Model Rules of European Contract Law. From Draft Common Frame of Reference to Draft Optional Instrument

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PRESENTATION OF THE DRAFT COMMON FRAME OF REFERENCE AND THE FEASIBILITY STUDY ON EUROPEAN CONTRACT LAW (1–11)

1 Introduction

The European Commission is working on a feasibility study on a European Contract Law for Consumers and Businesses, presented in May 2011 by an Expert Group. The Commission has published a “work-in-progress” version dated 8 July 2011.¹ It is still not decided what kind of text that may come out of this, but the most likely alternative is an “optional instrument”, possibly legislated as a Regulation making the instrument a “2nd regime” in each member state.²

The feasibility study is based on the Draft Common Frame of Reference (DCFR, more below), but covers only general rules on formation of contract and rules on sales contracts and related service contracts.

The third important text at the moment is the revised version of the proposal for a Consumer Rights Directive³

These lectures will concentrate on the process up to the DCFR and the possible optional instrument, the discussion on these instruments, and on some examples of the content of the instruments.

Preparation:


Read Introduction of the Expert Group’s feasibility study (see footnote 1).

You do not have to read the works referred to in the footnotes of this outline.

Prepare exercises.

2 National law, choice of law, uniform law, harmonisation

Contract law varies from country to country, also in Europe. There are differences not only between common law and civil law countries, but even among civil law countries

¹ The Expert Group’s study and the Commission’s version are available here:
³ See for the latest development, including a consolidated text agreed upon by the Parliament and the Commission:
When a contract is connected to more than one legal system, choice-of-law rules decide which (substantive) rules govern the contractual relationship. For EU member states, see Regulation 593/2008 on the law applicable to contractual obligations (Rome I)

States may agree on uniform rules on certain types of contract, e.g. **CISG** (UN Convention on contracts for the international sale of goods)

Harmonisation has different meanings: bringing national rules closer or creating common rules and principles

European Union legislation: regulations may be regarded as uniform legislation; directives as harmonisation instruments


Some recent and ongoing national reforms: German *Schuldrechtsform* (from 2001), influence from EU legislation, CISG; new civil codes in several Eastern European countries (e.g. **Estonia**), influence from EU legislation, CISG, PECL; French **avant-projet Catala** (law of obligations)

### 3 Academic projects concerning European private law

During the last thirty years, several academic groups have been working with various aspects of European private law. Some of them will be mentioned here:

The *Principles of European Contract Law* was prepared by the Commission on European Contract Law (“the Lando Commission”)

The *Study Group on a European Civil Code* is the successor of the Lando Commission. The Study Group prepared several volumes of *Principles of European Law*.

The *Acquis Group* targeted “a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law”

The *Common Core of European Private Law Project* (“the Trento Common Core Project”), under the leadership of Ugo Mattei and Mauro Bussani, has completed several comparative studies on European private law.

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The Academy of European Private Lawyers, ("Gandolfi Project") based in Pavia, has published a draft European Contract Code, inspired by the Italian Civil Code and a draft Contract Code prepared for the Law Commissions of England and Scotland by Harvey McGregor.

The European Group on Tort Law ("Tilburg Group") has drafted Principles of European Tort Law.

The Commission on European Family Law conducts research concerning the harmonisation of family law in Europe.

The Unidroit Principles of International Commercial Contracts are not limited to Europe; on the other hand they deal with commercial contracts exclusively.

4 The Common Frame of Reference – political documents

The European Parliament has repeatedly expressed the need for harmonisation of European private law (or even a European civil code).

The Commission’s “action plan” on “a more coherent European contract law” resulted inter alia in a research project for the preparation of a “common frame of reference” of European contract law (CFR). Among the participants of the research network (Joint Network on European Private Law (CoPECL)) were the Acquis Group, the Study Group on a European Civil Code, and the Common Core of European Law Project. The DCFR is an academic text – a possible CFR will be prepared by the Commission.

An expert group was appointed in April 2010, a Green Paper on policy options was presented in July 2010 (COM/2010/0348 final), in May 2011 the feasibility study was published and in July the Commission’s work-in-progress version (see 1 above).

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10 See for publications etc., http://www.ceflonline.net/.
12 See for example, press release 12 April 2011.
5 The Draft Common Frame of Reference and the French drafts

A full version of the Draft Common Frame of Reference was published in October 2009.15

A text which can, to a certain extent, be regarded as an alternative to the DCFR, were published by the Association Henri Capitant and the Société de législation comparé in 2008, including a revision of PECL.16

6 The DCFR – overview

The DCFR has the formal outline of a civil code (books, chapters, sections, articles)

Black letter rules, comments with illustrations, comparative notes

Book I General provisions
Book II Contracts and other juridical acts (pre-contractual duties, formation of contract, representation, invalidity, interpretation, etc.)
Book III Obligations and corresponding rights (performance, remedies for non-performance, transfer of rights and obligations, set-off, prescription)
Book IV Specific contracts and the rights and obligations arising from them (sales, leases, services, mandate, commercial agency, franchise and distributorship, loan contracts, personal security, donation)
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 in moveables
Book IX Proprietary security rights in movable assets
Book X Trusts

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7  **Character of the DCFR**\(^\text{17}\)

Purposes: Possible model for a political CFR; legal science, research and education; possible source of inspiration (legislators, courts, parties)

Underlying principles: freedom, security, justice and efficiency

Overriding principles: protection of human rights; promotion of solidarity and social responsibility; preservation of cultural and linguistic diversity; protection and promotion of welfare; promotion of the internal market (and again freedom, security, justice and efficiency)

Definitions (suggestions for the development of a uniform European legal terminology)

Model rules (not necessarily “common core” or “restatement”), a “toolbox”

8  **The Expert Group’s feasibility study – overview**

The text has a much narrower scope than the DCFR:

- Part I  Introductory provisions
- Part II  Making a binding contract
- Part III  Assessing what is in the contract
- Part IV  Obligations and remedies of the parties to a sales contract\(^\text{18}\)
- Part V  Obligations and remedies of the parties to a related services contract
- Part VI  Damages, stipulated payments for non-performance and interest
- Part VII  Restitution
- Part VIII  Prescription

9  **The proposal for a Directive on consumer rights**

In 2008 the Commission presented a proposal for a Consumer Rights Directive, merging four existing directives.\(^\text{19}\) The proposal met severe criticism and a revised proposal is limited to

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\(^{18}\) The Commission’s July version adds ”or a contract for the supply of digital content”.

distance contracts and off-premises contracts. The agreement between the Parliament and the Council seems to widen the scope again.

10 Existing EC contract law

Most of the existing EC contract law regulation is consumer contract law (some exceptions, e.g. Late Payment Directive 2011/7)

Important directives:


Some of the directives are “vertical” (applying only to one type of contract), while others are “horizontal” (covering certain issues common to all consumer contracts or a larger group of contracts)

Most of the directives imply minimum harmonisation (states are allowed to keep or introduce rules that are more favourable to consumers than the directives do), but the directives on Unfair Commercial Practices and on Consumer Credit are maximum harmonisation directives (neither more favourable nor less favourable rules are allowed concern issues covered by the directives)

11 Debate concerning the DCFR and a possible optional instrument

11.1 Legitimacy

Is harmonisation of private law within the competence of the EU?

11.2 Is there a need for model rules on European contract law?

Does business ask for this instrument? Will national law have to provide for background rules anyway?


For latest development in the Parliament, see http://www.europarl.europa.eu/activities/committees/subjectFilesCom/subjectFileCom.do?language=EN&id=201117CDT95928&body=IMCO.


11.3 Is harmonisation possible?

Is it possible to combine common law and civil law? 25

11.4 Is harmonisation a threat to cultural (and legal) pluralism? 26

Law as a part of culture. 27 The question of language – English as a common language? 28

11.5 The DCFR and social justice

Market liberalism v. social justice? 29

11.6 An optional instrument?

Rules that may be chosen by the parties (today only as a supplement to national law). The “blue button” approach (“click here if you choose the DCFR to apply to our contract”). 30 A “28th regime” or a 22nd regime of each member state?

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11.7 Is the DCFR a modern contract law instrument?

Is the DCFR too abstract, too “German”? Does it reflect modern contract law problems? Is it too much based on the approach of national law? Does it sufficiently reflect “multi-level governance”?

PRESENTATION OF SELECTED RULES IN THE DRAFT COMMON FRAME OF REFERENCE (12–22)

12 Unfair terms

Background: Unfair Contract Terms Directive (93/13); national legislation; proposal for Consumer Rights Directive (see 9 above)

The Directive are limited to non-negotiated terms; DCFR II.–9:403 has a possible expansion of scope to negotiated terms in business to consumer contracts. See also differences between the Expert Group’s feasibility study and the Commission’s July text.

The Directive and the DCFR have a “grey list” of terms that are presumed to be unfair in business to consumer contracts; the feasibility study has in addition a “black list” of terms which are in all circumstances considered unfair (art. 83)

Duty of transparency (DCFR II.–9:402); “plain, intelligible language” (feasibility study art. 80)

Definition of “not individually negotiated” (DCFR II.–1:110)

Meaning of “unfair”

business to consumer contracts (DCFR II.–9:403; feasibility study art. 81)
contracts between non-business parties (DCFR II.–9:404)
contracts between businesses (DCFR II.–9:405; feasibility study art. 85)

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Exclusions for rules based on legislation etc.; “main subject matter” and price (DCFR II.–9:406; feasibility study art. 78(3))

Factors to be taken into account (DCFR II.–9:407; feasibility study art. 82)

Effects on unfair terms (DCFR II.–9:408; feasibility study art. 77); not binding on the party who did not supply it

Exercise 1:
Group discussion and presentation in class

Lisa bought an apartment in a house with eight apartments in total. The house was not constructed yet at the time when the contract was concluded, but the contract included a description of the apartment together with dimensioned drawings. When the apartment was finished six months later and Lisa was going to move in, it turned out that the ceiling had been lowered with thirty centimetres in part of the living-room because of a ventilation duct. Lisa found this ugly and considered it to be a lack of conformity. The seller referred to a clause in the contract allowing him to make “small alterations of the planned apartments if necessary due to technical reasons”. The ventilation system was not planned in detail at the time when the contracts were concluded, he explained. The seller asserted that there was no lack of conformity. In Lisa’s opinion, this contract term was unfair. She had not noticed the term in the twelve-page contract document which was presented only at the meeting where she signed the document.

Should the term be considered unfair under the DCFR?

13 Overview of DCFR Book III

“Law of obligations”: general rules on obligations (contractual and non-contractual); performance; remedies for non-performance; plurality of debtors and creditors; transfer of rights and obligations; set-off and merger; prescription (limitation)

We will concentrate on remedies for non-performance

14 Obligations and performance

Definitions in DCFR III.–1:101 of “obligation”, “performance”, “non-performance”, “reciprocal obligation” (the correlative of “obligation” is “right to performance”)

Terminology: the difference between “duty” and “obligation”

Good faith and fair dealing (DCFR III.–1:103; feasibility study art. 2(10)); duty to act in accordance with good faith and fair dealing; effects of breach of such duty; “good faith and fair dealing” as objective standard of conduct (distinguished from “good faith” referring to knowledge)

Obligation to co-operate (DCFR III.–1:104; feasibility study art. 89)

Detailed rules in Book III Chapter 2 on place of performance, time of performance etc.
15 Non-performance, excuse, remedies

Remedies for non-performance are regulated in DCFR Book III Chapter 3. The rules in the feasibility study deal only with sales and related services.

Enforcing specific performance and damages are not available if non-performance is excused due to an impediment (DCFR III.–3:101(3)); compare contract terms giving a party right to additional time or additional payment; if the impediment is permanent the obligation (and any reciprocal obligation) is extinguished (DCFR III.–3:104(4)). See also feasibility study art. 91

Compare rules on mistake (impediment existing at the time when the contract was concluded)

Compare rules on changed circumstances (DCFR III.–1:110; feasibility study art. 92); an obligation may be varied or terminated by the court (“hardship”)

Compare the distinction between obligation to achieve a specific result and obligation to make reasonable efforts; not regulated in the DCFR; compare UNIDROIT Principles 5.1.4 (see also feasibility study art. 152 on services)

16 Excuse due to an impediment (DCFR III.–3:104; feasibility study art. 91)

Functions:

a permanent excusing impediment leads to extinguishment of the obligation and any reciprocal obligation; restitutionary effects are regulated in Book III, Chapter 3, Section 5, Subsection 4 (DCFR III.–3:104(4))

a temporary excusing impediment bars claims for enforcement of specific performance and claims for damages, but not other remedies for non-performance (DCFR III.–3:104(3), 3:101(2))

Prerequisites

impediment

beyond the debtor’s control

declarant could not reasonably be expected to have taken the impediment into account

declarant could not reasonably be expected to have avoided or overcome the impediment or its consequences

Compare CISG art. 79

17 Other prerequisites for remedies

The creditor must not have caused the debtor’s non-performance (DCFR III.–3:101(3)); obligation to co-operate (DCFR III.–1:104, feasibility study art. 108(6))

Possible exclusion or restriction of remedies (DCFR III.–3:105); restriction concerning personal injury; good faith and fair dealing
Notification within reasonable time (DCFR III.–3:107)

Possible cure by debtor (DCFR Book III, Chapter 3, Section 2); the debtor as a rule has a chance to cure a lack of conformity (DCFR III.–3:202); limitations in DCFR III.–3:203. Feasibility study art. 110

18 **Right to enforce performance**

Non-monetary obligations (DCFR III.–3:302; feasibility study art. 111); the creditor may as a rule enforce specific performance, including remedying of a lack of conformity; limitations (performance is unlawful or impossible, unreasonably burdensome, of a personal character); substitute transaction and damages

Compare English law: the main rule is that specific performance cannot be enforced

Monetary obligations (DCFR III.–3:301; feasibility study art. 134); the creditor is entitled to recover money; limitations are mainly a question of “cancellation” (damages instead of enforcement of agreed payment may be more favourable to the debtor)

**Exercise 2:**

Group discussion and presentation in class

Mr. Wilson, a farmer, ordered from Machine Industry Ltd. a machine for automatic packaging of the cheese he produced at his farm. The machine was to be produced according to Mr. Wilson’s specifications. Some days after the contract was concluded, Mr. Wilson was contacted by another factory that offered to produce a similar machine for just half the price. Mr. Wilson immediately informed Machine Industry Ltd. that he was not willing to receive the machine which he had just ordered. Machine Industry Ltd. protested and wished to produce the machine and recover the payment for it. The machine was still not put into production at the time of this correspondence.

Discuss this case according to the DCFR and then according to your national law.

19 **Withholding performance**

Right to withhold performance of reciprocal obligation (DCFR III.–3:401; feasibility study arts. 114 and 135); creditor is to perform at the same time or after; creditor is to perform first (cases of anticipated non-performance)

Whole or reasonable part of the performance may be withheld

20 **Termination for fundamental non-performance**

Main rule: the creditor may terminate if the debtor’s non-performance is fundamental (DCFR III.–3:502; feasibility study arts. 115 and 136)

Definition of “fundamental” non-performance (DCFR III.–3:502(2); feasibility study art. 90); substantially deprives the creditor of what the creditor was entitled to expect (and foreseeability on debtor’s side); intentional or reckless non-performance (and aspects for future performance)
Termination after notice fixing additional time for performance (DCFR III.–3:503; feasibility study arts. 116 and 137); reasonable period

Termination for anticipated non-performance (DCFR III.–3:504 and 505; feasibility study arts. 117 and 138)

Termination of divisible obligations (DCFR III.–3:506(2); feasibility study art. 119)

Exercise of right to terminate (DCFR III.–3:507; feasibility study arts. 120 and 141); notice to the debtor (court decision is not necessary)

Right to terminate must be exercised within a reasonable time (DCFR III.–3:508); note the “automatic” termination in case of permanent excusable impediment (DCFR III.–3:104(4))

Effects of termination

- **outstanding** obligations under the contract come to end (DCFR III.–3:509(1); feasibility study art. 6)

- return of benefits received (or value), DCFR III.–3:510; but not as far as conforming performance has been met with conforming performance (DCFR III.–3:511)

- payment of value of benefits for what is not returned (DCFR III.–3:512) and for use or improvements (DCFR III.–3:513)

- creditor retains right to damages (DCFR III.–3:509(3))

see also feasibility study arts. 176–180

**Exercise 3:**

Group discussion and presentation in class

Summum Ius, a law firm, planned to invite the entire town for the celebration of the firm’s five-year anniversary and ordered food for 500 persons from a catering business to be delivered at fixed date (a Saturday). The event was properly announced in the local media. In the morning of the agreed day, Summum Ius received a phone call from the catering business: there was a serious problem with the internal electricity supply, and it was not possible to provide the food before Saturday afternoon. The representative of Summum Ius explained that the event would take place at noon, and she terminated the contract with immediate effect. All the disposable plates, cutlery etc. which the catering business had delivered on Friday would be returned and not paid for, she said. – The catering business did not agree with her on any of these points.

Discuss this case according to the DCFR and then according to your national law.

**Price reduction**

Right to reduce price (DCFR III.–3:601; feasibility study art. 122)

Proportionate reduction of price, typically for lack of conformity
Combination with damages

Exercise 4:

Group discussion and presentation in class

Bénédicte was looking for a small boat for leisure purposes and went to J. Flint, a dealer of new and second-hand boats. Bénédicte found a six-year old boat that she liked. The boat had a sign with “10 000 euro” on it, but she managed to beat the price down to 8000 euro. It turned out that the boat had a leakage, the repair of which cost 1000 euro. Bénédicte claimed that the price of the boat must be reduced with 1000 euro. Flint admitted that the leakage was a lack of conformity, but asserted that the correct price reduction in a case like this was 800 euro. Bénédicte did not agree.

Discuss this case according to the DCFR and then according to your national law.

22 Damages and interest

Structure

right to damages (non-performance which is not excused)
loss (economic and non-economic)
measure of damages
creditor’s contribution to the loss; duty to reduce the loss

Right to damages (DCFR III.–3:701(1); feasibility study art. 163); non-performance which is not excused; no fault requirement; compare CISG; compare national systems

Loss (DCFR III.–3:701(2) and (3); feasibility study art. 163(2)); actual and future loss; including loss of income or profit; economic and non-economic loss

Measure of damages

general measure of damages (DCFR III.–3:702; feasibility study art. 164); comparison with due performance

foreseeability (DCFR III.–3:703; feasibility study art. 165); extended if non-performance is intentional, reckless, or grossly negligent

creditor’s contribution to the loss (DCFR III.–3:704; feasibility study art. 166); duty to reduce loss (DCFR III.–3:705); damages may be reduced; expenses incurred in attempting to reduce loss

substitute transaction (DCFR III.–3:706; feasibility study art. 168); measure of damages based on current price DCFR III.–3:707; feasibility study art. 169)

Interest; delay in payment of money (DCFR III.–3:708; feasibility study art. 171); the average commercial bank short term lending rate to prime borrowers
Stipulated payment for non performance (DCFR III.–3:710; feasibility study art. 170); stipulation in contract is valid; reduction if grossly excessive; compare in particular English law on liquidated damages and penalty clauses

**Exercise 5:**

Group discussion and presentation in class

The facts are the same as in exercise 10. Summum Ius as a “plan B”, in a hurry bought a lot of fruit, cakes and sweets in order to be able to serve the guests at least something. They had to pay twice as much for this as the price that was agreed for the food. Summum Ius now claimed damages for loss amounting to the difference between these prices. In addition they claimed damages for loss of reputation. The catering firm did not accept any liability.

Discuss this case according to the DCFR and then according to your national law.