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# Common Frame of Reference: Conciliation or Clash?<sup>\*1</sup>

In the beginning there was separation. According to the Communication of 12 February 2003, there were two favoured options from among the four originally cited in the Communication of 11 July 2001 for application in the pursuit of a ‘more coherent European contract law’ (which was the subtitle of the Action Plan document enacted by the same communication of February 2003). One was the promotion of a set of common principles in the field of contract law; the other was the improvement of the existing legislation. These two options were set forth in the context of a relationship of a means to an end: the end would be the improvement of the existing and the future *acquis*, and the means would be a common frame of reference (items. 2, 3, and 4 of the Action Plan).

Still, in the Communication of 11 October 2004<sup>\*2</sup> we read that “the Common Frame of Reference (CFR) will be developed to improve the coherence of the existing and future *acquis*” (from the document’s introduction). But by that stage something had changed. In the same document, we find one page later, in the direction we have just mentioned, that “the Commission will use the CFR as a toolbox [...] to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law” but soon after that “the CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”. Finally, and possibly in a more clear way, it is stated (in item 3.1.3) that “the research preparing the CFR will aim to identify best solutions, taking into account national contract law [...] the EC *acquis* and relevant international instruments”. At that stage, what is conceived is a kind of mixture between option II (common principles) and option III (improvement of existing EC contract law).

Thus we are told that this is a ‘new orientation’, by which “the *acquis communautaire* is able to provide in turn a basis for the preparation of the future European contract law”.<sup>\*3</sup> Thus arises the question of whether the merger of the *acquis* with the common frame be a good chance for this project.

If one looks at the origins and ends of European Community private law and of what may be termed the ‘common principles’ movement, they appear to be in opposition, since the latter, as the word ‘principles’ shows, is essentially characterised in terms of generality in the sense of traditional contract law, whereas the *acquis communautaire* is constituted by rules related to specific situations — moreover, specified with regard to the consumer as one of the parties to the contract. On one side there is the attitude, which has been typical of classic codifications, according to which one may refer to the man without qualities, as I once expressed

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<sup>1</sup> This writing will appear also in the collection of Essays in honour of Ewoud Hondius.

<sup>2</sup> Communication from the Commission. European Contract Law and the Revision of the *Acquis*: the Way Forward. Brussels 11.10.2004, COM(2004) 651 final.

<sup>3</sup> R. Schulze. Principi sulla conclusione dei contratti nell’*acquis communautaire*. – Contratto Impresa Europa 2005, p. 405.

this idea<sup>4</sup>, while on the other side there is a unique qualification around which many rules have been introduced. These two regulative trends correspond to two different ideas of what a uniform law in Europe should be.

In the preface to the PECL, Ole Lando tells us that his original idea for setting up what became the Principles of European Contract Law was to “establish the legal uniformity necessary for an integrated European market”.<sup>5</sup> The introduction of the PECL speaks of ‘harmonization’ as a foundation for the “efficient conduct of cross-border business within Europe”<sup>6</sup> and, moreover, of a “statement” — not a re-statement, indeed — to serve as “in effect a modern European *lex mercatoria*”. Thus, the clear aim was that of creating a set of rules on commercial contract law drafted with the technique of general private law unifying civil and commercial law, in the manner of the Swiss Code of Obligations and the Italian civil code of 1942. Apart from some material specifically dedicated to professionals (articles 2:209 and 2:210), that was the model.

The *acquis communautaire*, which in our context is European Community law with reference to contracts, has been generated by a very different idea of harmonisation of private law in Europe: that which has been filled by the idea of protection of the consumer, an idea that originally was alien to European community law. What I am saying is that the original Treaty of Rome did not envisage the protection of consumers. However, protection of consumers has, historically, constituted much of the content of what has been set up formally as the uniform law considered necessary to the establishment of a common market.

The basic difference between the ‘principles’ idea and the consumerist one implies a series of others.

First of all, the approach adopted by the PECL starts from freedom of contract, as “parties are free to enter into a contract and to determine its contents, subject to the requirement of good faith and fair dealing, and the mandatory rules established by (the) Principles”. In general, it is non-mandatory law: “for the most part the Principles provide rules which the parties are free to vary or exclude”, states the ‘Survey of chapters 1–9’ introducing the principles. And this is the meaning of article 1:102 paragraph 2. In contrast to this, European Community law is ‘*zwingendes Recht*’, mandatory law, since it is set up to attain specific ends precisely in consideration of the fact that they are not achievable through pure freedom of contract. Of course, the principles put good faith and fair dealing together with mandatory rules in order to constitute a kind of fence against the abuse of freedom of contract. But this is not the case for community contract law. Whereas the first rules operate, so to say, inside and around what the parties freely determine, the latter imposes models originally designed to protect one of the parties.

Protection is indeed another feature from which angle European Community private law can be viewed. If at some time there is written a history of the European Community’s private law, it should be interesting to note the way in which the historians explain how it was that, in order to build a common market, the result was consumer protection law. The reason can fairly be indicated as being that, at some point, social policies in the individual member states exerted pressure toward more consumer-friendly law but to enact it in a different way for each legal order would have produced different outcomes, impairing the idea of a common market. The transposition of the directive on unfair contract terms can be mentioned as a typical example. Once enacted in Germany, a new law on that subject — what we can call the equal protection clause for professionals, since here they were subjected to a unique regime in terms of their relationship to consumers — called for the same treatment for all European undertakings. Paradoxically, what appears to be, and in fact is, a protection law for consumers was originally a way to protect the actors involved in business competition. The necessity of implementing freedom of industry and trade for production and sale of products in a situation of equal rules for the various actors has paved the way to equal protection for consumers. Paradoxically again, protection of consumers became a fundamental aim of community law after it had already become fact in large measure, since a duty of the European Community to contribute to the strengthening of consumer protection was set forth in the European Community Treaty only in 1991, when some of the directives, such as those on door-to-door selling<sup>7</sup>, on consumer credit<sup>8</sup>, and on liability related to products<sup>9</sup>, had already been enacted.

The natural insularity of the directives made it clear that, as the introduction to the PECL puts it, “there [was and still] is no general contract law infrastructure to support these specific Community measures”.<sup>10</sup> The PECL and the *Code européen des contrats*<sup>11</sup> were then devoted to constituting this infrastructure, which

<sup>4</sup> C. Castronovo. Contract and the Idea of Codification in the Principles of European Contract Law. Festschrift til Ole Lando. Copenhagen 1997, p. 112, echoed by B. Lurger. Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union. Vienna–New York 2002, p. 420.

<sup>5</sup> O. Lando, H. Beale (eds.). Principles of European Contract Law. Parts I and II. The Hague, London, Boston 2000, p. xi.

<sup>6</sup> *Ibid.*, p. xxi.

<sup>7</sup> Council Directive 85/577 EEC.

<sup>8</sup> Council Directive 87/02 EEC, amended by Council Directive 90/88 EEC.

<sup>9</sup> Council Directive 85/374 EEC.

<sup>10</sup> O. Lando, H. Beale (eds.) (see note 5), p. xxii.

<sup>11</sup> G. Gandolfi (co-ordinator). Code européen des contrats. Milan 2000.

could not but be basic contract law. Thus, the recent observation that the Lando Commission has not even considered consumer contract law to be an essential part of modern contract law<sup>\*12</sup> cannot be taken as a criticism, since at the time the PECL were conceived there was not a body of consumer contract law such as to be generalised within the text of ‘principles’. The logic of the special law that characterised consumer law appeared to be just the opposite of what is intended to be general law. On the other hand, what could be converted into a general provision, in a principle indeed in accordance with the meaning this word has now acquired thanks to the PECL and the UNIDROIT Principles, was taken into account. This happened particularly strongly with respect to unfair contract terms. Article 4:110 of the PECL provides that “a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations [...] to the detriment of that party”. In the notes to that article we find all that we must know and understand about the provision:

Article 4:110, as the notes read, is in the same terms as [the] Council Directive on Unfair Terms in Consumer Contracts<sup>\*13</sup>, save that it is not limited to terms used against consumers. This reflects the law in many Member States. First, before passing any specific legislation many systems had adopted or developed judicial controls over unfair terms. These are not usually limited to consumer contracts and, for the most part, they continue to apply. Second, many Member States have legislation on unfair terms which applies to unfair terms, particularly those in general conditions of contract, even when neither party is a consumer.<sup>\*14</sup>

But the PECL have done better than the Directive on Unfair Terms in Consumer Contracts, in that they provided a specific rule, article 2:104, concerning the prerequisites for contractual terms not individually negotiated to be binding. In fact, the generalisation operated by the PECL is not a development of a properly consumer-oriented rule: rather, it was European consumer law that embezzled what originally was meant to be a necessary new aspect of general contract law. The first European source of law dealing with general conditions of contract was the Italian civil code of 1942. Article 1341 regulates protection of the weak party, with regard to the way in which general conditions enter the content of a contract, and, correspondingly, to their unfairness, without distinguishing among categories of contracting parties. Similarly this later happened with German law on general conditions, in 1976, as well as with the English Unfair Contract Terms Act of 1977.

Whenever we speak in terms of protection and judicial control, we cross the line separating formal law from substantive law, if we wish to adopt Max Weber’s distinction<sup>\*15</sup>, within which he defines the latter as characterised with reference to substantive justice and the specific aim of the rule, whereas formal law might be said to be self-referent, solving problems not with attention to real situations but as a mere application of the internal logic of the law. Now the case of general conditions shows that not only formal law but also substantive law is apt to be generalised. Generalisations, however, cannot operate when substantive law is at the same time special law. Status law is special law by its very nature, and so it is with consumer law. To generalise either seems to be a contradiction, and, thus, when an attempt of this nature is made, the class of persons to which it initially referred loses the original quality, as seen under the law, that set it apart as deserving of a special set of rules.<sup>\*16</sup>

The difficulty I have been pointing out in co-ordination between the level of reference proper to the PECL and that of the *acquis communautaire* may be clarified and simplified, making it clear that PECL interpret a model of codification, whereas the *acquis* as part of the common frame of reference shall be similar to what in continental systems is called consolidation<sup>\*17</sup>, a true restatement of what has already been adopted as European Community law, irrespective of what the rule of law should be: it is as the rule of law as it has been enacted through the years as European Community law, right or wrong, that this could be considered. That is why, as it has been written, there is a European Community law, consisting in special regulations, from which it is far from evident that a true European uniform contract law, consisting in uniform general rules, can derive.<sup>\*18</sup>

<sup>12</sup> R. Schulze (Note 3), p. 406.

<sup>13</sup> EEC Directive 93/13 of 5.04.1993. – OJ L95/29.

<sup>14</sup> O. Lando, H. Beale (eds.) (Note 5), p. 270.

<sup>15</sup> *Economia e società* (Italian trans.). Milan 1974, II, pp. 16, 186, 192. M. Rheinstein (ed.). *Max Weber on Law in Economy and Society* (English trans.). Cambridge, MA 1954, p. 301 et seq. Recently, C. W. Canaris. *Wandlungen des Schuldvertragsrechts. Tendenzen zu seiner ‘Materialisierung’*. – *Archbold’s Practice* 2000 (200), p. 273 et seq., has attracted attention to ‘substantivation’ of law, making reference to J. Habermas and F. Wieacker but not, as far as I can see, to M. Weber.

<sup>16</sup> In fact, C. W. Canaris (Note 15), p. 360 et seq., speaks of the consumer as a ‘jedermann’. This, however, appears to contradict the evidence of the facts. Were this true, there would have been consumer protection evident in the legal codes of the 19<sup>th</sup> century.

<sup>17</sup> Compare A. Cavanna. *Storia del diritto moderno in Europa*. Vol. 2. Milan 2005, p. 43.

<sup>18</sup> R. Alessi. *Luci ed ombre del nascente diritto europeo dei contratti*. – *Diritto europeo e autonomia contrattuale*. Palermo 1999, p. 9. See also G. Vettori. *Buona fede e diritto europeo dei contratti*. – *Europa e diritto privato* 915 s., 918 holds that, if one starts from the corpus of the European directives, it is not possible to build up a unitary law but that, if anything, one may find some orientation consistent with communitarian principles.

After all, some special rules are not fit to be extended to all situations that can be considered identical as to the asymmetry between professional and consumer but different in economic substance, as is the case with different types of contract. The consideration arising from this remark is that the *acquis communautaire* stands at a level of generality that is much lower and cannot be compared with that of general rules on contract law.<sup>\*19</sup> Moreover, it is not suitable for the generalisation of the kind the latter imply.

Attempts to summarise the peculiarities of European Union private law have identified them in the following features: (1) duties of information at the negotiation stage, (2) periods of time within which consent of the consumer to the contract is revocable, (3) invalidity or unenforceability of contract terms not individually negotiated, and (4) formal requirements in the formation of contracts.<sup>\*20</sup> Some of these features cannot be extended beyond consumer contracts.

Take, for example, the rules on formation of contract that are provided for in the directives on contracts negotiated away from business premises and on distance contracts, or those on time sharing and on consumer financial services.<sup>\*21</sup> It is true that some authors have advocated the right of withdrawal from the contract, provided for by these directives, as a new principle of the law of contract.<sup>\*22</sup> This would imply that in every contract the party that, in a short time, finds a better price or better contractual conditions may be freed from the already stipulated contract. And this would be an expression of a '*kompettitives Vertragsrecht*'. It is odd, though, to refer to as competition what is, in fact, the negation of it. Competition implies that each party struggles for the best conditions up to the moment at which the contract is concluded. A second choice after the parties have agreed on the contract would appear to be a remedy of different kind, something overcoming competition and establishing a new logic, that of protection of a weak party. In speaking against that strange idea of a contract that would not be binding, it has been observed that this would mean turning upside down the fundament of contract law — i.e. the principle *pacta sunt servanda*.<sup>\*23</sup> Indeed, the right to unilaterally cancel the contract has not been repeated in the directive on sale of consumer goods, nor could anybody seriously conceive of adopting it in that field. The 'cooling-off period' is to be considered alien to commercial contracts as well as to contracts in general, and so with the requirement of writing, and, in actuality, the PECL, have adopted neither the first nor the latter.

If we look at what is expected to be Chapter 4 of Book II of CoPECL (the name given to the draft mixing the PECL and the *acquis*), whose title could resemble *The Consumer's Right to Withdraw from Certain Contracts*, it may be presumed that this is going to reflect the right to withdraw from a contract to the same extent as has already been provided in the directives we have mentioned above. Indeed, if we compare the degree of generality of these rules with that of the others included in Book II, it would appear that those related to the right of withdrawal are limited to 'certain contracts' only: precisely those related to consumers. In fact, the right to withdraw from a contract introduces a very radical modification to the law of contract, which needs to have a serious legitimacy<sup>\*24</sup> and thus can be afforded only in situations fit to justify this deviation. In addition, there shall present itself a need to choose among different periods of time set up in each directive as terms for the valid exercise of this right: not less than seven days (Dir. 85/577), at least seven working days (Dir. 97/7), within 10 working days (Dir. 94/47), and 14 calendar days for distance contracts in general and 30 calendar days for those relating to life insurance (Dir. 2002/765).

On the contrary, suitable for a true general level are the rules on duties of provision of information prior to the conclusion of a contract, examples being found in article 4 of the directive on package travel<sup>\*25</sup>, article 3 of the directive on purchase of immovables on a timeshare basis<sup>\*26</sup>, article 4 of the directive on distance contracts<sup>\*27</sup>, and article 3 of the directive on distance marketing of financial services.<sup>\*28</sup> These rules only

<sup>19</sup> I wonder whether this judgement would change if one were to adopt the perspective of C. W. Canaris (see note 15), p. 360, according to which it is not just the consumer who deserves protection but, on the contrary, is the professional who must be less protected through exceptional rules. I do not think, though, that by now the perspective of European community law has moved on to consider the professional with regard to the consumer. Rather, it proceeds from the consumer with regard to the professional. As L. Mengoni, in *Problemi di integrazione della disciplina dei «contrattidel consumatore» nel sistema del codice civile. – Scritti in onore di Pietro Rescigno. III. Milan 1998, p. 537 et seq.*, points out, in contrast to the logic of commercial codes, consumer law attracts contracts between the professional and consumer to an area of discipline derogating to general law in favour of the consumer.

<sup>20</sup> L. Mengoni (Note 19), p. 536 et seq.

<sup>21</sup> Respectively, Council Directive 85/577 ECC, Council Directive 97/7 ECC, Council Directive 94/47 ECC, and Council Directive 2002/65 ECC.

<sup>22</sup> For example, H. Micklitz. *Perspektiven eines Europäischen Privatrechts. – Zeitschrift für Europäisches Privatrecht* 1998, p. 265.

<sup>23</sup> C. W. Canaris (Note 15), p. 344 et seq.

<sup>24</sup> *Ibid.*, pp. 343, 345.

<sup>25</sup> Directive 90/314/EEC on package travel, package holidays, and package tours.

<sup>26</sup> Directive 94/47/EC on certain aspects of purchase of the right to use immovable properties on a timeshare basis.

<sup>27</sup> Directive 97/7/EC on the protection of consumers in respect of distance contracts.

<sup>28</sup> Directive 2002/65/EC concerning the distance marketing of consumer financial services.

point out an aspect of precontractual good faith<sup>29</sup> and, more generally, of good faith as a general duty as it is imposed upon the parties to the contract by article 1:102 (1) PECL. That this provision, as well as that of article 1:201 and of article 2:301, specifically refers to precontractual liability arising from negotiations contrary to good faith appears to be necessary, since from consideration of European law in its totality it has been pointed out that good faith, not being recognised in all member states, still cannot be considered a general principle<sup>30</sup> of the European law of contracts and obligations. What the principles have done, and consequently what the common frame of reference is going to do, is just to generalise the good faith that, apart from the differences among national legal systems, is already rooted in the law of the European Union. In this sense, one can recall the reference to good faith in the directive on unfair contract terms, which in its article 3 qualifies as unfair a contract term not individually negotiated “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

But then, taking seriously the idea of using the *acquis* as a source of principles, one can refer to an example from Italian legislation, which, in transposing Directive 98/27 through the legislative decree of 30 July 1998, no. 281, “on injunctions for the protection of consumer interests”, has indicated as fundamental rights of consumers those included in the directives listed in the annex to the same Directive 98/27, as follows:

- (a) protection of health;
- (b) security and quality of products and services;
- (c) adequate information and fair advertising;
- (d) education as consumers;
- (e) fairness, clarity, and equity in the relationships concerning goods and services;
- (f) promotion and development of free associations among consumers;
- (g) supply of high-quality, efficient public services.

In this way, the *acquis* has attained the highest level of generality, because the rights referred to are considered relevant in all situations in which a consumer is involved. It is still consumer law but applicable to all consumers, in all situations. And if, according to the communication of October 2004 as mentioned at the start of this article, “the CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”, to this extent the *acquis* has been shown to be fit for the purpose.

Thus, notwithstanding the different points of departure and structure and goals, the PECL and *acquis*, being destined to go together, shall compose the common frame of reference. The two components provide the best character for the part of each: the Principles of European Contract Law the true structure of the product and fundamental rules and the *acquis*, together with some main points of consumer law, the importance of already being part of European enacted law, able to attract toward the state of grace of positive law what for the moment still remains only fruit of an academic work.

<sup>29</sup> Literally referring to ‘the principles of good faith in commercial transactions’ are article 4 (2) of Directive 97/7 on distance contracts and article 3 (2) of Directive 2002/65 on distance marketing of consumer financial services.

<sup>30</sup> K. Riesenhuber. *Europäisches Vertragsrecht*. Berlin 2003, p. 221.