



Hugh Beale

Professor, University of Warwick

# Pre-contractual Obligations: The General Contract Law Background

In my first paper in this volume<sup>1</sup>, I argued that one of the functions of the Common Frame of Reference (CFR) as a legislator's guide or 'toolbox' would be to provide the legislator with 'essential background information'. Firstly, the CFR necessarily includes some rules that do not reflect the law in every Member State. Instead, they may reflect the 'best solutions' to an issue, solutions found in only some of the laws. To include these without explaining what rules apply in the laws of the other Member States would be highly misleading. To gain an accurate picture, the legislator needs to have information about the different laws in the various Member States. This is the function of the comparative notes that will be included in the final version of the Draft Common Frame of Reference (DCFR). Secondly, European legislators need to know what is a problem in terms of national laws and what is not. If a particular issue is already regulated adequately in the laws of the Member States, and this is done in a reasonably harmonious fashion, then there is no reason for the European legislator to apply harmonisation measures. Thirdly, if legislation at the European level is to be enacted, it should as far as possible be drafted in terms that will be understandable from the standpoint of each national system, and which can achieve a reasonable 'fit' with that system. Again, therefore, the European legislator — or at least the person responsible for the detailed drafting — needs to know how particular issues are treated in the laws of the different Member States.

Thus, in addition to principles, definitions, and model rules, the CFR should contain what I term 'essential background material'. Information about the different laws would be made available in the notes to each article, so that it would be grouped under headings with which the legislator will be familiar.

In this paper, I want to give a practical example of this role in providing essential background information. Wilhelmsson's paper<sup>2</sup> deals with pre-contractual information duties in the existing *acquis* and the DCFR — in particular, the information that a business is required to give to a consumer. But all Member States, as part of their general law, have some rules that apply when a party has entered into a contract on the basis of inaccurate or incomplete information about the facts. These are the rules on fraud, misrepresentation, and mistake, and — in some countries — the duty to disclose. These provisions of general contract law normally apply to consumer ('B-to-C') contracts as well as to contracts between businesses ('B-to-B') and contracts between private parties ('C-to-C').<sup>3</sup> In order to decide whether it is necessary to maintain or extend the directives that require disclosure of information before a contract is made, the legislator needs to know what rules the Member States already apply as part of their general laws of contract.

I will also show consider the provisions of the DCFR as 'model rules' that might be adopted as part of, for instance, an optional instrument. How do they differ from the national laws, and how suitable are the DCFR provisions for an optional instrument?

---

<sup>1</sup> The Nature and Purposes of the Common Frame of Reference, above, pp. 10–17.

<sup>2</sup> Below, pp. 51–57.

<sup>3</sup> In theory, the general rules might be displaced by specific consumer rules but this is unlikely: normally consumer law gives the consumer additional rights or remedies but does not take away the consumer's rights under the general law.

Thus, in this paper I deal with the rules of general contract law that may give a party a remedy when they have entered a contract under some form of ‘misapprehension’ of the facts — for example, about the characteristics of what they are buying or the circumstances of the contract.<sup>4</sup> (I prefer to use the neutral term ‘misapprehension’ rather than ‘mistake’, because the word ‘mistake’ often carries with it an implication that a kind of mistake is involved that is legally relevant. As we will see, in some systems only a very narrow range of ‘mistakes’ may be grounds for relief; in others, a far wider range of ‘mistakes’ may be legally relevant.)

The misapprehension may be the result of one party being given incorrect information by the other, or by a third party, or it may be the result of the party’s own misunderstanding, in which case we can call it ‘self-induced’. The DCFR contains rules on all of these topics. To what extent do these rules merely state principles that are common to all Member States? Are there substantial differences meaning that, in some Member States, consumers or other parties who enter contracts under a misapprehension are significantly better protected than they are in other Member States? Might such differences constitute hindrances to the internal market?

What I will attempt here is a brief survey of the treatment of these issues in the laws of some of the Member States, and a comparison to the provisions of the DCFR. Because space is limited, I hope I may be forgiven for dealing only with the laws of England, France, and Germany. Even with these I will have to resort to some broad generalisations, with the consequent risk that many of the nuances of each system may be lost. I will also have to limit the discussion to selected topics. Thus I will deal only very briefly with the case in which self-induced misapprehensions are shared by both parties<sup>5</sup>; and I will not deal at all with the complex problem of contracts entered into on the basis of incorrect information from third parties.<sup>6</sup> I hope, however, to be able to say enough to demonstrate the need for a toolbox to provide the kind of background information I have described.

## 1. Harmonisation?

Given the title of the volume, we should begin by asking whether this area is one in which there has been, to date, any degree of harmonisation. This might seem to be a field that is ripe for harmonisation. As we will see, at first sight the laws of the Member States mentioned above differ markedly, particularly as to mistake and duties of disclosure. I will argue that, if we look behind the variety of concepts and terminology, and concentrate on the actual results reached in concrete cases — this adaptation of the well-established ‘functional approach’ is the basis on which the Principles of European Contract Law<sup>7</sup> (PECL), for example, are founded — the differences become much less. Nonetheless, this is one of the areas of general contract law in which there are some very striking differences.

Obviously, there has been some harmonisation through implementation of the EC directives that require certain types of pre-contract information to be given — for example, the Distance Selling Directive<sup>8</sup> and the Package Travel Directive.<sup>9</sup> However, these apply only to B-to-C contracts. On B-to-B and C-to-C contracts there is very little. The Commercial Agents Directive, for example, says nothing about pre-contract information, though arguably commercial agents need to be properly informed before they enter into a contract.<sup>10</sup> It is, of course, true that ‘soft law’ instruments such as the UNIDROIT Principles of International Commercial Contracts<sup>11</sup> (UPICC), the PECL materials, and even the DCFR itself contain provisions that are set forth in broadly similar terms. However, soft law of itself does not achieve harmonisation. The most it can achieve on its own is some harmonisation of practice. Thus, there will be some harmonisation in practice if these instruments are adopted by the parties to govern their contract (so far as that is permissible under the applicable national law: under the Rome Convention, it is not possible to adopt such soft law to displace the governing national law entirely), or if the soft laws are applied by arbitrators as statements of ‘internationally accepted principles’ and the like.<sup>12</sup>

<sup>4</sup> I will not deal with mistakes and misunderstandings over the terms of the contract, for example when a party sends a written offer to sell goods for £10 when he meant to write £100.

<sup>5</sup> See below, p. 46.

<sup>6</sup> On this, see DCFR articles II.–7:208 and II.–9:102.

<sup>7</sup> O. Lando, H. Beale (eds.). *Principles of European Contract Law. Parts I and II.* Kluwer 2000; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). *Principles of European Contract Law. Part III.* Kluwer 2003.

<sup>8</sup> Directive 97/7/EC of 20 May 1997, article 4. – OJ L 144, 4.06.1997, pp. 19–27.

<sup>9</sup> Directive 90/314/EEC of 13 June 1990, articles 3 and 4. – OJ L 158, 23.06.1990, pp. 59–64.

<sup>10</sup> Cf. Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (Interim Outline Edition. Sellier 2008) (DCFR), Book IV.E–2:101.

<sup>11</sup> 2<sup>nd</sup> ed., 2004.

<sup>12</sup> For these uses, see PECL article 1:101 and the Preamble to the UPICC, section 4.

What in time I hope we will be able to say is that the soft law instruments have led to some degree of convergence between the laws, as national legislators and courts have drawn on them when reforming or developing national law. This is the subject of other papers in the volume, and I will not discuss it here, save to say that this process is only just beginning — with Estonia setting the pace!

## 2. Mistake caused by incorrect information given by the other party

I will start my comparison with the case in which a party has entered a contract under a misapprehension about the subject matter or the surrounding circumstances that was caused by incorrect information given by the other party. Since we are dealing with general contract law, I will resort to disembodied characters. Let us call the (female) party who claims she entered into the contract under the misapprehension party ‘A’ and the other (male) party to the contract — the one who gave A the incorrect information — party ‘B’.

### 2.1. Shared principles and terminology: Fraudulent misstatements

I begin with a case in which we find a good deal of similarity between the systems, not only in results but in the terminology and concepts used. This is where A entered into the contract under a misapprehension because B had deliberately given A information that B knew to be incorrect. It is normal to refer to this as a case of fraud. In some systems, it is called fraudulent misrepresentation, while in others it might be more common to call it mistake induced by fraud, but the difference in these concepts seems to be minimal.<sup>\*13</sup> The remedies are also broadly similar in the different systems. Thus, even if the fraud is related to a fairly minor matter, A will have the right to avoid the contract; and B will also be liable to pay damages. The liability for damages will normally be non-contractual (tort, delict, civil responsibility), with the aim being to compensate A for her reliance loss (‘negative’ interest).

Thus, it was hard to agree on the PECL<sup>\*14</sup> fraud article, which in its DCFR version reads as follows (in part<sup>\*15</sup>):

#### II.–7:205: Fraud

- (1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct [...]
- (2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and is intended to induce the recipient to make a mistake [...]

Likewise, the DCFR provides that A may recover damages from B. The damages are “to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded”<sup>\*16</sup>.

### 2.2. Different concepts, similar results: B gives incorrect information without fraud

In the next category we find that the systems apply different concepts and terminology but the practical results are very similar. This is the case when A enters into the contract under a misapprehension because of incorrect information given to her by B but B was not acting fraudulently — B did not know that the information was incorrect.

In many systems, including French and German law, this case would be treated as one of mistake. Firstly, A would be permitted to avoid the contract on grounds of mistake, provided that the mistake had a certain seriousness: in French law, if it related to some *qualité substantielle* of the subject matter<sup>\*17</sup>; in German law, if it was “as to those characteristics of a [...] thing that are regarded in business as essential”<sup>\*18</sup>.

<sup>13</sup> I will discuss one major difference — that in some systems keeping silent may amount to fraudulent conduct, below.

<sup>14</sup> Article 4:107.

<sup>15</sup> See further below, p. 48.

<sup>16</sup> DCFR article II.–7:214 (2).

<sup>17</sup> E.g., Cass civ, 23 novembre 1931, D.P.1932.1.129, n. Jossierand; Gaz.Pal, 1932.1.96; see H. Beale, A. Hartkamp, H. Kötz, D. Tallon. Cases, Materials and Text on Contract Law. Hart 2002 (“Ius Commune Casebook”), p. 369.

<sup>18</sup> BGB § 119 (2).

Secondly, if B was at fault — if he should have known that the information was inaccurate — it seems that B would be liable to pay damages to A. In French law, this would be on the basis of CC article 1382. In German law, the claim would be on the basis of *culpa in contrahendo*.<sup>\*19</sup> The usual remedy for *culpa in contrahendo* is an award of the negative interest in damages under BGB § 249.<sup>\*20</sup> It seems that in either system there may be liability under these headings even if the conditions for avoidance for mistake are not met, for example, because the mistake is not sufficiently serious.<sup>\*21</sup>

It should be noted that in both systems A may have relief from the contract in more cases than I have just mentioned. Later we will see that in both systems there may be relief on the ground of mistake in further cases; additionally, there are a number of other doctrines which may also afford relief: for example, in French law, absence of *objet* or of *cause*, or in German law, initial impossibility.<sup>\*22</sup> However, I want to confine my discussion to the case where B gave incorrect information, and to relief on the ground of mistake, in order to show how other systems may reach similar results but by a very different route.

The principal comparison here is to the common law systems. As we will see in more detail later, English law<sup>\*23</sup> would seldom give relief on grounds of mistake in such a case. Just as in the case of fraud, English lawyers would normally say that A's remedy is given because of B's fraudulent misrepresentation, rather than on the basis of A's mistake, so in this case relief would be granted on grounds of misrepresentation. In the 19<sup>th</sup> century it was established that a contract that has been entered into as a result of a misrepresentation may be avoided by the misrepresentee, even though the misrepresentation was not fraudulent but 'innocent'.<sup>\*24</sup> Until 1967 it would have been possible for A to avoid the contract even if the incorrect statement concerned some minor matter<sup>\*25</sup>, but now, by statute, where there was no fraud the court has discretion to refuse to permit rescission.<sup>\*26</sup> The court would probably exercise its discretion where the misrepresentation was as to something minor.<sup>\*27</sup> The same statute creates liability for damages if B was negligent in giving the incorrect information.<sup>\*28</sup> Again, damages will be on the tort measure.<sup>\*29</sup>

Thus, in the second situation I pose, the concepts and language employed by the three systems are quite different but the actual results are similar. If A's misapprehension was as to something important, she will be able to avoid the contract whether or not B was at fault in giving the incorrect information. If B was at fault, B will be liable in damages (measured on the negative interest basis) whether or not A can avoid the contract. Again it was not too hard for the Commission on European Contract Law to agree on the substance of the results that should be produced by the common principles.

There was, however, a difficulty over the form, the terminology, to use in stating the 'rules'. Which concepts and language should be used — the Continental language of 'mistake', the English language of 'misrepresentation', or possibly some neutral but unfamiliar term like 'misapprehension'? It is not surprising that the Commission on European Contract Law followed the UPICC<sup>\*30</sup> in adopting a 'mistake-based' model<sup>\*31</sup>, and this is followed in the DCFR in II.–7:201: Mistake:

- (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
  - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
  - (b) the other party:
    - (i) caused the mistake (otherwise than by merely leaving the mistaken party in error) [...].

<sup>19</sup> See Ius Commune Casebook (Note 17), p. 405; also PECL article 4:117, Note 1. Moreover, B would lose any claim to compensation under BGB § 122.

<sup>20</sup> See Münchener Kommentar, under BGB § 275, paragraph 194.

<sup>21</sup> See Ius Commune Casebook (Note 17), pp. 404–405.

<sup>22</sup> *Ibid.*, pp. 381–382.

<sup>23</sup> I believe the same is true of Irish law, but not always of American law, where the grounds of relief mistake have been broadened.

<sup>24</sup> *Redgrave v. Hurd* (1881) 20 ChD 1; Ius Commune Casebook (Note 17), p. 401.

<sup>25</sup> Though possibly there is no remedy if it is not 'material' in the sense that it is so minor that it would have no influence at all on the reasonable person; see Chitty on Contracts (29<sup>th</sup> ed, 2004) § 6–036.

<sup>26</sup> Misrepresentation Act 1967, § 2 (2).

<sup>27</sup> *Cf. William Sindall Ltd. v. Cambridgeshire CC* [1994] 1 WLR 1016.

<sup>28</sup> See § 2 (1), which gives B the burden of proving that he had reasonable grounds for believing what he said.

<sup>29</sup> *Royscot Trust Ltd. v. Rogerson* [1991] 2 QB 297, CA.

<sup>30</sup> See now UPISCC article 3.5.

<sup>31</sup> See PECL article 4:103.

This needs to be read alongside DCFR II.–7:204 ('Liability for Loss Caused by Reliance on Incorrect Information')<sup>32</sup>, which provides that a party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information was at fault.

## 2.3. Different results: Self-induced misapprehension

When we turn to my last category, we find not only that the systems use different language but that they reach very different results. This is the category of case in which A has entered the contract under some misapprehension that was not caused by anything B did or said; in other words, the misapprehension was 'self-induced'. Within cases in this category there are variations possible. Firstly, B may or may not have been under the same misapprehension. Secondly, B may or may not have known that A was under the misapprehension.

For reasons of space, I will not deal with the case where the two parties shared the same misapprehension. All of the systems give relief in some cases of shared mistake, though under rather different conditions. In French and German law, the right to avoid is subject to the normal test that the mistake must be as to something of importance.<sup>33</sup> The common law gives relief for shared ('common') mistake only in very extreme cases. If fulfilment of the contract, or the contractual venture as conceived by both the parties, is in fact impossible, the contract will be void. In other cases there will be no relief.<sup>34</sup> The DCFR follows the Continental approach.<sup>35</sup>

### 2.3.1. B knew about A's mistake

If, when the contract was made, B knew that A was entering into it under a misapprehension about the subject matter or circumstances but B dishonestly decided to keep silent, in many Continental systems B will be deemed guilty of fraud. In French law, this would be a case of *dol par réticence* and A would have the same remedies as in a case of fraudulent misrepresentation. German courts have also held that non-disclosure can amount to fraud if A may expect disclosure in keeping with the requirements of good faith and fair practices in accordance with BGB § 242.<sup>36</sup> However, the German courts may be less demanding than the French: A cannot always expect disclosure.<sup>37</sup> This seems to depend on factors such as how important the fact is and how hard it would have been for A to discover the truth.<sup>38</sup>

Further, even if B was not acting dishonestly, if A's misapprehension was as to something of importance, A will be able to avoid the contract on grounds of mistake.

Under English law, by contrast, keeping silent cannot amount to fraud. There is no duty for B to point out A's mistake, even if it is perfectly obvious that A would never enter the contract if she knew the truth. Only in exceptional cases, such as with contracts of insurance<sup>39</sup>, is there any duty of disclosure in common law. Nor will A get any help from the doctrine of mistake. A self-induced mistake as to the facts — the nature of the subject matter or the circumstances — made by one party but not the other simply does not constitute grounds for relief in English law.

### 2.3.2. A's mistake was unknown to B

The last scenario is that A entered into the contract under a mistake that was unknown to B. In French law, A may avoid the contract, provided that the mistake was as to some matter that B knew was a matter of importance. Under German law, the same is true, but the relief for A is subject to an important qualification. If A avoids the contract, she may be required to compensate B for losses incurred in reliance on the contract, unless B did not know and had no reason to know of the mistake.<sup>40</sup> In English law, there would be no relief at all in this situation.

In these cases, therefore, we see a real divergence in substance between the three legal systems. I would say that this difference is probably the greatest that we encountered in preparing the PECL. It is clearly important to flag for the reader that whatever rules on this topic are contained in the CFR are definitely **not** shared by all

<sup>32</sup> Derived from PECL article 4:106.

<sup>33</sup> See above, pp. 44–45.

<sup>34</sup> See *Great Peace Shipping Ltd. v. Tsavlis Salvage (International) Ltd.*, *The Great Peace* [2002] E.W.C.A. Civ. 1407, [2003] Q.B. 679.

<sup>35</sup> See II.–7:201.

<sup>36</sup> E.g., BGH, 3 March 1982. – NJW 1982.1386; *Ius Commune Casebook* (Note 17), p. 415.

<sup>37</sup> E.g., BGH, 13 July 1988. – NJW 1989.763.

<sup>38</sup> See *Ius Commune Casebook* (Note 17), pp. 417–419.

<sup>39</sup> Contracts of insurance are described as contracts 'of the utmost good faith' and the parties (in practice, the would-be insured) must disclose all material facts. Similar rules apply to a few other kinds of contract; see *Chitty on Contracts* § 6–139 *ff.*

<sup>40</sup> BGB § 122.

of the Member States. Rather, the researchers, like the Commission on European Contract Law before them, have made a policy choice. The divergence also illustrates the need to provide the European legislator with information about what is out there in the laws of the Member States. For example, were a legislator to assume that the position in French law reflects ‘the norm’ throughout Europe, it might well conclude that it is not necessary to provide any additional protection, even for consumers. This also illustrates the need to make sure the legislation fits with the different systems. For instance, it would be no good for the legislation to provide that “a party’s duty of disclosure shall include X and Y” when in English law there is no such duty.

### 3. The DCFR solution

What approach does the DCFR take? It will come as no surprise for one to find that the DCFR, like the PECL before it, adopts a compromise position. Firstly, in some cases B’s failure to point out to A that A is making a serious mistake may amount to fraud. But, as under German law, this is only when failure to point this out would be a breach of the duty of good faith and fair dealing. Thus article II.–7:205 (1) provides that there is fraud not only where there has been fraudulent misrepresentation<sup>\*41</sup> but also where there was “fraudulent non-disclosure of any information which good faith and fair dealing required that party to disclose”. Equally, there is a compromise on mistake. Secondly, the DCFR allows avoidance on grounds of mistake in cases where only one party is under a self-induced misapprehension, but under more limited conditions than in French or German law. Self-induced mistake by A is grounds for relief but only when B shared it<sup>\*42</sup> or

(ii) knew or could reasonably be expected to have known of the mistake and, contrary to good faith and fair dealing, left the mistaken party in error [...] <sup>\*43</sup>

These articles serve as not just an example of a political compromise between two opposing positions, however. We think they provide a more workable approach than do either of the extreme positions represented by English law, on one hand, and French law, on the other.

For a long time, English lawyers have recognised that in many situations their rule of non-disclosure is out of step with morality. As long ago as in 1871, Chief Justice Cockburn said that the law was different from the moral position:

The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding [...] <sup>\*44</sup>

It is not wholly clear why English law has adhered to this rule of non-disclosure. One possibility is that English morality is out of line with that of our fellow Europeans. I doubt that. I think it is more likely to be the result of the fact that English law is very heavily influenced by the heavy diet of commercial cases that are heard in English courts. Many of these are contracts between very sophisticated players in highly competitive markets in which good faith probably would not require any disclosure to be made in any event. If one takes a case like the leading French case, in which the seller of a country cottage deliberately did not tell the buyer that a neighbouring farmer was about to open a pig farm<sup>\*45</sup>, I suspect that even the most hardened English lawyer would say that the law ought to require the seller to say something. I think what has happened is that the rule has only ever been challenged in commercial cases, and these have produced a rule that has been said to apply to all cases but is not appropriate for all of them.

Conversely, however, it has been argued even by French authors that some of the French cases go too far — particularly, cases such as the celebrated case of the Poussin painting, in which it was held that the buyer of a painting (the Louvre) should have disclosed to the sellers that there was a chance that it was by that famous artist, whereas (to the buyer’s knowledge) the sellers were under the impression that it could not be by Poussin.<sup>\*46</sup> That rule seems to prevent a party from capitalising on information that it may have expended a great deal of time and money to acquire.<sup>\*47</sup> It has been argued persuasively that it may be right to require a party to disclose

<sup>41</sup> See above, p. 44.

<sup>42</sup> See above, p. 46.

<sup>43</sup> DCFR article II.–7:201 (1) (a) (ii). PECL article 4:103 was to the same effect.

<sup>44</sup> *Smith v. Hughes* (1871) LR 6 QB 596.

<sup>45</sup> Cass Civ 3, 2 octobre 1974, Bull.civ. III.330, D.1974, IR.252; RGLJ 1975.669, n. Blanc; *Ius Commune Casebook* (Note 17), p. 412.

<sup>46</sup> Cass Civ 13 decembre 1983, JCP 1984.II.20186 and Cour d’appel versailles, 7 janvier 1987, Gaz.Pal.34; *Ius Commune Casebook* (Note 17), p. 373.

<sup>47</sup> For a valuable discussion of the problem from a law-and-economics viewpoint, see A. Kronman. *Mistake, Disclosure, Information and the Law of Contracts.* – *Law & Society* 1978 (7) 1 and further pieces cited in *Ius Commune Casebook* (Note 17), p. 428, n. 303.

information about his own *prestation* but not to require that he give the other party information about that other's own *prestation*.<sup>\*48</sup> It seems a better rule to say that B should have to point out A's mistake when in the circumstances a failure to do so would be contrary to the general standard of good faith and fair dealing. As we have seen, this is what the DCFR's articles II.–7:205 ('Fraud') and II.–7:201 ('Mistake') do. However, since good faith and fair dealing is not a standard that is well known in all legal systems, the DCFR tries to give more precise guidance as to when disclosure is required. Article II.–7:205 continues thus:

- (3) In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including:
- (a) whether the party had special expertise;
  - (b) the cost to the party of acquiring the relevant information;
  - (c) whether the other party could reasonably acquire the information by other means; and
  - (d) the apparent importance of the information to the other party.

One sees here that the DCFR takes a compromise rule. We researchers think that, were the European legislator ever to contemplate a directive to harmonise the laws on the general duty of disclosure, this would be a good model, at least one from which to start the negotiations that inevitably would take place on exactly what the rule should say. Likewise, we think this would be an appropriate rule to include in an 'optional instrument', whether that were to be aimed at B-to-C contracts or at B-to-B contracts, especially those involving SMEs.<sup>\*49</sup>

## 4. Indirect duties of disclosure

So far I have discussed only the rules on fraud, mistake, and non-disclosure. It is worth pointing out that, in all legal systems, in practice these form only part of the picture. There are other rules that have the indirect effect of requiring one party to make a disclosure to the other party. I will mention just a few of these.

### 4.1. Unfair exploitation

Many legal systems allow a party to claim relief if said party has been a victim of deliberate exploitation by the other party — what is sometimes called 'qualified lesion'.<sup>\*50</sup> The DCFR, like the PECL<sup>\*51</sup> and UPICC<sup>\*52</sup>, contains a provision on this, in its II.–7:207 ('Unfair Exploitation'):

- (1) A party may avoid a contract if, at the time of the conclusion of the contract:
- (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and
  - (b) the other party knew or could reasonably be expected to have known this and [...] exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.

One form of advantage-taking is where one party exploits the other's ignorance by buying property at well below its market price while knowing that the seller has no idea of its value. It is obvious that an indirect effect of this rule is to make the buyer warn the buyer of the true value.

Another example is the indirect effect of the obligations related to conformity in contracts such as those for sale of goods. If the goods are not in conformity with the contract, the seller will be liable<sup>\*53</sup> — unless, before the contract was made, the seller pointed out the defect in the goods to the buyer.<sup>\*54</sup>

When these indirect obligations are taken into account, the practical differences between the laws of the Member States are reduced even further, yet, in those cases falling outside these rules, the fundamental differences I identified earlier remain.

<sup>48</sup> M. Fabre-Magnan. Duties of Disclosure and French Contract Law. — J. Beatson, D. Friedmann (eds.). *Good Faith and Fault in Contract Law*. Oxford: Clarendon 1995, pp. 99–120.

<sup>49</sup> See my first paper, above, p. 10–17.

<sup>50</sup> See *Ius Commune Casebook* (Note 17), pp. 460 *ff.*

<sup>51</sup> PECL article 4:109.

<sup>52</sup> UPICC article 3.10.

<sup>53</sup> See DCFR article IV.A–2:102.

<sup>54</sup> See DCFR article IV.A–2:307.

## 4.2. Duties of disclosure in special contracts

I end my survey by considering some specific requirements to disclose information that appear in the DCFR, though they are far from being recognisable in all legal systems and therefore may appear striking, even shocking. In the Book on Services Contracts, there is a general duty set forth for the service provider to warn the client if there is a risk that the service requested may cause damage or injury to the client's other property or interests, and even to warn that the service may not achieve the results the client wants. Article IV.C-2:102 ('Pre-contractual Duties to Warn') states the following:

- (1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware that the service requested:
  - (a) may not achieve the result stated or envisaged by the client, or
  - (b) may damage other interests of the client, or
  - (c) may become more expensive or take more time than reasonably expected by the client.

The category of service contracts addressed in the DCFR is so broad — “It applies in particular to contracts for construction, processing, storage, design, information or advice, and treatment”<sup>55</sup> — that this almost amounts to a provision of general contract law. It goes further than either the article on fraud (which specifies that the service provider may not deliberately aim to mislead the client) or that on mistake. The mistake article applies only if the mistake results in the terms of the contract being fundamentally different from what would have been agreed upon had the client known the true position, which is not a requirement of article IV.C-2:102.

At first sight, I thought, article IV.C-2:102 simply cannot represent anything like the ‘common principles’ of the laws of the Member States, but, when I thought about it more carefully, I realised that it is not actually so radical. It merely **seems** radical, for at least two reasons. Firstly, we are not used to seeing ‘rules’ on service contracts — in most legal systems, there is little by way of legislation on them. Secondly, again we need to consider function, not form. Even in my own system, which I think may fairly be characterised as espousing highly individualistic values and imposing few information duties, there are cases that come very close to this. We have cases of courts holding that a surgeon is under a duty to a patient to explain the risks involved in a course of treatment, including both the risk that the operation may cause further injury<sup>56</sup> and the risk that the operation or treatment may not work.<sup>57</sup> They are rather ‘hidden’, however, by the fact that cases of professional negligence are more often discussed in books on liability in tort than in books on contract law — if only because in a country in which at least some operations are carried out under the National Health Service, the patient has no contract with the surgeon and must therefore sue in tort. However, when the operation is performed ‘privately’, the patient may sue the surgeon for negligence in either contract or tort (English law has no rule of *non-cumul*). At least some of the decisions are explicitly based on contract.<sup>58</sup> Similarly, there have been cases in the common law world holding a builder liable as negligent for failing to point out defects in a design.<sup>59</sup>

Thus, we can see that the rule quoted above is not so radical, and to me it makes a lot of sense. If a woman takes her favourite vintage dress to the dry cleaners, is it unreasonable to require the dry cleaner to point out that the fabric may no longer be strong enough to withstand the treatment, or that the treatment will not remove a stain that is 20 years old? I don't think it is.

What is more radical, perhaps, is to require the client to give information to the service provider about the risks the latter faces. Article IV.C-2:102 continues thus:

- (4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.

So if you employ a builder to build an extension to your house, and you happen to know that running across the site there is an old drain that the builder doesn't know about and that is likely to cause him problems, you should warn him. Again, it does not seem unfair that the duty should be reciprocal. As we say in England, what is sauce for the goose is sauce for the gander.

<sup>55</sup> DCFR article IV.C-1:101 (2).

<sup>56</sup> E.g., *Sidaway v. Governors of the Bethlem Royal and Maudsley Hospital* [1985] AC 871, HL.

<sup>57</sup> See *Thake v. Maurice* [1986] QB 644, CA (surgeon negligent in not warning private patient that a male sterilisation operation might reverse itself naturally.)

<sup>58</sup> *Thake v. Maurice*, above.

<sup>59</sup> *Brunswick Construction Ltée v. Nowlan* (1974) 21 Building LR 27 (Supreme Court of Canada).

## 5. Conclusions

I have tried to show the function of the CFR in order to provide essential background information — and indeed I hope I have provided some background to more specific discussion of pre-contract information duties in the *acquis*. I have also shown how the CFR can provide model rules that should be considered — were there ever to be European legislation dealing with general contract law. Harmonisation of the general contract law in the Member States — via a directive on general contract law, for example — seems most unlikely, but (as I argued in my first paper) there is a case for developing an optional instrument that parties could use to govern their contract in place of national law. Obviously, the model rules of the DCFR could form a first draft for discussion.