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Reform of Contract Law in Estonia:

Influences of Harmonisation of European Private Law

Estonia has become known as one of the most reform-inclined countries in Europe. Rapid restructuring of the economy in the spirit of liberalism, reform of the entire private law system upon the principle of private autonomy, and adaptation of the legal system to the EU accession requirements were completed swiftly and without long discussions.[*1] The first laws were the reform laws, the aim of which was to support economic reforms, but also the first parts of the new Civil Code were adopted quite soon after the regaining of independence.[*2] The legislative process was from the beginning to be largely influenced by the decision of the Estonian Parliament from 1992 on the continuity of legislation, but, fortunately, this was only a parliamentary policy decision and did not indicate a direction that it was obligatory to follow. In practice, the recommendation to use old laws or drafts from the first independence to draft the new legislation on contract law was ignored.[*3] The Law of Obligations Act[*4], adopted on 28 September 2001 and entering into force on 1 July 2002, has been influenced by the most important sources of European harmonised private law, such as the Principles of European Contract Law (PECL), the Principles of International Commercial Contracts (UNIDROIT principles), and the 1980 Convention on Contracts for the International Sale of Goods (CISG). Also the civil laws of European countries were taken into account as models for drafting the LOA. Most influential were the

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1 About the legal reforms in Estonia see P. Varul. The Creation of New Estonian Private Law. – European Review of Private Law (ERPL) 2008/1, p. 95 *ff*; P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International 2001, p. 104 *ff*. Also M. Käerdi. Estonia and the New Civil Law. – H. Mac Queen et al. (ed.). Regional Private Laws & Codification in Europe 2003, p. 250 *ff*; N. Reich. Transformation of Contract Law and Civil Justice in the New EU Member Countries: The Example of the Baltic States, Hungary and Poland. – F. Cafaggi (ed.). The Institutional Framework of European Private Law 2006, p. 271 *ff*.

2 First was the Property Law Act (asjaõigusseadus), adopted on 9 June 1993, entered into force on 1 December 1993. – RT I 1993, 39, 590 (in Estonian). Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

3 Resolution of the *Riigikogu* (Estonian Parliament) concerning the continuity of legislation. – RT 1992, 52, 651 (in Estonian). During the first independence from 1918–1940 the Estonian codification process had been nearly completed before the Soviet takeover in 1940, but the Civil Code of 1939 was never formally enacted. The Civil Code of 1939 was influenced largely by the German Civil Code and the Swiss Civil Code. The tradition of pandectistic civil codes had been introduced in Estonia even before 1939, as the first major written body of law in the territory of Estonia – The Baltic Private Law Code (BPLC) – dates back to 1863. The BPLC had been in force in Estonia as a result of the so-called Baltic Special Rights granted to the Baltic countries by Russia (Estonia had been a part of Russia from the beginning of the 18th century), and it had been allowed to maintain the predominant Baltic-German law that had been in force here before the Russian Empire. See also M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International 2000 (V), pp. 157–167.

4 Law of Obligations Act (võlaõigusseadus), adopted on 28 September 2001, entered into force on 1 July 2002. – RT I 2001, 81, 487 (in Estonian). Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

German Civil Code, the Swiss Code of Obligations, and the civil codes of Austria and the Netherlands.[*5] The decision to follow the model of a pandectic civil code and adopt parts of the civil code as separate legal acts guaranteed that the most important fields of civil law were reformed first and that the whole of private law was drafted under the same principles. Work on the Law of Obligations Act started in 1994 when the first commissions were organised.[*6] The principal commission, for the civil and commercial code, started its work in 1992. Today when we are discussing the future development of European private law and the result of the work done by the Study Group on a European Civil Code on a Common Frame of Reference[*7], the experiences of different European countries in modernising or reforming their national private law become highly valuable. The following brief overview of the main sources and influences in the legal drafting of the new Estonian contract law system concentrates only on some critical moments and conclusions.

1. The main influences — our own history and European private law

The relevant guidelines from 1992 in the decision on the legal continuity of the Republic of Estonia determined unambiguously the effect of the historical argument concerning legislation. The main effect entailed by such an approach was the justified ties with the German legal family facilitated by the historical argument of the legislator following regaining of independence.[*8] It must be pointed out that the most important model from the era of the first independence was the draft Civil Code of 1939. It was an updated and simplified version of the Baltic Private Law Code (from 1864), which consisted of five books and had some significant implications derived from the most important classical private law codes of the beginning of the 20th century, such as the German and Swiss civil codes and the Austrian Law of Obligations, as well as legal acts of Scandinavian countries; the draft codes of Hungary, Czechoslovakia, and Poland; international conventions; and draft laws.[*9] The draft from 1939 was prepared under the guidance of Professor Uluots for more than 15 years and could not be approved by the Estonian parliament because of the occupation in 1940. Through intensive discussions in the early 1990s, it became evident that the mere reintroduction of the old draft statutes from the 1940s would not serve the needs of the society and that the goal should be to create a new, modern, comprehensive civil code. Specifically, in the field of contracts and non-contractual obligations it was impossible to follow the old law. Influences from Soviet law were quite strong until 2002, when the new LOA replaced the old Soviet Civil Code from 1965. Here we have to remember that contract law was governed not by the principle of autonomy but by discretionary regulation, obligation to conclude a contract, and binding law. During the time of the Soviet Republic of Estonia, transactions between enterprises (there was no concept of legal person) were regulated by public-law-like rules on state procurement, there was no concept of real property, all land belonged to the state, and contracts between natural persons were restricted to items of personal and family use.[*10] Changes in the legal system were revolutionary — they changed the entire way of thinking, understanding the role of law and justice in the society, the tasks of the lawyers, and the meaning of law generally. As the goal of civil law reform was set as creation of a completely new, modern and democratic civil law that meets the needs of a market economy, it influences also how lawyers think of law and understand it. In speaking about the influences from the recent past, we should recognise that the main purpose of the reform was to make a break from the past and build a new legal system, one based on principles common to all European countries and legal systems.

There were many important decisions made that influenced the reform of the system of Estonian private law. The most important of these was the choice of the Germanic family of law as the main model for the drafting of new laws[*11], but at the same time drafting of the acts was based on a comparative approach. The main

5 P. Varul (Note 1), p. 99. See also M. Käerdi (Note 1), p. 250 *ff*; N. Reich (Note 1), pp. 271–302. See also I. Kull, A. Hussar. Codi del dret civil d'Estònia: procés i experiència en l'aplicació de la nova llei (Codification of Civil Law in Estonia — process and experience in applying the new law). Revista Catalana de Dret Privat 2006/7, pp. 167–194 (in Catalan).

6 H. Mikk. Tsiviilõiguse reformist Eesti võlaõiguse ja tsiviilseadustiku eelnõude valguses (About the Reform of Civil Law in Estonia on the Example of Drafts of Law of Obligations Act and Civil Code of 1940). Presentation at the Sixth Annual Conference on Notaries and Real Property Registry, 13–15 May 1999. – Ettekanded. Eesti Vabariigi Justiitsministeerium (Presentations. Republic of Estonia Ministry of Justice), 1999, pp. 122 (in Estonian).

7 Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition. Ed. by Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group). Sellier, European Law Publishers 2008.

8 M. Käerdi. Regulation of Limitation Periods in Estonian Private Law: Historical Overview and Prospects. – Juridica International 2001 (VI), p. 66.

9 *Ibid*., p. 67.

10 More about the "Baltic Revolution" see N. Reich (Note 1), pp. 275–279 *ff*.

11 About the development of the new Estonian private law see P. Varul (Note 1), pp. 104–118. Also M. Käerdi (Note 1), p. 250 *ff*; N. Reich (Note 1), pp. 271–302. See also I. Kull, A. Hussar (Note 5), pp. 167–194.

goal was to draft an act that would outlive or at least easily cope with the inevitable unification process of private law in Europe. Here we have to refer to our past once again. In the explanatory memorandum of the draft, Professor Uluots wrote in 1936 that "Estonia is a country with a rich civil law past while its historical development has been excessively unique, consisting of elements that originate from ancient to modern era. This legacy had to be updated and supplemented."[*12] One may see that these words are not outdated even today. There is a tradition of comparative research, searching for the best solutions from other legal systems and adapting them to our own legal traditions and culture — to our understanding of fairness, reasonableness, and needs of real life.

The fact that Estonia was cut off from the roots of its legal traditions had in that sense also some positive effects. As the new civil law was basically initiated with a blank slate, with no predetermined authorities, we were indeed offered a unique opportunity to realise all those unification and harmonisation ideas that most of Europe can only dream of.[*13] A feature specific to the civil law reform in Estonia was the codification in step-by-step principles, starting with the most urgent subject matter in property law and concluding with the Law of Obligations Act in 2002. The first book — the Law of Property Act — came into force in 1993 in order to create a foundation for the emerging immovable property commerce.[*14] The second book was the General Part of the Civil Code Act[*15] (GPCCA), which represented a mixture of the Civil Code from 1965 and the principles derived from the draft Civil Code of 1939[*16] and which was renewed in 2002. Then the Family Law Act[*17] in 1995 and the Law of Succession Act[*18] in 1996 followed. As a result of the monist system of Estonian private law, the imaginary Civil Code (five books as separate acts) applies to legal relationships between business and private individuals in a uniform manner.[*19] It was decided that there would be no commercial code dealing with business transactions and no consumer code for consumer transactions. The Consumer Law Act has been in force since 1994 but from 2002 has consisted of reference to the LOA concerning private law relations. Now the LOA contains special rules and exceptions to general provisions that apply only to B-to-B or B-to-C contracts, mainly granting more freedom in contracts concluded in the course of professional or economic activities and providing restrictions and mandatory rules for consumer contracts.

During the preparatory phase, it was decided not to copy the law of any particular country.[*20] Thus, the working group decided to select a particular type of legal system as its basic model and use other sources for better solutions (legal acts of Switzerland, the Netherlands, Denmark, France, Italy, and the Nordic countries).[*21] The basic model was the Germanic legal system, and the draft of the LOA was largely modelled on the German Civil Code (BGB) and particularly the draft proposing modification to the BGB (BGB-KE).[*22] In contrast, provisions on non-contractual liability were based extensively on provisions of the Swiss draft law.[*23] The available court practice of the respective countries and the actual application of various provisions were taken into account. Because of time limits, no significant attention has been paid to issues such as the social consequences of innovations and their impact on the formation of legal culture or changes in it. In the understanding

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[12] J. Uluots. Seletuskiri Tsiviilseadustiku 1936. aasta eelnõu juurde (Explanatory Memorandum to the Draft Civil Code of 1936 written by Professor J. Uluots).

[13] M. Käerdi (Note 1), pp. 255–257.

[14] It was amended and modified after the adoption many times, because "For certain, the text of the law reflects the lack of knowledge and the chaotic nature of the period". It was advanced primarily on the basis of the German Civil Code although the codes of, for instance, the Netherlands and Louisiana were also analysed. P. Pärna. The Law of Property Act. Cornerstone of the Civil Law Reform. – Juridica International 2001, pp. 89, 90.

[15] Tsiviilseadustiku üldosa seadus. Adopted on 27.03.2002, entered into force on 1.07.2002. – RT I 2003, 78, 523 (in Estonian); last amendments 21.02.2007. Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

[16] M. Käerdi (Note 8), p. 69.

[17] Perekonnaseadus. Adopted on 12.10.1994; entered into force on 1.01.1995. – RT I 1994, 75, 1326 (in Estonian); last amendments 8.03.2006. Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

[18] Pärimisseadus. Adopted on 15.05.1996, entered into force on 1.01.1997. – RT I 1996, 38, 752; last amendments 15.06.2005. Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

[19] The Commercial Code entered into force in 1995 and consists of rules regulating commercial corporations, no special rules about the transactions or other civil law matters. See äriseadustik. Adopted on 15.02.1995, entered into force on 1.09.1995. – RT I 1995, 26/28, 355 (in Estonian); last amendments 6.12.2006. Available in English, but not updated, at http://www.legaltext.ee/et/andmebaas/ava.asp?m=022 (18.08.2008). The Consumer Protection Act consists of mainly public law rules on rights of the consumers, consumer organisations and refers to the Law of Obligations Act as main legal act consisting of rules on consumer protection. See tarbijakaitseseadus. Adopted on 11.02.2004, entered into force on 15.04.2004. – RT I 2004, 13, 86 (in Estonian); last amendments 15.12.2005. Available in English at http://www.legaltext.ee/indexen.htm (18.08.2008).

[20] Legal systems have had and will have mutual effects through different channels. The loaning of an entire codification from another country may have a particularly large impact on the legal system. *Cf.* P. de Cruz. Comparative Law in a Changing World. London, Sydney 1999, pp. 485–486.

[21] The comparative approach was in the Estonian case a pragmatic one. See M. Käerdi (Note 1), p. 257.

[22] Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts. Herausg vom Bundesminister der Justiz. Köln: Bundesanzeiger 1992.

[23] V. Kõve. The Influence of PECL on Estonian Law of Obligations Act. – I. Kull (ed.). Development of Estonian Contract and Company Law in the Context of the Harmonized EU Law I. Tartu 2007, p. 125.

that any change can be effective only if it is assimilated into the deeper structures of law and social life, the commission intentionally accepted the risk that there will be changes in the society in the future.[*24]

The Law of Obligations Act stands out in its unusual textbook-like style. Firstly, this is evident in its numerous legal definitions. The attempt to formulate legal definitions becomes apparent in all areas of law, not in private law only. Secondly, Estonian legislation stands out in the detailed nature of its regulation.[*25] The history of Estonian jurisprudence and legal science had experienced many fallbacks in the last few centuries, and the aim of giving to the legal acts also some didactic functions seemed to be reasonable. One can find, for example, special articles about the principle of dispositivity (LOA § 5), good faith[*26] (LOA § 6), reasonableness[*27] (LOA § 7), and *pacta sunt servanda* (LOA § 8) formulated under the models of the PECL and PICC in the LOA. Some of the rules in the LOA were formulated under the influence of court practice and legal science of other European countries that were models for drafting of the LOA, like rules on *culpa in contrahendo*[*28], guarantee liability[*29] (LOA § 103), claim for specific performance as a restricted secondary claim[*30] (LOA § 108), pre-contract (LOA § 33), and change of circumstances (LOA § 97). Various specific institutes derived from the doctrine of the principle of good faith have been transposed from German law in full.[*31]

Some rules were pure transplants from legal acts or draft laws. Here the term 'legal' is reduced to rules, conventionally taken to refer to legislated texts and, though less peremptorily, judicial decisions.[*32] It is evident that some rules were not understood entirely but still placed in the draft LOA in the belief that the real meaning of a rule that is not entirely supplied by the rule itself will be explained by the interpreters. Somehow the traditional and largely accepted concept of pre-understanding (*Vorverständnis*) by which the act of interpretation is supposed to be embedded in a language, in a morality, in a tradition, and — in sum — in a whole cultural ambience[*33] does not work in a country where the legal traditions have been cut off from their roots for a long time. The process of drafting Estonian contract law was a perfect example of Watson's idea that law develops by transplanting not because some particular rule was an inevitable consequence of the social structure and would have emerged even without a model to copy but because the foreign rule was known to those with control over lawmaking and they observed the apparent merits that could be derived from it.[*34] At present, the Estonian legal system is developing rapidly under the influence of ideas coming from transplant countries. The Estonian Supreme Court has already declared several times that foreign legal acts, court practice, and legal doctrines can be taken as sources for the interpretation of Estonian law if there exists no court practice and the rules or legal system of the country is similar to the Estonian legal system.[*35] It makes the Estonian legal system more open to influences from other legal systems and also from the processes of harmonisation taking place in Europe.

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[24] S. Paasilehto. Challenges for Legal Cultural Change: Innovations and Traditions. From Dissonance to Sense. International Conference in Porvoo, Finland. 28–31 August 1997. Not published.

[25] M. Luts. Textbook of Pandects or New Style of Legislation in Estonia? – Juridica International 2001 (VI), p. 157.

[26] About the principle of good faith see I. Kull. Principle of Good Faith and Constitutional Values in Contract Law. – Juridica International 2002 (VII), pp. 142–149. Although the Estonian general provision setting out the mandatory nature of the principle of good faith is similar to German BGB § 242, the second part of the clause, or LOA § 6 (2), is based on the example provided by article 6:248 of the Civil Code of Netherlands.

[27] About the principle of reasonableness in LOA see M. A. Simovart. The Standard of Reasonableness in the Estonian Law of Obligations. – I. Kull (ed.). Development of Estonian Contract and Company Law in the Context of the Harmonized EU Law I. Tartu 2007, pp. 65–86.

[28] Concept of pre-contractual negotiations and *culpa in contrahendo* was a novelty to Estonian legal system and became as a living part of the legal system only recently. See P. Varul (Note 1), p. 106.

[29] V. Kõve (Note 23), pp. 130–134.

[30] About the claim on specific performance see A. Hussar. Remarks on Restrictions to the Rigth to Require Performance in Estonian Contract Law. – I. Kull (ed.). Development of Estonian Contract and Company Law in the Context of the Harmonized EU Law I. Tartu 2007, pp. 27–28.

[31] Such as changing the proportion of contractual obligations in LOA § 94 and contracts with a protective effect for a third party in LOA § 81 or in part by the provision of relevant rules of conduct in specific sections (e.g., the provisions in LOA § 108 (3) concerning an impermissible delay in the enforcement of a right to terminate the contract).

[32] To follow the P. Legrand's description of legal transplants in P. Legrand. What "Legal Transplants"? – D. Nelken, J. Feest (eds.). Adapting Legal Cultures. Hart Publishing 2001, p. 56.

[33] *Ibid*., 58. See also J. Habermas. The Theory of Communicative Action, Vol. I: Reason and the Ationalization of Society. Cambridge: Polity 1991, p. 132.

[34] A. Watson. Comparative Law and Legal Change. – Cambridge L.J. 1978/37 pp. 313, 315.

[35] See decisions of the Estonian Supreme Court from 21.12.2004 No. 3-2-1-145-04 and from 13.09.2005 No. 3-2-1-72-05. Available in Estonian at www.nc.ee.

2. The role of the *acquis communautaire* in the reform process

The civil law reform that started in the 1990s was influenced also by the political and legal link to the European *acquis* under the Europe Agreement[*36] from 1995, which brought a new dimension to the drafting process and influenced it remarkably. From the very beginning, the drafters attempted not merely to copy the rules of the EC literally but to incorporate them into the rest of the system and creatively harmonise the directives in order to avoid possible conflicts later upon the application of Estonian national law.[*37] This decision has had certain positive consequences in many ways. First of all, it allows us to build a system of private law based on the same basic principles, terminology, and methods. Secondly, it supported the process of harmonisation of consumer law and general private law in such a way that consumer law had an effect on general private law even if in most cases the rules transferred from consumer law directives and other *acquis* remained *lex specialis*.

We may say now that the implementation of the existing EU consumer law in the context of the Estonian legal system has been quite successful; the LOA contains the rules that fulfil the requirements of all EC directives concerning specific consumer and also non-consumer directives. In many cases, the drafts of the proposed directives were taken into account as well as reform laws of other European countries. Of course, contradictions and problems surfaced regarding the directives themselves and complicated their incorporation. For example, the right to withdraw is regulated as a general rule applicable to all consumer contracts where the right to withdraw is granted. This proved to be a creative challenge, as the directives are going ever more deeply into the essence of contract law itself, affecting the whole system of legal remedies in contractual relations.[*38] Some directives are incorporated into the general part of the LOA (§§ 35–45), among them the directives on unfair terms in consumer contracts[*39], contracts negotiated away from business premises[*40], distance contracts with consumers[*41], electronic commerce[*42], and the late payment directive.[*43] In the special part of the LOA, the directives on consumer sales[*44] and product liability[*45] are integrated as part of the rules on contract of sale (LOA §§ 207 *ff.*) and product liability (LOA § 1061 *ff.*). Also directives on package travel contracts[*46], timesharing[*47], and cross-border credit transfers[*48] were implemented in the special part of the LOA. In addition to this, the LOA takes into consideration EC directives concerning insurance contracts and employment contracts. The EC requirements for the *Handelsvertreter*[*49] have also been incorporated. Electronic payment instruments have been regulated in compliance with the EC recommendation.[*50]

In implementing the consumer *acquis* in the LOA, Estonia often uses the directives to modernise the entire given field of law, and in consumer contracts the legal remedies provided cannot be contracted out of. For

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36 The Europe Agreement was approved by the Estonian Parliament (*Riigikogu*) in 1995.

37 M. Käerdi (Note 1), p. 257.

38 *Ibid*., pp. 257–258. Estonian experience of implementing consumer *acquis* into the general private law is in its essence predecessor to the process which started with the idea of coherent European contract law (Communications of European Parliament from 2001, 11.07.2001 COM(2001) 398 final and from 12.02.2003 COM(2003) 68 final ("Action Plan")). See also R. Schulze (ed.). The Common Frame of Reference and Existing EC Contract Law. München: Sellier 2008.

39 Directive 1993/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.04.1993, pp. 29–34.). Transplanted into LOA §§ 35–45.

40 Directive 1985/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises. – OJ L 158, 23.06.1990, pp. 31–33.

41 Directive 1997/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts. – OJ L 144, 4.06.1977.

42 Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. – OJ L 178, 17.07.2000, pp. 1–16.

43 Directive 2000/35/EC of 8 August 2000 on combating late payment in commercial transactions. – OJ L 200, 8.08.2000, pp. 35–38.

44 Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.07.1999, pp. 12–16.

45 Directive 1985/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions pf the Member States concerning liability for defective products. – OJ L 210, 7.08.1985, pp. 29–33.

46 Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours. – OJ L 158, 23.06.1990, pp. 59–64.

47 Directive 94/47/EEC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. – OJ L 280, 29.10.1994.

48 Directive 1997/5/EC of 27 January 1997 on cross-border credit transfers. Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.02.1987, pp. 48–53) was implemented in the rules on consumer credit in §§ 402 *ff.*

49 Directive 1986/653/EEC of 18 December 1986 on the co-ordination of the laws of the member states relating to self-employed commercial agents. – OJ L 382, 31.12.1986, pp. 17–21.

50 Commission Recommendation of 1997/489/EC 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder. – OJ L 365, 24.12.1987, pp. 72–76.

example, in sales law the implementation of directive 99/44 influenced also the general law on sales, which means that the remedies of the buyer are nearly identical for B-to-B and B-to-C contracts. For example, parties to non-consumer contracts cannot claim for specific performance in reference to all kinds of non-conformity of goods; they can make a claim only if the non-conformity is considered to be a fundamental breach (LOA § 222 (2)). In some provisions there are also deviations from the directives. Under the LOA § 228, in a consumer sale, the seller who sells goods to a consumer is liable to the buyer for any lack of conformity of the goods that arises as a result of a statement made by the producer, previous seller, or other intermediary with respect to particular characteristics of the goods, and it is presumed that the seller may claim compensation for damage caused thereto by the corresponding person in accordance with the relationship between them and to the extent of the liability of the seller to the consumer. A prerequisite for the claim is that the basis of the liability of the seller toward the buyer has been non-conformity of the goods because of statements made publicly with respect to particular characteristics of the goods by the seller, producer, or previous seller of the thing or by another retailer — in particular, in the advertising of the thing or on labels (LOA § 217 (2)). This seems to be narrower than what is set forth in article 4 of directive 99/44, because in the latter redress can be sought because of a lack of conformity resulting from either an act or omission by the producer.*[51]

Directive 93/13, on unfair terms in consumer contracts, is incorporated into the general principles of the LOA (§§ 35–45) and applies to all contracts. Two distinct problems are presented in standard-form contracts — procedural fairness of contract and substantive fairness, which relates to the outcome of such contracts.*[52] In harmonisation of this area of the law, the LOA took up the general clause on unfairness of a contract term as contained in the Unfair Contract Terms Directive and the PECL (article 4:110). Under the Estonian law, a term shall be regarded as unfair if, contrary to the principle of reasonableness, it causes a significant imbalance in the parties' rights and obligations arising under the contract or if a standard term is contrary to good morals, in consideration of the content of the contract, the circumstances attending the conclusion of the contract, the interests of the parties, and other essential circumstances (LOA § 42 (1)). The Estonian LOA does not contain two different lists of unfair contract terms. There is only one list of contract terms, which serves as a 'blacklist' for consumers and a 'grey list' for business contracts (LOA § 42 (3)). The law provides for the nullification of standard terms of the contract where the other party is a consumer if a provision is considered to be unfair. The inclusion of identical terms for commercial contracts concluded in the course of business is entitled to only a presumption of unfairness. Regulation of pre-formulated and standard terms significantly widened the indicative list given in article 3 (3) of directive 93/13, blacklisting 37 terms in total as void in consumer contracts and presumably unfair in B-to-B contracts.

3. The role of model laws (PECL and UNIDROIT Principles) and the CISG in the reform process

The role of the PECL as a source for the LOA is explained in the annotated edition of the Law of Obligations Act*[53], where it is stated that the primary importance of the PECL has been in systematising the LOA, though the substantive norms contained in the act have been largely influenced by the German BGB and, in lesser measure, the New Civil Code of the Netherlands*[54] (BW) and pertinent EU directives. Not only the LOA but also the General Part of the Civil Code Act has been influenced by the PECL and UNIDROIT Principles, the LOA more extensively than the GPCCA. In describing the influence of the PECL and PICC on the process of drafting the LOA, one encounters slightly differing opinions among scholars.*[55] It must be remembered that in large part the LOA was completed before the first version of the PECL arrived in Estonia (in 1995, with the second version available only from 1999). By the time the version from 1999 reached Estonia, the legislative process for enactment of the LOA was at such an advanced stage that further changes were not possible. The

[51] See N. Reich (Note 1), p. 290.

[52] T. Wilhelmsson. Towards a (Post)modern European Contract Law. – Juridica International 2001 (VI), p. 29.

[53] P. Varul, I. Kull, V. Kõve, M. Käerdi. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations I. Commented ed.). Tallinn: Juura 2006 (in Estonian).

[54] Burgerlijk Wetboek, 1992. F. Nieper et al. Niederländisches Bürgerliches Gesetzbuch. Buch 6 Allgemeiner Teil des Schuldrechts. Bücher 7 und 7A. Besondere Verträge. München: C. H. Beck. Kluwer Law International 1995.

[55] See V. Kõve (Note 23), p. 124. About the reception of PICC into the Lihtuanian private law system see T. Žukas. Reception of the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania. – E. C. Ritaine, E. Lein (eds.). The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification: Reports of the ISDC Colloquium (8/9 June 2006). Zurich, Basel, Geneve: Schulthess 2007 (Publications of the Swiss Institute of Comparative Law (ISDC), Publ. No. 56, in co-operation with the International Institute for Unification of Private Law (UNIDROIT)), pp. 231–243.

third section of the PECL[*56], which was publicly released in 2003 — after the entry into force of the LOA — had no influence on Estonian legislation.

When the general part of the LOA was in its final phase of preparation, Estonia was presented with the UNIDROIT Principles of International Commercial Contracts[*57], on the basis of which much of the text was rewritten and new provisions added. Even if widespread opinion holds that Estonian contract law was mainly influenced by the PECL, deeper analysis of the articles consisted in the LOA does not support this opinion. We have to remember also that the PECL material deals with contracts in general, and the PICC material only with commercial contracts; therefore, the rules from the PECL were spread far and wide through different parts of the LOA and also in the GPCCA. Of course, we can find many rules in the LOA similar or even identical to those contained in the PECL and much more in the PICC, but, as both of these sets of rules consist of the best regulations from national laws and the most practical and reasonable solutions of modern contract law and are based on the same ethical, technical, and economic considerations[*58], discussions about the level of influence from one or another set of rules have no deeper meaning.

Significant influence has been exerted on the LOA by the Vienna Convention on International Sale of Goods (CISG), from 1980.[*59] In particular, the CISG provided the initial conceptual foundation in creating rules on conclusion of contracts, a system of contractual liability, and a set of remedies and general principles related to compensation for damage.[*60] For example, the LOA transposed almost identically the main principles of contract law, among them that of the binding nature of usages and practices (CISG article 9, LOA § 25), objective interpretation of declaration of intention (CISG article 6, LOA § 29), freedom of form (CISG articles 6 and 12; LOA § 11 (1)), mitigation of harm (CISG articles 77, 85, and 86; LOA § 139 (2)), and prohibition of abuse of rights (CISG article 80, LOA § 101 (3)). In the special part of the LOA, the rules on the obligations of the seller in §§ 208–211 are in accordance with the CISG provisions in articles 30–32. Also the rules regulating the conformity of goods under a contract of sale in the LOA § 217 are similar to the rules in the CISG article 35.

The technique of the transposition of rules from different sources depended on the legal nature and regulatory purpose of the transplant. Some rules were reformulated and restructured during transposition, while other rules were appropriated word for word. For example, there was a decision that the rules on formation of contracts should be drafted on the basis of the classical elements of the conclusion of a contract — offer and acceptance. There should be consensus between the parties in order to have a binding contract reached by offer and acceptance. At the same time, new rules supplement the classical standard with the principle that a contract is deemed concluded by the mutual exchange of declarations of intention in any other manner if it is clear that the parties have reached sufficient agreement.[*61] For example, in the CFR the requirements for the conclusion of a contract are the following:

CFR: II.–4:101: Requirements for the conclusion of a contract

> A contract is concluded, without any further requirement, if the parties:
> (a) intend to enter into a binding legal relationship or bring about some other legal effect and
> (b) reach a sufficient agreement.

In the PECL:

> Article 2:101: Conditions for the Conclusion of a Contract
> (1) A contract is concluded if:
> (a) the parties intend to be legally bound and
> (b) they reach a sufficient agreement without any further requirement.
> (2) A contract need not be concluded or evidenced in writing, nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

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[56] O. Lando et al. (eds.). Principles of European Contract Law. Part III. The Hague: Kluwer Law International 2003.

[57] Principles of International Commercial Contracts. UNIDROIT, 2004. Available at http://www.unidroit.org/english/principles/contracts/main.htm (18.08.2008).

[58] O. Lando. The Structure and the Legal Values of the Common Frame of Reference. – ERCL 2007/3, p. 245.

[59] UN Convention of the International Sale of Goods. 11 April 1980. Ratified by Estonia through act of Parliament (*Riigikogu*) on 16.06.1993. – RT II 1993, 21/22, 52.

[60] P. Schlechtriem. The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe. – Juridica International 2001 (VI), p. 19. See also, e.g., U. Magnus. The CISG's Impact on European Legislation. – F. Ferrari (ed.). The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003. München: Sellier, European Law Publishers 2003, pp. 129–134; H. M. Flechtner. The CISG's impact on International Unification Efforts: The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law. – F. Ferrari (ed.). The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003. München: Sellier, European Law Publishers 2003, pp. 169–183; H.-P. Mansel. Kaufrechtsreform in Europa und die Dogmatik das deutchen Leistungsstörungsrechts. Archiv für die civilistische Praxis. Bd. 204 (2004), pp. 396–456.

[61] As opposed to CISG article 14 (1), under which a contract is deemed concluded when the parties have reached an agreement on all fundamental conditions by an exchange of offer and acceptance.

In the LOA:

> § 9. Conclusion of Contract
> A contract is entered into by an offer being made and accepted or by the mutual exchange of declarations of intent in any other manner if it is sufficiently clear that the parties have reached an agreement.

One can see that the wordings are slightly different but the main idea remains the same in all three sources of law.

4. Some conclusions on the ongoing harmonisation process and the coming CFR from the perspective of Estonia

Almost six years have now passed since the Estonian Law of Obligations Act was adopted. Under the existing court practice and as seen in scholarly writings, it is possible now, at least in general terms, to evaluate the actual vitality of regulations offered by the PECL, UNIDROIT Principles, and CISG, as well as the consumer *acquis* and EU directives and their compatibility with other statutory provisions, though this amount of time is not sufficient to permit ultimate conclusions to be drawn. Transposition of rules from different legal sources should be evaluated as successful. I think that the main reason for this is the decision made to choose one national legal system to be a basis for the entire private law codification project. In consideration of the fact that work for the future development of the PECL and PICC continues within the context of the Common Frame of Reference, the Estonian experience may even provide usable feedback for that project. In Estonia, the civil law reform was surely a reverse process — there was no adaptation of law in response to changes in social relations. Instead, social changes were brought about in the society by law. The harmonisation process and preparing of the CFR involve developments and problems that are not limited to any one country and assert that the changes and challenges in modern contract law are part of the worldwide change in economic relationships. These developments and changes in contract law will influence the national legislative process and also legal practice. There is also an increase in the importance of the transfer of legal ideas and solutions from one legal order to another, with adoption of concepts of international law on the level of national law. As has been mentioned above, the Estonian Supreme Court[*62] opened the gates for foreign legal ideas and court practice in accepting the general principle of applicability of foreign court practice and customs in solving cases under Estonian law if there are similarities in legal regulation and application of law. We should see the process of harmonisation of private law and the CFR not only as an effort of legal engineering but more as an effort to engage the society in inter-cultural communication.

[62] Estonian Supreme Court already in 2003 (Supreme Court, case No. 3-2-1-9-03). The Supreme Court restricted this principle to the cases where the element of international private law is involved in 2004 (Decision of Supreme Court, case No. 3-2-1-145-04, sec. 39) this principle was widened also to the cases where there are no elements of international private law. See also Note 35.