with commentary in six volumes: Christian von Bar & Eric Clive, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference* (2009).

[2] For events before 2003 there is an extensive collection of literature in Guido Alpa & Giuseppe Conte, *Riflessioni sul progetto di Common Frame of Reference e sulla revisione dell'Acquis communautaire*, Riv. Dir. Civ. 141ff. (2008); some references can be found even in my article Aldo Petrucci, *Introduzione. Il Progetto di Quadro comune di riferimento (DCFR)* in Giovanni Luchetti & Aldo Petrucci

According to the Commission's intention, the main point of the CFR would be to increase constancy of the acquis communautaire (meaning existing common European legislation) in the field of contractual law in the nearest future, to support uniform application of law, which is intended to correct the functioning of 'cross-border transactions, and by that to complement internal market'. However, the CFR should have to 'create the basis for further deliberations of an optional instrument in European contract law' according to the opinion expressed by the Economic and Social Committee on July the 17th, 2002, with the purpose of establishing a uniform and general law in this field, based on the instrument called opt-in, which is binding only if it is voluntarily adopted by the EU Member States.

The Commission, in the same Communication, also proposed the creation of standard contractual clauses to be used on the European scale. They should be broadcast among businessmen and professionals in electronic form, in order to show that the objectives of European contract law shall be implemented not only through traditional regulatory instruments, but also with the help of practical ones.

This kind of action plan has gained an appreciation from the European Council and Parliament, so that the Commission, in a new Communication of October the 11th, 2004 entitled 'European Contract Law and the Revision of the Acquis: Prospects for the future', defines directions of development of the CFR that will provide 'a conceptual legal tool box, which provides tools essential to proceed at revision of actual acquis, at introduction of new regulations, elaboration of standard conditions and clauses … and at projecting of European Civil Code'.[3]

For the implementation of a draft of the CFR, the Commission decided to finance a three-year research, by means of the foundation of a network (DCFR-Network), giving this task to two already existing groups: the Study Group on a European Civil Code and the Acquis Group (Research Group on Existing EC Private Law), whose workshops and meetings were scheduled and not only involved researchers and academics, but also experts and representatives of associations and interested groups of the EU Member States (currently 27) and other European countries, such as Switzerland and Norway. The work began on December 15th, 2004 and was conducted in the years 2005-2007 until the interim edition of 2008 and the full edition of 2009.

(eds.), *Fondamenti romanistici del diritto europeo. Obbligazioni ei le Radici contratti dalle romane al Draft Common Frame of Reference* 8ff. (2010).

[3] See Guido Alpa & Giuseppe Conte, *Riflessioni sul progetto*... 158 (2008).

Reasons for the creation and publication of the interim edition of DCFR in 2008 were explained by the authors in The Introduction: there was a need to realize the commitments received in 2004 by the European Commission (that was the financing unit), to complete a three-year work and to gain opinions, suggestions and critical remarks through conferences, workshops and University courses that would have an influence on the final edition.[4] On the other hand, the content of the interim edition was incomplete compared to the original plan, because it did not include typical figures of contracts in Book IV (except for sales and lease of goods), and lacked Books VIII, IX and X dedicated to acquisition and loss of ownership of goods, on proprietary security on movable assets and on trusts.

The final edition is not only complete, but also contains many observations made during discussions of the interim text and reflections performed by members of the Groups. It has three parts:

a) ten books including Model Rules;

b) a separate part of Principles;

c) an annex devoted to Definitions.

To refer to the content of each part, we may use indications supplied by the same authors in The Introduction.[5]

As for the Principles (which in the outline edition are before Model Rules) it considered the experience of Principes directeurs du droit européen du contrat formulated by the Association Henri Capitant and Société de législation comparée and included in two books published in Paris in 2008,[6] but the choice was fully independent. They are as follows:

1. Four **Underlying principles** consisting of freedom, security, justice and efficiency;
2. **Overriding principles**, originating from the four mentioned above, and adding others like those of a highly political nature, for example: protection of human rights, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity, protection and promotion of social welfare, and promotion of the internal market.

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[4] In the Introduction of the provisional version Christian von Bar et al., *Principles, Definitions and Model Rules...* 4ff. (2009).

[5] *Ibid.*, 12ff. (2009).

[6] See Bénédicte Fauvarque-Cosson & Denis Mazeaud (eds.), *Principes contractuels communs. Projet de cadre commun de référence* (which constitute the first part of Principes directeurs) and *Id*., *Terminologie contractuelle commune. Projet de cadre commun de référence* (2008).

Model Rules are distributed in ten books of the Project and do not have any normative force, but are considered as 'soft law' rules such as those of PECL (Principles of European Contract Law) written by the Lando Commission and might be used as a model for European and national legislations for the improvement of the coherence of the acquis communautaire and internal laws.

Model Rules are contained in 1023 articles in total.

Book I consists of only ten articles (from I.-1:101 to I.-1:110) and collects some **General provisions**, that apply to all the DCFR, including those relating to its application (I.-1:101), interpretation and development (I.-1:102), good faith and fair dealing (I.-1:103), reasonableness (I.-1:104), regulations regarding consumers and entrepreneurs (I.-1:105), regarding the meaning of expressions 'in writing' and 'signature' (I.-1:106 and I.-1:107) and calculation of time (I.-1:110).

Book II on **Contracts and other juridical acts** is composed of nine chapters, Book III on **Obligations and corresponding rights** contains seven chapters, and in Book IV, entitled **Specific contracts, rights and obligations arising from them**, some types of contracts are regulated, such as: sales, lease of goods, services, mandate contracts, commercial agency, franchise and distributorship, loan contracts, personal security and donation.

Books V, VI and VII contain, in order, **Benevolent intervention in another's affairs, Non-contractual liability arising from damage caused to another, and Unjustified enrichment**.

Finally, Book VIII deals with **Acquisition and loss of ownership of goods**, Book IX concerns **Owners security on movable assets,** and Book X is dedicated to **Trusts**.

Definitions have a function of suggestions for the development of the uniform legal language and terminology at European level.

Definitions that relate particularly to important concepts are part of Book I of the Project. For the others, Article I.-1: 108 refers to the Annex, which contains a list of 164 definitions and becomes an integral part of the Project: 'The definitions in the Annex apply to all the purposes of these rules unless otherwise results from the context'.

From the substantive viewpoint, these definitions are taken from the acquis and Model rules. The reason this location was chosen, is connected with the need to maintain the brief character of Book I and enable eventual extension of the list in the future without the necessity of modifying and distorting all of the Project.

As can be seen in this short description, DCFR, although it excludes from its area of application the number of private law matters provided in

Article I. - 1:101 (2),[7] goes far beyond the intentions reserved to the Common Frame of Reference by the European Commission, because of the addition of parts relating to non-contractual obligations (from benevolent intervention in another's affairs to unjustified enrichment and non-contractual liability arising from damages), to acquisition and loss of ownership of goods, owners security on movable assets and the trust, in order to point out the independence of the 'academic work' from the constraints of 'politic choices'.[8]

A final note concerns the language. The adoption of English for the publication of the final edition of the Project is justified by the language of the editors' Groups. However, it is accentuated that English is not the only official language, because a large number of translations into other European languages are expected. Therefore, editors have made the effort to chose a terminology that was accurate, precise, and at the same time accessible and clear, in a broader perspective of providing effective 'model–rules' for national legislators.

Implementation of DCFR and previous legal tradition

The main purpose of my paper today is how to place this new hypothesis of a unification of large sections of European private law, in the context of more than two thousand years of legal tradition of our continent, in order to estimate, whether the DCFR is something totally unrelated and independent, or whether we can see in it some roots of such long tradition, more or less consciously taken into account. For this reason it is extremely important to start from explicit statements made by the same editors of the DCFR in the Introduction.

In fact, after pointing out the autonomy of the Project as 'academic text' with reference to the destiny of a future Common Frame of Reference, the editors of DCFR hope that it will promote the knowledge of European private law at the level of an overall legal order, as well as develop legal education thereon. In particular the Project can: 'help to show how much national private laws resemble one another and have provided mutual

[7] Status and legal capacity of private persons; will and succession; family relationships, including marriage; bills of exchange, checks, promissory notes and other negotiable instruments; employment relationships; the ownership of, or rights in security over, immovable property; creation and regulation of companies and other bodies corporate or incorporated; matters relating primarily to procedure or enforcement.

[8] Cf. Christian von Bar & Eric Clive, *Principles, Definitions and Model Rules...* 3 (2009).

stimulus for development *directed to unification* and indeed how much those laws may be regarded as regional manifestations of an overall common European legacy'.[9]

This function is strengthened also by the publication of comments and notes to all Model-rules. It should reveal just a small number of cases in which European legal systems produced quite different answers to common problems.

So the same editors are conscious of the existence of a 'common European legacy', emphasized by the various national private laws, classified as simple regional variations of it, thus greatly facilitating the task of elaborating uniform rules and principles.

Even if it is not said which one this common legacy is, in obedience – it seems - to a spreading contemporary, there is no doubt that this must be identified with the complex of rules and principles inherited from Roman law and the subsequent Romanist (or Roman–canonical or Roman-German) tradition, which have represented for centuries the *ius commune Europaeum*.

We do not intend now to go into the details of an investigation intended to find those historical roots and some points of contact in relation to the various parts of the DCFR, as this is the objective that we intend to achieve in specific studies.[10] Instead of this, here we limit ourselves to some general remarks regarding the structure of the Project and its systematic exposition.

The first is the evident choice made in favour of a 'code solution', through the adoption of Model rules in ten books that may be considered as a kind of 'codification' between a 'code of principles' and a 'code of rules'.

Despite the deep difference of contemporary historical context from that in which the 'codification movement' arose in the 19th and the first half of 20th century, it is clear that the DCFR expresses a type of codified law in contrast with solutions in favour of a non-codified private law.[11]

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[9] So Christian von Bar & Eric Clive, *Principles, Definitions and Model Rules...* 4 (2009).

[10] See, in addition to Giovanni Luchetti & Aldo Petrucci (eds.), *Fondamenti romanistici del diritto europeo. Obbligazioni ei le Radici contratti dalle romane al Draft Common Frame of Reference* (2010) also the more recent one: Id. (eds.), *Fondamenti di diritto contrattuale europeo. Dalle radici romane al Draft Common Frame of Reference* 3 (2010).

[11] For further information see Guido Alpa & Giuseppe Conte, *Riflessioni sul progetto...* 161ff. (2008) (with references to bibliography) and for earlier legal tradition Sandro Schipani, *La codificazione del diritto romano comune* (1999).

The second remark relates to the decision of separating the 'Principles' and 'Definitions' from the body of Model rules and of locating them, respectively, in an autonomous 'section' and in the attached Annex.

It is true that this choice to separate the Principles was inspired by the French Principes Directeurs of 2008, and for Definitions by the example of the acquis communautaire.

But it is also true that something that cannot be ignored, even if omitted by the editors, is the obvious connection with some systematic choices existing in the Codification of Justinian (Corpus Iuris Civilis).

Without going into detail, we can observe that the first title of the Institutiones (I. 1, 1) and of the Digest (D. 1, 1), both entitled *de iustitia et iure*, give some basic principles for all the Compilation; then the concept of the *principium* located in D. 1, 2, 1 has the sense of the initial element, necessary to understand the historical development of all the rules, but at the same time even the meaning of their foundation (*et certe cuiusque rei potissima pars principium est*);[12] finally at the end of the Digest, like Appendices, we find Title 50, 16 (*De verborum significatione*), containing definitions of more used terms and concepts, and Title 50, 17 (*De diversis regulis iuris antiqui*), which includes a list of more general rules, both applied all over the body of law.

The third remark concerns the existence of a general part of obligations (Book III of the DCFR), including a framework applicable not only to those arising from contract, but also to those arising from damages caused to another (Book VI), of benevolent intervention in another's affairs (Book V) and of unjustified enrichment (Book VII).

This leads to the unity of the concept of obligation and of its legal regime, even when it does not derive from a contract (it is not a coincidence that in the project 'non-contractual obligations' are mentioned), with a strong reaffirmation of the Roman law based (or civil law) 'model' in opposition to the common law system, which excludes, as is known, non-contractual liability (torts law) from the law of obligations.

It seems appropriate to set out what is said by the same authors in the Introduction:[13] 'The *DCFR* also covers other private law rights and obligations within its scope even if they do not arise from a contract. It

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[12] On this concept see: 3 Sandro Schipani, *Principia iuris, potissima pars principium est. Principi generali del diritto. Schede sulla formazione di un concetto in Normazione formazione e interpretazione del diritto dall'età romana alle esperienze moderne. Ricerche dedicate al Professor Filippo Gallo* 649 ff (1997).

[13] Christian von Bar & Eric Clive, *Principles, Definitions and Model Rules...* 11 (2009)

covers, for example, those arising as the result of an unjustified enrichment, of damage caused to another and of benevolent intervention in another's affairs. It also covers obligations, which a person might have, for example, by virtue of being in possession of assets subject to proprietary security or by virtue of being a trustee… Book III contains some general rules which are applicable to all obligations within the scope of the DCFR, whether contractual or not. The advantage of this approach is that the rules in Book III may be taken for granted, or slightly modified where appropriate, in the later Books on non-contractual matters. The alternative would be an unacceptable amount of unnecessary repetition'.

Such a choice reflects, as is known, the systematization adopted from Justinian's Institutions 3,13,2 (and before, at least in its core, from Gaius' Institutions 3,88)[14] and from European codifications of the 19th and 20th centuries. The reasons that led to this adjustment do not consist of a formal respect of the legal tradition, but in a 'mere advantage', emphasized by the words of the same editors' Groups, when they outline that any other alternative would have meant 'an unacceptable amount of unnecessary repetition'.

We may just discuss why it was decided to put Book II, on contract and other juridical acts, before Book III on the general part of obligations and Book IV on typical contracts. As there is no 'official' explanation and without omitting an influence, perhaps unconscious, of the systematization of Gaius' and Justinians' Institutions, where for contracts a priority exposition was reserved compared to grounds for termination of obligations, we can think of two hypotheses.

Firstly, that this is due to the original motivation of the oldest projects of unification of European private law, concentrated on contract as an essential legal instrument to facilitate the integration of EU's internal market. The reasons would be understandable, in this interpretation, for the precedence of its legal discipline in comparison with this of obligations. An obvious example, on the other hand, is the expositive order of *PECL*, in which the discipline for contract is contained in Parts I and II, while the obligations are set out in Part III.

The second hypothesis is based on the precise choice of a model, i.e. that of the German Civil Code (BGB), in which the regulation of the legal

[14] *Gai 3, 88*: omnis enim obligatio vel ex contractu nascitur vel ex delicto [In fact, each obligation arises out of a contract or a delict]; *I. 3, 13, 2*: sequens divisio <obligationum> in quattuor species diducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio [a subsequent division <of obligations> outlines four species: in fact or they arise out of contracts or of quasi-contracts, or of delicts or of quasi-delicts].

transaction (*Rechtsgeschäft*), including contract, is found in the general part of Book I (§§104ff.), while the regulation of obligatory relations in general is placed in the introduction of Book II, dedicated to them, followed by the typical contractual figures.

Another important remark relates to the identification of the negotiorum gestio as a category of source of non-contractual obligations (Book V: **Benevolent Intervention in Another's Affairs**), restoring and maintaining a tradition dating back to Gaius' work *Aurea* in D. 44, 7, 5 and to Iustinian's Institutions (I. 3, 27, 1). A similar observation may also be applied to unjustified enrichment (Book VII: **Unjustified enrichment**), where instead the conservation of Roman roots (*indebiti solutio, actio de in rem verso* and restitution obligations in *id quo locupletior factus est*)[15] is not reflected directly, but passes through the filter of the elaboration of German legal studies (Pandectistic) in the construction of the category of the *ungerechtfertigte Bereicherung* (§§ 812ff. BGB).

We may also mention a general tendency to concentrate as much as possible on and to order under a limited set of criteria (the concept of legally relevant damage, accountability, causation, defences and remedies) the system of obligations for damages caused to others and its liability (Book VI: **Non-contractual liability arising out of damage caused to another**, in a total of 57 articles), with an evident preference for a model much closer to the Roman tradition, deriving from *lex Aquilia* (in both French and German interpretations), and completed by some special provisions of greater severity,[16] rather than for a model characterized by a series of exaggerated and fragmented rules proceeding from the system of common law torts.[17]

Finally, the last remark relates to the place reserved for ownership of goods (Book VIII) and proprietary security of movable assets (Book IX), both located after contracts and obligations. This may, on one hand, reflect the fundamental distinction in patrimonial private law - of Roman origin - between property law and rights and obligations law (expressed, as we know, in the combination of *actiones in rem / in personam*

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[15] For the *indebiti solutio* see *D. 44, 7, 5, 3* (Gai. 3 aur.); *I. 3, 27, 6-7*; about *actio de in rem* verso the title *D. 15, 3* and the obligations of reimbursement of enrichment, for ex., *D. 5, 3, 25, 11ff.* and *D. 14, 3, 17, 4* (Paul. 30 ad ed.).

[16] See. eg, Vincenzo Zeno-Zencovich, *La responsabilità civile* in Guido Alpa et al., *Diritto privato comparato. Istituti e problemi* 273ff. (2004); Sandro. Schipani, *Contributi romanistici al sistema della responsabilità extracontrattuale* (2009).

[17] See, e.g., Vincenzo Zeno-Zencovich, La responsabilità... 281ff. (2004); Ugo Mattei, *Il modello di Common law* 224ff. (2004)

actiones),[18] on the other hand, the influence is clear, once again, of the model of the German Code, in which rules of property and proprietary securities are collected in Book III, which immediately follows Book II on obligatory relations.

Future prospects of the Project: doubts and certainties

What is the predictable destiny of DCFR in the near future? After two years from its publication there have been many critical and favourable voices. We may perhaps deduce something from two recent decisions of the European Commission on the way to prepare and to adopt the Common Frame of Reference (CFR) for EU.

With reference to criticism, it came from many directions.[19] Great hesitation was due to two 'strong initial conditioning factors', related to this as well as to all other projects of integration and harmonization of contract law or, more generally, in patrimonial private law in the EU, developed according to the requirements specified by the Community Bodies. Because their goal is to pursue the achievement of the unified market, hindered by differences between national legal systems, the first conditioning factor is the imposition of a 'suspect, much too unequivocal correlation between economic activities and legal forms', thus relegating projects of harmonization of private law rules to an ancillary position in regard to the economic needs.

The second conditioning factor derives from the exclusion in the perspective of a future integration of entire areas of private law, such as family relationships, inheritance, ownership of immovable property, intended to stay 'on the edge of this evolutionary process', creating a 'European private law strongly unbalanced in its parts', with some areas covered by common principles and rules, and others still covered by individual national – and sometimes regional - legal systems and cultural traditions.

Severe complaints about the systematic and methodological choices of DCFR were made by a large proportion of the European academic world.[20]

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[18] See e.g., *Gai. 4, 1-5*; *I. 4, 6, 1-2*.

[19] A general view is found in Guido Alpa & Giuseppe Conte, *Riflessioni sul progetto*... 146ff. (2008) (with extensive references), to these two authors belong the expressions quoted in the text. Adde U. Perfetti, *Presentazione* in *Il Draft Common Frame of Reference del diritto privato europeo* XVII (2009).

[20] See, R. Zimmermann et al., *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht. Wertungsfragen und Kodifikationsprobleme*, Juristenzeitung 529ff. (2008); Bénédicte Fauvarque-Cosson, *Présentation des*