

(Stockholm conference October 23, 2009)

**The (Draft) Common Frame of reference  
as a toolbox and as a basis for an optional instrument**

**Matthias E. Storme<sup>o</sup>**

(1) The concept of a common frame of reference was first developed in the Action Plan of the Commission of 2003<sup>1</sup>; from the beginning it was meant to serve two purposes: as a common frame of reference for the revision and development of specific binding instruments (such as directives and regulations) - what is now called the "toolbox" for better law making - and as the basis for possible "optional instruments"<sup>2</sup>. I was asked to comment on both functions, and indicate how we should move forward in this regard. The following comments are at the same time a reaction to some opinions already delivered by others on these questions.

**I. The CFR as toolbox**

(2) The discussion about the toolbox function has circled mainly around two questions, on the one hand the scope of the frame of reference and on the other hand the type of content.

**a. The Scope of a CFR as toolbox.**

(3) As to the scope of a frame of reference, some arguments have been voiced to limit the scope quite drastically. Some people seem to be interested only in the few matters that we find e.g. already in the CISG (formation of contracts, performance and non-performance), even if the existing *acquis communautaire* deals with much more. Others would cover the whole field of the Draft CFR delivered to the Commission in December 2008<sup>3</sup> (and being the result of the research ordered by the European

---

<sup>o</sup> Professor at the K.U. Leuven and U. Antwerpen, member of the Brussels Bar. The author was active in the Lando-Commission, the Study Group on a European Civil Code and the Acquis Group and member of the CRT (Compilation and Redaction Team) for the Draft CFR.

<sup>1</sup> [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com\\_2003\\_68\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf).

<sup>2</sup> This was confirmed in the Communication of 11 October 2004, "the way forward", [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com2004\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com2004_en.pdf)

<sup>3</sup> *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference, Interim Outline Edition* edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll. The full edition was published in October 2009 as *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full edition*, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Based in part on a revised version of the Principles of European Contract Law. Edited by *Christian von Bar and Eric Clive* (6 Volumes, 6.563 pages; Sellier 2009, Oxford University Press 2010).

Commission following the 2004 Communication). But why would we restrict the scope? There are some reasonable arguments and some false arguments.

(4) The limited competence of the Union is a false argument, precisely because the CFR would not be a binding instrument. It is perfectly possible to have a frame of reference for better law-making containing principles and model rules which cannot be converted as such into binding rules because the Union only has competence for specific applications of these rules or principles. If not, there should never have been a Charter of Fundamental Rights either. It is clear that not every question where such fundamental rights matter belongs to the competence of the Union - I would even say that most questions do not. Although the Charter itself has the same legal value of the Treaties (Art. 6 TEU), it only applies within the limits and tasks of the Union as determined by the relevant articles of the TEU and TFEU. Art. 51 of the Nice - but not Nice - Charter thus states:

Article 51: Field of application

*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

It is perfectly possible to have a rule similar to art. 51 (2)<sup>4</sup> for the use of the CFR. Even if the CFR were binding for the legislator, it would still be binding only in the exercise of the law-making tasks of the Institutions of the Union as limited by the Treaties, including the principle of subsidiarity. In case of a non-binding CFR, the argument is thus clearly false.

(5) On the other hand, the scope of a CFR can best be determined by taking into account 1° where we most need something and 2° where we most have something already. As to the second point, we have the DCFR, consisting of 10 "Books". Do we "have" more *ius commune* in some of them than in others? We probably do, because it is generally recognised, also by the authors, that some parts are to a larger extent reflecting an existing degree of commonality, namely Books I to VII and probably VIII; Books IX on Security Rights and X on Trusts are indeed reform proposals rather a restatement of a law that is already common to a sufficient extent.

As to Books I to VII (Law of obligations) and probably VIII (some aspects of property law), there is no reason to exclude in advance any of them from a CFR. The

---

<sup>4</sup> Not 51 (1), as that paragraph is dealing with a hierarchy of norms, granting a constitutional status to the fundamental rights of the Charter.

CFR should on the contrary as far as possible cover the whole law of obligations (general contract law, tort and enrichment) including at least some specific contracts, and some aspects of the law of property in movables.

(6) For the toolbox, we should start from the DCFR for the simple reason that it is the most comprehensive instrument we have and the only one that has incorporated most of the relevant parts of the *Acquis communautaire*. More Acquis Group material on specific contracts that was not yet incorporated in the DCFR has recently been published (Acquis Principles, volume "Contract II"<sup>5</sup>). Moreover, the basis for the DCFR Books I to IVA, is simply PECL, UPICC, CISG and the existing *Acquis communautaire*. Where we deviated from these predecessors, we had reasons to do so. That does not exclude that we may have made some wrong choices. By publishing an interim edition in January 2008<sup>6</sup>, we made it possible to take criticism into account before finalising the draft at the end of 2008, and we did take into account many arguments and suggestions. Evidently, some colleagues are disappointed because their personal suggestions were not followed. But there were reasons not to do so. And above all: it was simply impossible to adopt all suggestions, because the critics contradict each other. On all the important points where criticism was not followed, there were also strong voices advocating the opposite position of those critics. Put all the critics together in one room and they'll never agree positively on an alternative text<sup>7</sup>.

(7) Certainly, insofar as a CFR would have any status at all (which the Council however does not seem to be willing to grant anyway) and thus has to be checked by institutions with the democratic legitimacy to do so, but with limited resources, it is not abnormal to prioritise and thus to move step by step in officialising parts of the scholarly CFR into a political CFR. However, even this requires a basic understanding that all the other relevant parts of the law of Obligations in the DCFR (and probably also some property law) form the background for the interpretation of those parts already officialised.

Indeed, we not only have materials for nearly the whole law of obligations, we also need that. Because private law rules do not work individually, they have no meaning in themselves but get their meaning from their relationship with other rules. And the function of such a toolbox must also be to keep the legislator aware of the whole, of the neighbouring lands that may be affected. Just to mention some examples: when formulating rules on the invalidity of contracts, one has to keep in mind the rules on

---

<sup>5</sup> *Principles of the Existing EC Contract Law (Acquis Principles), Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services*, Sellier München 2009.

<sup>6</sup> *Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference, Interim Outline Edition* edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll.

<sup>7</sup> See for some concrete examples my article "Une question de principe(s)? Réponse à quelques critiques à l'égard du projet provisoire du "Cadre commun de référence", Conférence "The Draft Common Frame of reference", ERA Trier 6/7 March 2008, 9. *ERA-Forum* 2008 Supplement 1, p. S65 - S77 and @ <http://storme.be/ERA-ForumTrier2008.pdf>.

unjust enrichment, when formulating rules on sales keep in mind transfer of property, when dealing with assignment keep in mind that this is dealing with aspects of the law of obligations and with aspects of property law<sup>8</sup>.

(8) Nevertheless, if a priority has to be given, it is to all topics where either there is *acquis* or a background frame is useful for the revision and development of the *acquis*. Full harmonisation is moreover purely an illusion without at least such a background instrument.

This can be illustrated by the Proposal for a Consumer Rights Directive. The Proposal uses many concepts from general contract law that are not defined, such as "contract" (art. 1 to 3), "contract of sale" (art. 2 (3)) , "conclusion of the contract " in art. 2 (6) and (7) and art. 7, to "sign" in art. 2(11) and Annex 1 2.a, "loss" and " damage" and similar terms in art. 23 and 27, "damages or compensation " in art. 27, "rescission" in art. 26, etc. Where there are so-called definitions, they usually are no definitions at all, but rules on the scope of application (e.g. the "definition" of a contract of sale, or the "definition" of goods). And above all, the rules of the proposed Directive cannot function without a functioning general contract law that remains unharmonised, and will thus not have the same effects in the different member state jurisdictions, mainly because the proposal has very few functioning rules on the remedies. Remedies for pre-contractual information duties are to a large extent missing (see art. 5; only in art. 6 (1) and 13 some remedies are regulated; in the DCFR there is a full set of rules on remedies in art. II-3:109 and II-3:501); the sanctions of form requirements (in art. 10 en 11) are missing; the rules on the scope and effects of termination of contracts are missing (we do find them in art. III-3:506 and III-3:509 to 3:514 DCFR); the concrete rules on damages are missing; the list of remedies in art. 26 and 27 is incomplete; it is not spelled out what it means that unfair terms are 'not binding' (art. 37), and so forth<sup>9</sup>. A further reason why full harmonization of consumer contract law is an illusion as long as there is no sufficient harmonization of general contract law, is that the concrete solution in many cases of conflict also depends on other rules and institutions of contract law not covered by the (proposed) Directive: rules on defects of consent for example; a possible general information duty in general contract law; possibly tort law if it also applies between contracting parties.

### **b. Principles, definitions and model rules for a CFR as toolbox?**

(9) If we have to follow the Council on the Common Frame of reference, then

*"one part of the CFR would set out common fundamental principles of contract law, possibly accompanied by guidelines to cover cases where exceptions to those principles were required.*

---

<sup>8</sup> See also C. von Bar & U. Drobnig, *Property Law and Non-contractual Liability Law - Study prepared for SANCO*, 2004, on the impact of property law and tort law impact on the Internal Market, @ [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf).

<sup>9</sup> In some other aspects, on the other hand, the proposed rules may well be appropriate to fulfill their function, for example, the rules on withdrawal rights; they are sufficiently complete and have integrated a lot of experience from the cases which arose under the existing rules.

*They should apply to all stages of the contractual relationship, including the pre-contractual stage.*

*Of the principles that might apply throughout the contractual relationship, the following few should be mentioned by way of examples:*

- the principle of freedom of contract (party autonomy);*
- the principle of legal certainty in contractual matters which includes, inter alia, the binding force of the contract (pacta sunt servanda); and*
- the principle of fair dealing which includes, inter alia, the principles of good faith and of reasonable behaviour;*

*These principles would have to be delineated and described in greater detail in the CFR".*

When reading these and other documents of the Council and the member states and listening to the declarations at this Stockholm Conference, I could not but be reminded of a fairy tale I was told as a child, about an Emperor, who was excessively fond of new clothes, and of two weavers telling him that they knew how to weave stuffs for the most beautiful clothes which had the wonderful property of remaining invisible to everyone who was unfit for the office he held, or who was extraordinarily simple in character. During the work, he sent his ministers to see its progress. They pretended they saw the beautiful stuff. You all know the rest of the story. The Emperor walked in the midst of his ministers through the streets of his capital; and all the people cried how beautiful it was until a little child said: "But the Emperor has nothing at all on!".

Indeed, we have a Council and civil servants presenting us a concept of a CFR that would have no official status at all, which would not consist in the first place of well-drafted rules but of some so-called principles and a set of key concepts of definitions. A CFR which would consist of three separate parts not even integrated, whereby the rules should build upon the definitions (instead of the opposite) and be an element of interpretation of principles (instead of the opposite, principles being an element of the interpretation of rules). Exactly the opposite of what any serious legal instrument does, be it a Code, a Sales Act, CISG, Unidroit, PECL or the DCFR. In other words: this emperor has no cloths on either. This concept will never lead to anything serious. It shows that the Council does not want anything serious and up to the needs of our time in European contract law.

It is also clear from Council documents that many persons whose opinions are forming them do not know what they're talking about or at least do not know how a decent contract law functions. Take by way of example the nonsense produced by the delegation of my own government:

*"Instead of considering the definitions as a mere technical support of the model rules, it appears that, just as for the general principles, an opposite reasoning could be adopted.*

*Indeed, some key concepts could be analysed more deeply. Together with the general principles, they could be the foundation on which model rules, proposing a particular materialization of it, could be erected."*

(10) Where the member states all have a well-developed and comprehensive contract law, where we have a well developed international sales law, and in response to well developed drafts for contract law and other parts of private law, be it the Unidroit PICC, the PECL or the DCFR, the Council is preparing a new Law of XII Tables.

In an age of jet planes and satellites the Council is trying to reinvent the balloon filled with hot air.

Does *anyone* believe that a contract law can be made out of 3 conflicting principles "applying to all stages of the contractual relationship, including the pre-contractual stage"? I recently published an analysis of the coherence of the DCFR in its rules on multiparty relationships: agency, contracts for the benefit of a third party, assignment, subrogation, suretyship, independent guarantees, *delegatio solvendi*<sup>10</sup>. Does anyone believe that you can produce anything meaningful here with some principles and a set of definitions ?

(11) I'm sorry, but if we want something serious as a CFR, it will not consist of three separate parts. It will have to be integrated, which means that definitions and principles cannot form separate parts, but are integrated in the corpus of rules. Any serious CFR will in this respect have to look like the DCFR, which in this respect conforms to most national codes, to the PECL, to the Unidroit PICC, to CISG, etc. etc. This is true although the DCFR at first sight consists precisely of these three parts too. Let me therefore clarify the necessary relationship between definitions and rules and between principles and rules, as found i.a. in the DCFR.

(12) As to the *relationship between definitions and rules*, one must distinguish the "operative" definitions, which are all found in the corpus of rules themselves, and the "list of definitions" in the Annex, which is merely a glossary, an auxiliary instrument which does not form part of the DCFR as such. The definitions in the Annex are a guideline for the readers and a justification of how we used terms. They should not be part of the CFR either.

The rules in the corpus of the DCFR are basically "remedy oriented", and not "concept oriented", and they should remain so. Yes, we have some definitions in the rules, but they have no independent role: they are only there in order to make rules more readable, not repeating each time their scope of application<sup>11</sup>. Please let's not bow for the essentialist temptation, the temptation to think that key terms in law have an essence or a meaning in themselves.

---

<sup>10</sup> "The structure of the law on multiparty-situations in the 2009 Draft Common Frame of Reference" (2nd revised and expanded version), *ERPL* 2009, p. 531-557, [http://www.storme.be/ERPL\\_17-4Storme.pdf](http://www.storme.be/ERPL_17-4Storme.pdf).

<sup>11</sup> There are only a few general definitions, which are relevant for the whole of the (D)CFR, such as "consumer" and "business" in I-1:105, "writing" in I-1:106, "signature" in I-1:107, "contract" in II-1:101, "juridical act" in II-1:101, "obligation", "non-performance", "reciprocal obligation" in III-1:102. Next to them, some definitions with a more limited purpose are found next to the rules where they play a role.

This approach is by the way fully consistent with the approach of the ECJ. The ECJ rather consistently rules that terms have no meaning in themselves and have to be interpreted in the context of the rule<sup>12</sup>.

(13) The term "principles" on the other hand is unfortunately used in different meanings in the law. We distinguish at least 2 types of principles, the ones directly applicable, the other ones only indirectly applicable.

- The principles that are rules, which apply generally as long as there is no rule deviating from it. They are directly applicable. They are integrated in the DCFR rules and have a rather prominent position, even if not prominent enough for some critics. The Book on Contracts (Book II) starts with the principle of party autonomy and the principle of binding effect of contract. The Book on Obligations (Book III) starts with the good faith principle. In the interim edition it was also in the beginning of Book II, but deleted after criticism of the "famous German law professors" which was unfounded but nevertheless indicated that it was ambiguous.

- The "underlying principles" which are not directly applicable, but have an interpretative function according to article 2 of the DCFR on interpretation: fundamental freedoms and other human rights, constitutional principles and other underlying principles not specified in the text but left to the doctrine and case law to be formulated according to the values and needs of the time. This notion and this interpretation rule is also found in art. 7 II CISG, in the Unidroit Principles (art. 16 (2) thus using the term Principles in 2 very different meanings, one in the Title of the restatement and one in the article on interpretation and supplementation) and in a slightly different form in the PECL<sup>13</sup>.

The function of such "underlying principles" differs from the function of rules, whether general (and therefore called principles in the first sense) or specific. Such principles express general values which are in conflict, and which the rulemaker should try to balance when formulating rules. Here, a principle is not confronted with exceptions, but with another, competing principle. The principle of party autonomy is conflicting with the principle of reliance protection and with the principle of protection (of i.a. consumers). These conflicts cannot be "settled" by the principles themselves<sup>14</sup>, but only by drafting rules indicating which principle gets priority in which case, i.e. by indicating under which circumstances a legal effect applies, and by trying to find a balance between these conflicting principles in such rules. By doing

---

<sup>12</sup> E.g. the notion of force majeure: ECJ 11 July 1968, C-4/68, *Schwarzwaldmilch* and later ECJ decisions.

<sup>13</sup> Art. 1:106 (2) PECL on the other hand uses "underlying ideas", probably in order to avoid the use of "principles" in two meanings.

<sup>14</sup> Comp. N. LUHMANN, "Positives Recht und Ideologie", 53. *Archiv für Rechts- und Sozialphilosophie* 1967, 531 ff., also in *Soziologische Aufklärung*, vol. I, Westdeutscher Verlag Köln-Opladen 1970, p. (178) 189 ff.

so, each of these principles is "adulterated" and it would be dangerous to proclaim an undiluted principle the rule<sup>15</sup>.

(14) What we need is therefore not a set of articles listing separate principles, but a set of rules that are the result of the balancing of the underlying principles. This is the reason why the authors of the Draft CFR have not "formulated" principles in the form of a set of articles, but indicated the underlying principles in another form (in an introductory essay). And indeed, the authors of the Draft CFR have done what I just described: they have balanced the underlying principles when formulating the rules. In doing so, they have given weight to these principles, giving sometimes priority to the one and sometimes to the other. Did they strike the right balance? Everybody is free to disagree on the chosen solutions and to try to improve them. But it makes no sense to criticize the results because they would be not principled enough. It would have been very misleading to present the principles otherwise, thereby hiding that they are always in conflict and can nearly never be applied unadulteredly. Did the authors explain sufficiently how they balanced underlying principles? It was theoretically certainly possible to explain more in this respect, but the time pressure was enormous and the full edition is already more than 6.500 pages ... very few model codes have ever had such an apparatus.

### **c) The order in which matters are dealt with ("structure") in a CFR as toolbox.**

(15) Contrary to what some critics have argued, the PECL, the UPICC and the DCFR have basically the same order of treatment. More specifically, Book I to III of the DCFR deviate only slightly from the PECL (the other Books do not deal with matters dealt with by PECL or UPICC): Chapter 1 of PECL has been divided into 2 consecutive chapters (Book I and Book II Ch. 1), Chapter 2 to 6 of PECL are then found in the same order, supplemented by new chapters from *acquis material* (precontractual duties, non-discrimination and withdrawal rights) (Book II Ch. 2 to 9), and having integrated the 2 PECL chapters on invalidity in one chapter; Chapter 7 of PECL is preceded by a new chapter on obligations in general which integrates the PECL Chapter 16 on conditional obligations (Book III Ch. 1); Ch. 7 to 14 PECL are then found as the remaining chapters of Book III (Ch. 2 to 7), in the same order. The difference is thus very small.

(16) Contrary also to what some have pretended, the model followed most closely by the Draft CFR is not the model of the German BGB, but if any classical code rather the model of the Swiss ZGB - or more precisely the Swiss Code of Obligations (forming Book V of the Swiss Civil Code)<sup>16</sup>, generally applauded for its simple structure<sup>17</sup>. The first Section of the CO, containing the general law of obligations

---

<sup>15</sup> Expression used by J.H. NIEUWENHUIS, "Legitimatie en heuristiek van het rechterlijk oordeel", *Rechtsgeleerd magazijn Themis* 1976, p. (494) 505, [https://openaccess.leidenuniv.nl/bitstream/1887/3186/1/353\\_003.pdf](https://openaccess.leidenuniv.nl/bitstream/1887/3186/1/353_003.pdf).

<sup>16</sup> I have myself drafted a synoptic table of the structure of a whole series of existing European civil codes, table which was used when discussing the way in which we would structure the material in the Draft CFR.

<sup>17</sup> See <http://www.admin.ch/ch/d/sr/220/index1.html>.

(Section 2 dealing with specific contracts just like Book IV of the Draft CFR), deals with the I 1° the creation of obligations by contract, I 2° by tort, I 3° by unjust enrichment, II 1° performance of obligations, II 2° non-performance II 3° entry of third parties, III extinction of obligations (set-off, prescription), IV Plurality of parties, conditional obligations and change of parties (incl. assignment). The main difference with the CO is that we've put the creation of non-contractual obligations after the Books on contracts, in order precisely to maintain the order of PECL. And we've grouped these matters in 2 Books (Book II and III) rather than in 4 Parts as in the CO.

(17) Although a different order would certainly be possible - e.g. the Dutch Civil Code deals first with the matters of Book III DCFR and only then with those of Book II, V, VI and VII, then followed by the specific contracts of Book IV DCFR - I haven't met any serious argument against the order chosen in the DCFR, which is still very close to that of PECL and UPICC.

## **II. The DCFR as a basis for drafting optional instruments**

### **1. For which relationships ?**

(18) An optional instrument is by definition an instrument parties have opted for. The optional instruments discussed here are further more precisely instruments which can be chosen as applicable law by the parties, and not merely as conditions of contract. Such an optional instrument requires that either the conflict of law rule or the national substantive law allows parties to set aside the legal rules which normally apply to a certain relationship by opting for an alternative set of rules.

According to the existing European conflict of law rules on matters of the law of obligations, as found in the Rome-I<sup>18</sup> and Rome-II<sup>19</sup> regulations, there is a large scope for such a choice of law - not limited to contractual obligations alone - , but these regulations do not for the moment accept the choice of a non-national law. As long as the EU does not implement consideration 14 of the Rome-I Regulation - "*Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules*" - or change the Regulation, an optional instrument for contractual obligations will only have this effect insofar as national law creates such an option. National legal systems indeed sometimes do have options, whereby parties can opt for a different set of rules than those normally applicable<sup>20</sup>,

---

<sup>18</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:01:EN:HTML>

<sup>19</sup> Regulation 864/2007 on the law applicable to non-contractual obligations, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML>

<sup>20</sup> E.g. the Unidroit Convention providing a uniform Law on the Form of an International Will 1973, <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>.

an option which may be limited to cross-border transactions<sup>21</sup>. In other matters, such optional instruments have already been created by the EU itself, e.g. European intellectual property rights existing alongside national rights (the European Trademark), European forms of legal persons existing alongside national forms (e.g. *Societas Europaea*<sup>22</sup>, *Societas Cooperative Europaea*<sup>23</sup>), optional forms of procedure for cross-border litigation existing alongside national procedure (European order for payment procedure<sup>24</sup>; European Small Claims Procedure<sup>25</sup>).

Business parties do not have to wait for such an officially recognized instrument if they can escape the restrictive European conflict rules by choosing a different *forum* (in a country outside the EU or in international arbitration) that would apply a less restrictive conflict of law rule. However, this is not the topic of this conference and I'm thus only making some remarks on the optional instruments that we should promote on the European level.

In this respect, we should not worry about the really "big" players and ask whether rules chosen for an optional instrument are fit for those players. They can take care of themselves. When discussing an optional instrument, we should see which instruments might be useful for "normal" business transactions with SME's and/or for consumer transactions.

(19) The existence and success of CISG is not a sufficient reason to exclude from the beginning an optional instrument also applying to international business sales. CISG is there, and parties in international business sales can in nearly all cases formulate their choice of law in such a way that CISG applies. Even if CISG were the best possible state of rules, as some CISG *aficionados* would state, this is not an argument against the recognition of an alternative optional instrument parties could choose even in international business sales. If parties deem CISG better, they will simply not opt in another instrument. Probably big players won't, but it is certainly possible to draft in the line of the Draft CFR an optional instrument for sales that would better fit for at least some SME's. Apart from this, there is also room for an optional instrument for sales apart from CISG, as well for contracts where CISG does not apply, as for matters not regulated by CISG such as validity and many others. Nevertheless, the existence of CISG may be a reason to give priority to an optional instrument for cross-border *consumer* transactions rather than to another instrument for international

---

<sup>21</sup> An example is the CISG for international sales, even if it is an opt-out rather than an opt-in instrument.

<sup>22</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R2157:EN:HTML>.

<sup>23</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R1435:EN:HTML>.

<sup>24</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:399:0001:01:EN:HTML>.

<sup>25</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007R0861:EN:HTML>.

business sales. On the other hand, it would be useful to have an optional instrument for sales in general. Not all sales are exclusively B2B or exclusively B2C, and in the light of some economic and technical developments the number of transactions that are "mixed" in this respect may rise further.

(20) One of the advantages of the concept of optional instrument is anyway precisely that it is perfectly possible to have several ones. It is also possible to "extract" from a framework such as a CFR a number of compatible optional instruments: on the basis of the same text, one could extract an optional instrument for contracts in general, one for sales in general or for services in general, one for consumer sales and one for consumer services, one for consumer sales electronically concluded only, one for contracts for a certain type of services only, etc. One could add optional instruments for lease of movables, for certain distribution contracts, for personal security contracts (dependent and independent guarantees). But as said, also a general contract law OI could be useful, as many contracts do not fit in these categories very well.

Thus, an optional instrument could be "extracted" from a CFR (and adapted) at several levels (from general to specific), tailored to the needs and wishes of practice. Therefore, the drafting should probably start at the same time with a very general and a very specific one (e.g. general contract law on the one hand, online consumer sales on the other hand, and maybe service contracts in general as a mid-level instrument).

## **2. Consisting of rules only.**

(21) Even more so than for a toolbox, it is advisable to have basically only rules in an optional instrument. For other elements, we should refer to the CFR as toolbox. In order to be an optional instrument, a set of rules must be comprehensive enough to settle most of the questions that may arise in the relationship between the parties having chosen the optional instrument. An optional instrument must therefore absolutely contain model rules on those questions normally dealt with in the general law of contract and obligations (that is what CISG has partially done, too). Even an optional instrument should thus cover a broad range of rules. I would thus also include e.g. rules on restitution in case of avoidance (i.e. nullity) as well as termination of the contract.

## **3. Extracted from the (D)CFR**

(22) Whether the Draft CFR is suitable as a framework from which to extract an optional instrument can only be judged when the exercise is first made. For this reason, I did extract an optional instrument for sales as well as one for services from the DCFR and will present and publish them soon.

An optional instrument for sales, which contains *all* rules from the DCFR which may be relevant for sales - including the whole of general contract law - except the rules on unjust enrichment, would consist of about 300 articles. That may seem a lot, but to judge this, one has to compare the number of articles necessary in national law in order to cover the same topics (general contract law including consumer contract law,

as well as sales law, including all the topics not covered by CISG) - that number is higher.

As the DCFR is criticized because it would contain too much cross-references, I have counted them. Apart from immediate references to a preceding or following article, the draft for sales would contain only 29 articles with cross-references. Nearly all of them are made in order to specify remedies for obligations and duties mentioned. One of the weaknesses of the existing *acquis communautaire* in the field of contract law is precisely that it often lacks uniform rules on remedies; the DCFR has developed and specified them. If, however, the same remedy is suitable for different obligations or duties found in different chapters of the draft, it is better to have a cross-reference rather than a repetition of rules. The way the remedies have been dealt with is thus precisely one of the strengths of the DCFR.

The exercise also proves that another criticism raised against the DCFR is of very minor importance: the criticism that Book III of the DCFR is not formulated in terms of contract law alone. For an optional instrument applying to contracts only or to certain types of contracts only, Book III can be "contractualised" very easily. Very few changes are necessary in order to make this work, which show how exaggerated this criticism was.

### **Conclusion**

Although there are important differences between a common frame of reference as a "toolbox" and optional instruments, they should not be separated completely. The model rules forming a CFR are precisely also the rules that should be extracted into one or more optional instruments. The EU Commission was right in mentioning both functions together in its Action Plan.

The Draft CFR is certainly far from perfect, and many single rules or solutions can be criticized and sometimes improved. But nothing comparable exists for the moment as a suitable basis for a CFR and for optional instruments to be extracted from such a CFR. The CFR as the Council documents envisage it is clearly not suitable for these functions. A CFR, as the Council describes it, may at best serve as a little hand oracle for politicians in search of nice maxims and other slogans. However, in that case, I prefer Baltasar Gracian's *Oráculo manual y arte de prudencia* (1647). Well aware that in writing this, I have already sinned against its maxim 237 (in addition to many other maxims): *Nunca partir secretos con mayores* ('Never share the Secrets of your Superiors') (...).