



Christian von Bar^{*1}

Professor,
University of Osnabrück,
Chairman of the Study Group on a European Civil Code

Working Together Toward a Common Frame of Reference

1. Introduction

This year's December meeting of the Study Group on a European Civil Code^{*2} is taking place in Tartu because there are colleagues in this country whose organisational abilities are beyond comparison. Whilst at the 2004 December meeting in Milan, I spoke with Professor Paul Varul during the morning coffee break and wondered whether he could accept the 50 members of the Co-ordinating Group at his university in a year's time. By lunchtime on the same day, he had said to me that it was as good as arranged! It would be a dream if we were as successful as Professor Varul in dealing with the themes of the forthcoming working week — renting of movables, loan contracts, real securities, tort law, unjustified enrichment law, and problems relating to the drafting of our proposal for a common frame of reference. We are grateful for the privilege of being here!

After Professor Beale has explained to you the significant stages of our work leading up to the establishment of the so-called Network of Excellence 'Common Principles of European Contract Law' under the Sixth Research Framework Programme of the EU^{*3}, it falls to me to speak on the current situation and some of the difficulties we are now facing. Whilst preparing my short submission, I wondered whether I should add a question mark to its title, 'Working Together Toward a Common Frame of Reference'. This was because by no means everybody seems ready to constructively play a part in the development of this common frame of reference. We have had to deal with a significant number of very critical voices. It is part of my role, however, to spread optimism, and that, despite all of the bumps in the road, I mention that I would like it not to be forgotten how exciting it is to witness the creation of a new *jus commune europaeum*.

¹ I am grateful to Paul McKane, LL.B. (Ling. Germ.), for translating the draft.

² This is the thirteenth meeting, after: Utrecht in autumn 1999, Rome in June 2000, Salzburg in December 2000, Stockholm in June 2001, Oxford in December 2001, Valencia in June 2002, Oporto in December 2002, Helsinki in June 2003, Leuven in December 2003, Warsaw in June 2004, Milan in December 2004, and Berlin in June 2005.

³ More in section 3.

2. The Lando Commission and the Study Group

The modern documents of the constitutional organs of the Community regarding the ongoing work on the Common Frame of Reference document succinctly and cleanly divide the participants into two distinct groups, namely ‘stakeholders’ and ‘researchers’. Above them — *divide et impera* — is the European Commission, which for its part is involved with several Directorates-General (those for research, the internal market, and consumer protection), whose interests and hopes can prove difficult to marry. Apart from this, it also has to co-operate with the European Parliament, with the Council, and with the member states’ governments, which also can lead to abrupt changes in the aims and goals.

In any event, we, the Study Group on a European Civil Code⁴, belong to the group identified as ‘the researchers’. This could — and I hope I am mistaken — prove to be politically ‘helpful’, as such an identification, if necessary, can also isolate us. Should the project fail, or should the results of our work not concur with what at that time would be politically opportune, then it would be easy to dismiss our results as being ‘too academic’. The game has already begun. Legal scholars are, however, not a homogeneous group that follows orders but are, rather, highly individual minds, which do not allow themselves to be easily forced into administrative structures. They are also, incidentally, ‘stakeholders’, in the sense that they feel co-responsible for the quality of European private law. The classification of us according to specific groups could be even more problematic if one thinks of the many academics who critically or benevolently observe the process of the Europeanisation of private law. They appear to have been given the role of onlookers, which hardly contributes to our popularity amongst our colleagues.

What do we actually do? The Study Group on a European Civil Code was founded in 1999 and is the successor to the Commission on European Contract law, known all over the world as the Lando Commission. The Study Group has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of movable property that are especially relevant for the functioning of the common market. The two groups pursue(d) identical aims. However, the Study Group has a more far-reaching focus in terms of subject matter. Both groups have undertaken to ascertain and formulate European standards of ‘patrimonial’ law for the member states of the European Union. The Commission on European Contract Law has already achieved this for the field of general contract law.⁵ Its Principles of European Contract Law (PECL)⁶ are being adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group is itself dovetailing its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations — i.e., the law of tort/delict, the law of unjustified enrichment, and the law on benevolent intervention in another’s affairs (*negotiorum gestio*) — and (iii) by developing rules for fundamental questions in the law on mobile assets — in particular, transfer of ownership and security for credit. We have undertaken this endeavour on our own personal initiative. We have always taken care to identify the legal position of the member states of the European Union and to set out the results of this research in the introductions and notes. That, of course, does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up ‘sound and fitting’ principles; that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe. Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible, the articles drafted in English were translated into the other languages either by members of the team or by third parties commissioned for the purpose.

The first volumes of the findings of the Study Group have in the meantime gone to print, with more on the way. In order to leave no room for misunderstanding, it is important to stress that these principles have been prepared by impartial and independent-minded scholars whose sole interest has been their devotion to the subject matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimisation for promoting harmonisation of the law. Our legitimisation is confined to curiosity and an interest in Europe. In other words, the volumes in the Study Group on a European Civil Code series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the cur-

⁴ More details are available on our Web site (<http://www.sgecc.net/>).

⁵ O. Lando, H. Beale (eds.). Principles of European Contract Law, Parts I and II, Combined and Revised. The Hague 2000; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Principles of European Contract Law, Part III. The Hague 2003.

⁶ A newer bibliography concerning the PECL (Parts I–III) is to be found in R. Zimmermann. Die Principles of European Contract Law als Ausdruck und Gegenstand europäischer Rechtswissenschaft. Bonn: Zentrum für europäisches Wirtschaftsrecht der Universität Bonn, Vorträge und Berichte 2003, No. 138. Just recently published is the German translation of part III: C. von Bar, R. Zimmermann (translator). Die Grundregeln des Europäischen Vertragsrechts. Part III. München 2005.

rent law and introduce possible models for its further development, no less but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a **study** group. The question of whether a European Civil Code is or is not desirable is a political one on which each member can only express an individual view.

3. The so-called network of excellence 'Common Principles of European Contract Law'

Were it not for the political developments, what we do and the reason we have gathered here in Tartu would, therefore, be by all means unspectacular. I personally would have been happier had we had longer, in peace and without outside pressures, to discuss our principles, comments, and notes. Things should have proceeded differently. Coincidentally, at practically the same time as the Study Group first met in 1999 in the Dutch city of Utrecht, the European heads of government convened in the Finnish city of Tampere, where they decided, among other things, that 'in a true European area of justice, individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal systems in the Member States'. The conclusions of this summit were summarised in Chapter VII (Greater Convergence in the Area of Civil Law) under paragraph 39, with the declarative statement that 'as regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings'.⁷ Suddenly and without us having any conscious part in the ignition, the wheels of motion had started on a political level. From then on, the work progressed from strength to strength. Numerous resolutions of the European Parliament⁸, a range of important communications of the European Commission⁹, a further summit of the Council (Brussels 2004¹⁰), positive statements and comments from individual heads of government¹¹, and common and decided governmental declarations¹² were formulated, sometimes in interplay¹³ with ideas proposed by the Commission on European Contract Law and the Study Group on a European Civil Code.¹⁴

⁷ European Council meeting at Tampere, 15–16 October 1999, Conclusions of the Chair, SI(1999) 800, Point 39. For more, see C. von Bar. Ein gemeinsamer Referenzrahmen für das marktrelevante Privatrecht in der Europäischen Union. – Festschrift für Erik Jayme 2004, pp. 1217–1231.

⁸ See in particular the more recent resolutions of 15 November 2001 (OJ C 140 E, 13.06.2002, p. 538) (see C. von Bar. – ZEuP 2002, pp. 629–633) and of 2 September 2003 (OJ C 76 E 2004, 95). A further resolution is expected for autumn 2005. Earlier resolutions are dated 26 May 1989 (OJ C 156, 26.06.1989, p. 400) and 6 May 1994 (OJ C 205, 25.07.1994, p. 518).

⁹ These include the 'Communication on European Contract Law' of 11 July 2001 (OJ C 255, 13.09.2001 (see C. von Bar. Die Mitteilung der Europäischen Kommission zum Europäischen Vertragsrecht. – ZEuP 2001, pp. 799–804)), with which the Commission reacted to the Council meeting in Tampere, and the communication of 12 February 2003 titled 'A more coherent contract law: an action plan' (OJ C 63, 16.03.2003) as well as the communication of 11 October 2004 'European contract law and the revision of the *acquis*: the way forward' (OJ C 14, 20.01.2005, 6; reprinted in part in ZEuP 2005, pp. 462–469).

¹⁰ The summit in Brussels passed the so-called Hague Programme for the Strengthening of Freedom, Security and Justice in the European Union (OJ C 53, 03.03.2005) and with it 'development of a common frame of reference' (Point 3.4.4; *loc. cit.* c. 14). For an in-depth analysis and documentation of the materials and writings, see Schmidt-Kessel. Auf dem Weg zu einem gemeinsamen Referenzrahmen: Anmerkungen zur Mitteilung der Kommission vom 11. Oktober 2004. – GPR 2005, pp. 2–8.

¹¹ Thus, for example, German Chancellor Schröder. Sieben Chancen für mehr Wachstum in Europa. – Handelsblatt 26. October 2004; printed in part also in ZEuP 2005, p. 106.

¹² A striking document, albeit one not aimed directly at the common frame of reference, wherein the readiness of the participating states to bring laws closer together is addressed, is the Franco-German Common Declaration of the 40th anniversary of the Elysée Treaty. Point 22 states: 'In order to intensify the coming together of our societies and to realise new advances on a European level, we strive to harmonise our national legislation in significant areas which affects the lives of our citizens. We call on our government ministers to systematically consult with their partners during the preparation stages of law-making and to look at the current status and development of the law in the neighbour state in order to achieve agreement as far as possible. We especially hope that legislative projects would be considered which aim at drawing aspects of civil law, most particularly family law, together.' Available at: http://www.bundesregierung.de/emagazine_entw,-463558/Gemeinsame-Erklärung-zum-40.-.htm.

¹³ The Action Plan of the European Commission referred to suggestions from the 'Communication on European Contract Law: Joint Response of the Commission of European Contract Law and the Study Group on a European Civil Code' (submitted on behalf of the two groups by C. von Bar, O. Lando, and S. Swann) (reprinted, amongst others, in ERPL 2002, pp. 183–248 and in *Europa e diritto privato* 2002, pp. 133–199). Also, the resolution of the European Parliament of 15 November 2001 (see above, Note 7) accepted a large number of suggestions of European legal science — in particular, several suggestions from a study submitted to the Committee on Legal Affairs and the Internal Market of the European parliament entitled 'Examination of the private law systems of the EU with regard to discriminations and the creation of a European Civil Code.' European Parliament, General Direction Science, Working Document. Legal issues JURI 103 EN (10/1999, headed and co-ordinated by C. von Bar).

¹⁴ All of these documents concerning European contract law are available on the Commission's Web site under: http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

It is in the context of this interplay of European constitutional organs and European legal science that the above-mentioned founding of the Network of Excellence ‘Common Principles of European Contract Law’, the co-ordinator of which is Professor Hans Schulte-Nölke of Bielefeld University, must be seen. The story of how this ‘Network of Excellence’ (an expression from the bureaucratic nomenclature of the European Commission, which has earned us a lot of teasing) came into being would be worth an article of its own. After the success of a pre-application submission to bring European private law under the Sixth Framework Programme, there began a six-month-long application stage, which culminated in December 2003 in a 450-page submission. The ensuing evaluation phase took another nine months, after which there followed an eight-month phase of intensive and difficult negotiations. Although the contract was finally signed in May 2005, the Commission began as early as July to try to change some of its content significantly. These discussions are ongoing

We applicants understood too late that in no way were we merely dealing with the Directorate-General for Research and its conditions, aims, and experts. Our submission to finance our research works was exclusively aimed at achieving urgent scientific desiderata and additionally toward the creation of a European legal science community. Therefore the contract was formally signed with 17 European universities and research institutions, but the substantial work would be carried out by the Study Group, the *Acquis* Group, and a group that would deal with insurance contracts. These so-called drafting groups — i.e., the teams who prepare the commented and annotated ‘principles’ or ‘rules’ — are joined by a range of ‘evaluation teams’, who, among other things, concern themselves with economic and jurisprudential questions, promote the expansion of databases, and organise case studies on the basis of the rules developed by the drafting teams. The evaluation teams have it easy. They are not subject to a definite timeframe, nor has anyone ever attempted to prescribe what exactly they should be doing. Things are a little different for us drafting teams. Their work covers the entire range of subjects dealt with by the Study Group (that is to say, the law of specific contracts, extra-contractual obligations, and elements of property law). Furthermore, they concentrate on legal issues relating to consumer protection and the *acquis communautaire* that has developed from this. The inclusion of the law on insurance contracts has been encouraged by political actors. Our evaluators, however (correctly, in my opinion), had criticised us for this inclusion and therefore even deducted half a point from our evaluation score on account of it. The Commission, however, paid no heed to this, in the same way as the content of the entire evaluation did not concern them too much. What was important was only the end result. Thus, and this I understood far too late, we were part of an attempt to siphon monies out of the well-stocked research budget into the meagre budgets of the Internal Market and Consumer Protection departments.

Suddenly we were in another world. At the very outset of the negotiations regarding the Network of Excellence, we were informed that the work that we had to carry out should (also) significantly relate to the PECL. Upon our arrival at the first meeting in Brussels, we were presented with the draft of the Commission’s communication of 11 October 2004 (‘European contract law and the revision of the *acquis*: the way forward’¹⁵), and I asked with great astonishment which research submission we were actually dealing with. I had never reckoned on gaining financial backing for the revision (not to say for the transcription) of a book that was already on the shelves! Naturally, we had not requested any money for the subject matter of the PECL, nor later on did we get any. This has encumbered the work — above all, the common endeavours with the stakeholders — to this very day. I will come back to this. We ourselves had not only a different timescale but also an entirely different approach to the project; indeed, we wanted to postpone the revision of the PECL, and the working in of the *acquis*, to a time when we would have completed addressing those matters that we ourselves wanted to deal with. Instead, we experienced a short time later keen awareness that we would be constrained by the contract relating to the Network of Excellence to accept that we would deliver the complete proposal for a common frame of reference by the end of 2007 (that is to say, within a timeframe of only two and a half years, the contract being retrospective to the 1 of May 2005). Suddenly everything had to happen all at once. The motivation was and is, as one says, political: either it happens now, during the term of office of the Barroso Commission, or never. One needs a further two years for the final consultation process on a political level, and by the end of 2009 everything must be ready. Thus we arrived at the date December 2007. When I see before me what we have agreed to, my head is swimming. We have committed ourselves to delivering a text compiled from comparative introductions, rules (or principles), comments, and notes relating to all significant aspects of the law of obligations and movable property within two and a half years! Naturally, we knew that we could look back on almost 20 years of preparations on the part of the Lando Commission and our own texts. One must nonetheless imagine what it means to lay down almost all important elements of the law of obligations and property law in a series of coherent rules, to provide each rule with its own commentary, and to demonstrate whether or not such a rule is to be found in each of the individual member states. With certain highly complex areas we could begin only after the issue of financing was resolved, after the contract was signed with Brussels and the money had been transferred. I refer to, for example, the law relating to contracts for loans.

¹⁵ See Note 8.

4. Research in the face of politics and interest groups

Unfortunately, my report is not yet finished. This is because the European Commission had already founded the so-called stakeholder network CFR-net at the start of 2005, after announcing it in the middle of 2004. This, in turn, was done without having consulted with us. We were subjected to official announcements that most likely would have an effect on us without us being able to react to or become involved in them. The rules of the Directorate-General for Science and Research did not allow for this. The stakeholders' network was already a topic for discussion at a time when we were ourselves still wholly uncertain whether or not we would be granted financial support under the Sixth Framework Programme on Research. The stakeholders' network was established approximately six months before we signed our contract with the Commission. It consists of approximately 160 lawyers for industry and consumer groups, judges, and legal practitioners from all or nearly all of the member states. However, interest in participating in it is not shared equally by all member states. In particular, there are too many Germans, and that, in some circles, creates an additional problem.

The foundation of a stakeholder network was certainly a good idea. In the beginning its realisation, however, took place in such a way that the entire plan of the creation of a common frame of reference or even an optional instrument could be jeopardised. Warnings fell on deaf ears; a catastrophe seems unavoidable. The convening of a group of experts from other legal professions to critically analyse the documents of the Lando Commission and the Study Group on a European Civil Code, in order to first test the practicalities of our work, certainly was (and is) a worthwhile idea. The way in which this process began could easily have led to its subsequent destruction. One must understand that there were practically no advance discussions. A plenary session involving all participants never convened, so the researchers could not outline the processes that led to the writing of their texts. There was no overview of the intentions of the project. It was unclear to many stakeholders what indeed the common frame of reference had to do with the PECL at all. It was not even clear to everybody what the differences between 'rules', 'comments', and 'notes' was, nor did we ever have the opportunity to say anything preventive regarding the name of our group, the Study Group on a **European** Civil Code. A not altogether small part of the first workshop was taken up with the discussion of such general questions, most especially that of whether the Commission was not **really** pushing for a European Civil Code.

The Commission simply went *medias in res*. It was decided that we begin with a very long text on the law of service contracts. The researchers did not know what they ought to say, the stakeholders did not know how they should deal with the abundance of text, and the working teams within the Commission were so busy with issues of organisation and finance that they had no opportunity at all to have read at least some of the texts. The Commission's accompanying Web site was not yet up and running. The researchers were worried about both copyright and their independence. The reason we began with service contracts and subsequently dealt with distribution contracts (i.e., commercial agency and franchising), personal securities, *negotiorum gestio*, and the law of unjustified enrichment was that we had to name within a very short space of time (one or two days) subject matter for the workshops. Certainly, it would have been sensible to begin with the PECL, but it was impossible within the time constraints to name 'reporters' for the individual PECL chapters. Thus I had to suggest themes from among those I knew the Study Group had looked at and that were already in 'presentable condition'. The first meetings ended in an uproar, as it was perceived as a disadvantage to deal with 'finished' texts; one could not intervene any further, rendering the groups only talking shops. Next time, when we explicitly presented 'work in progress', we of course heard that this could not be discussed either, as it was not ready! So at the beginning there was a hellish mess that appeared to be very dangerous, so dangerous in fact that I was worried that the entire project would be whipped away in the wind.

Massive resistance followed. Stakeholders contacted politically influential players in Brussels and in their own countries. This all happened at roughly the same time that the French and Dutch people rejected the European Constitutional Treaty in referenda. The Commission was forced to react. They considered an about-face; suddenly focussed almost exclusively on the *acquis communautaire* and, with that, on consumer protection; and considered — now, thankfully, in counsel with us — an improvement of the entire process. We were also afforded some time in that the planned conference in London in July was cancelled and rescheduled for the end of September due to the horrific terrorist attacks.

What we have agreed with the Commission in the interim is not a secret, and therefore I will outline it at this point. We have adamantly refused to cut back the entire large research project to a study on the law of consumer protection. This we neither want nor are allowed to do — according to the contract, the possibility of such an about-turn is ruled out. We have, however, in part on our own suggestion, decided to fit a portion of our work to the political developments and to bear the load of additional work on our shoulders:

- Our research drafts will indicate which parts have been ‘harvested’ from, or fall within, the scope of the consumer or other EU-related *acquis* and to which provisions of the *acquis* these parts relate;
- Our drafts will contain rules applicable to all parties (private-to-private, or P-to-P, contracts) and, where appropriate, specific rules applicable to business-to-consumer (B-to-C) contracts, with the reasoning for the insertion of B-to-C rules being explained in the comments;
- Our drafts will identify policy choices/suggestions and explain their reasons in the comments;
- Mandatory rules will be clearly identified as such in the black-letter rules, and their mandatory character will be explained in the comments;
- We agreed to transmit a draft overall structure for the CFR so that a workshop on this matter can be organised;
- We accepted that the rules contained in different books will not be interwoven in such a way that it would turn out impossible to delete single books contained in our draft CFR from the final CFR;
- We agreed to participate in combined or mixed workshops on overlapping issues (e.g., the consequences of termination, withdrawal, and unjustified enrichment);
- We confirmed, regardless of some doubts on their usefulness, that the draft CFR shall contain a list of definitions (in Annex I); and
- In order to answer the criticism of the European Parliament, member states, and stakeholders that the draft rules of the CFR are too detailed, we accepted the task of trying to indicate in the final overall draft CFR which parts of the black-letter rules are specifically relevant for what the European Commission now seems to identify as the immediate use of the CFR (namely, the review of the *acquis*), though I have to admit that we do not yet really have a clue how to identify this ‘specific *acquis*-relevance’.

I still somewhat doubt that we can achieve all of these in addition to handling the current workload, which in itself remains to be managed. Above all, I remind you of the enormous effort that goes with the compilation of the national notes. However, we will persevere. Undoubtedly the time pressures that the European Commission has created also have their positive sides: we are forced to progress continuously. Nonetheless, we must also make sure that the constraints of time that we are faced with do not lead to a loss of quality in the work and that we do not lose our autonomy. This will include our going beyond the realm of general contract law in our draft CFR, most especially delving into the law of extra-contractual obligations and the above-mentioned items of property law. The rationale for this I have already explained elsewhere.¹⁶ Above all, the draft CFR will not merely tackle the *acquis*; rather, it shall follow the approach taken by the PECL — i.e., formulating a private law regime for the internal market. We are convinced that this is the correct approach to take and that to focus exclusively on the area of consumer protection would be the wrong idea. Without a general law of obligations and law of property, it would not be possible to create a specific law of consumer protection. Apart from this, we will not allow our Network of Excellence to be rerouted in an arbitrary manner; we have come too far for that. But, naturally, one must always take into account new surprises from Brussels.

5. What actually is a Common Frame of Reference?

For a researcher it is in no way easy to operate within the nest of imponderabilities of the political process. I have not yet even come to what is possibly the greatest of these uncertainties, that of what the common frame of reference actually is, or, in other words, what the document to be published at the end of 2009 will contain! For us researchers it has always been clear, and we felt that this was underpinned by all of the early announcements of the Parliament and Commission, that the PECL should form the model for the common frame of reference. Therefore, we took it for granted in all undertakings of the Study Group as well as the Network of Excellence that the PECL would be extended to areas that had not yet been dealt with. Accordingly, we understood and continue to understand the term ‘Common Frame of Reference’ to refer to a text bearing a resemblance to a codification. Unlike a codification, however, it is not binding and, furthermore, contains a commentary on its own rules as well as elaborate details on the law of the member states and the European Community. Our draft Common Frame of Reference document will share similarities with the American ‘Restatement’ documents, while not being identical to them. The latter would be impossible anyway, for the variations in European legal systems surpass the width of the legal spectrum in the USA;

¹⁶ C. von Bar, Drobni (eds.). *The Interaction of Contract Law and Tort and Property Law in Europe*. Munich 2004; C. von Bar. *Zur gegenständlichen Reichweite des Gemeinsamen Referenzrahmens*. Festschrift Rajski. Warsaw 2006 (in print).

there are also more languages to deal with than in the USA, if nothing else. A mere ‘restatement’ will not suffice; on occasion, we must try to formulate what appear to us to be ‘best solutions’. We must therefore submit policy choices and, moreover, insert our rules into a coherent system the like of which has thus far never been developed for Europe as an entity. In my experience, the actual difficulty of the entire undertaking is this coherent system, a difficulty that continues to be underestimated. Resolving this issue also means the development of a terminology that is understood all over Europe.

Nonetheless, in discussions with the stakeholders, and at the same time in discussions with some of the representatives of the European Commission, it became clear that there were differences in what was considered for the contents and formation of the Common Frame of Reference. Our approach would almost inevitably give credence to the oft-mentioned suspicion that in truth we want to create a European Civil Code. There thus emerged attempts to suggest a number of alternative models, including the idea that the Common Frame of Reference was to operate as a form of legal dictionary (i.e., to provide a mere catalogue of terminologies) or that we should restrict ourselves to proposing improvements to the texts of individual directives or their mutual coherence. A considerable amount of the intervention of the Commission in our research work — itself not an unproblematic procedure — can be traced back to these varied perceptions. It was against this background that the Commission introduced a new term, whose meaning is not altogether clear: the Common Frame of Reference ought to be considered a ‘toolbox’ for the improvement of the *acquis*. What then is a ‘toolbox’ aimed at improvement of European legislation in the area of private law? The term allows for a wide range of meanings. Perhaps it was chosen for this reason, and if that was the case, then it fills an obvious political function. This is because it allows for a vast range of meanings, none of them to be set in stone at this early stage. The idea of a toolbox allows those who manage and handle the political process to buy time before taking a final decision.

6. Another two years — what then?

How will the project continue at a practical level? At the beginning of this year, and therefore long before the contract with the European Commission had been signed, we formed a subcommittee. This subcommittee deals with the editing of the Draft Common Frame of Reference document that we must submit. The significant responsibility of this team is to make proposals to the plenary meetings of the individual research groups (in our case, the Co-ordinating Committee of the Study Group) as to the overall structure of the Draft Common Frame of Reference and as to the revision and amendment of the already existing rules and comments. Furthermore, the subcommittee has the task of ensuring that we members deliver those national notes still absent. At present, members of the subcommittee, on which Professor Varul represents Estonia, are busy with the integration of the PECL into the entire structure^{*17} and modernising it in the face of more recent findings.

If we do not give way under the pressures of time, we should actually succeed in presenting the European Commission with a complete draft of a common frame of reference, complete with ‘rules’, ‘comments’, and ‘notes’, by the end of 2007. This draft will contain all the provisions formulated by the research team plus those suggestions from the stakeholders that the researchers accepted, in complete independence, as improvements to their rules and comments. What then happens to the draft will, unsurprisingly, be beyond our influence. One possibility is that the draft, wholly or in part, will be published as a white paper, or in any case as a topic for intensive discussions and consultations within the politically responsible organs of the EU. The results of our work will be evaluated in light of the political atmosphere of the time. It will, of course, never be implemented word for word, but we, naturally, hope that a significant proportion will be retained. The ball will then lie in the court of the Commission, who will need a lot of strength to see the work through till the end. It would be good if they could receive far more support than they did at the start. The Governmental Conference in London in September 2005 made a contribution to improving the general position of the project. That the political atmosphere has started to ‘tilt’ in our favour has been shown in a recent survey showing an altogether different picture from that put forward by lobby groups earlier on.^{*18} When a large number of firms were asked whether they would support the introduction of a ‘European Contract Law’, the overwhelming majority of them in all member states responded in the affirmative.^{*19} The chance to create European-level private law is more realistic than ever before. It is up to us to grab hold **now!**

¹⁷ See annex.

¹⁸ Every now and then, correspondents from Brussels for national interest groups speculate in a misleading manner in their internal publications, as well as other publications, including research journals, which speculations find their way into the national press. Occasionally, these reports ‘know’ more about the researchers and their relationship with the Commission than the immediate parties themselves do. See, e.g., Wiesner. Ist das Europäische Zivilgesetzbuch noch zu stoppen? – DB 2005, pp. 871–875.

¹⁹ Telling are the results of a report published as part of a brochure for the legal firm Clifford Chance, ‘The Clifford Chance Survey: European Contract Law’. In nearly every country, the approval ratings for a European law of contract were between 80% and 100%. Only in the United Kingdom was there ‘merely’ 70% approval.

7. Annex: a possible structure for the draft Common Frame of Reference

The Draft Common Frame of Reference that has been tackled by the research teams will not be ready for some time. Before it can be made public, the members of the Study Group will publish projects covering portions of it and initiate public discussion. Also, the development of the Draft Common Frame of Reference may be subject to a number of changes. The research teams, however, have for their part already agreed on its main features^{*20}:

Preamble

Fundamental principles

- General functions of a contract
- Binding force of a contract and right of withdrawal
- Good faith
- General functions of contract law
- Promoting the integration of the internal market
- Freedom of contract and its restrictions
- Protection of certain parties to the contract
- Information
- Non-discrimination
- Notion of contract and excluded contracts
- Public law

Book I General Provisions

Book II Contracts and Other Juridical Acts

Chapter 1 General provisions on contracts

Chapter 2 Pre-contractual obligations

Pre-contractual information

No general obligation to provide information

Duty to prevent use of misleading or false information

Obligation to provide information in respect of particular transactions

Availability of information on request in respect of particular transactions

Format in which information is to be provided

Specific sanctions for failure to provide information

Non-discrimination

Discrimination

Remedies

Particular remedies

Time limits

Chapter 3 Formation of a contract

General

Offer and acceptance

Withdrawal

Applicability

Duty to inform about right of withdrawal

Consequences of failure to inform

²⁰ Text in italics to be drafted by the *Acquis* Group.

Performance during withdrawal period

Exercise of right of withdrawal

Consequences of withdrawal

Connected transactions

Unwinding the contract after withdrawal

- Chapter 4 Authority of agents in relation to contracts
- Chapter 5 Validity of contracts (including illegality)
- Chapter 6 Unfair terms
- Chapter 7 Interpretation of contracts
- Chapter 8 Contents and effects of contracts
- Chapter 9 Application of the above rules to other juridical acts

Book III Contractual and Non-contractual Rights and Obligations

- Chapter 1 Performance of contractual obligations
- Chapter 2 Non-performance of contractual obligations
- Chapter 3 Particular remedies for non-performance of contractual obligations
- Chapter 4 Application of the above rules to non-contractual obligations
- Chapter 5 Conditional rights and obligations
- Chapter 6 Plurality of debtors and creditors
- Chapter 7 Change of parties
 - Assignment of right to performance
 - Substitution of new debtor
 - Transfer of one party's entire legal position (rights and obligations)
- Chapter 8 Set-off
- Chapter 9 Prescription

Book IV Specific Contract Types

Sales

- Chapter 1 General provisions
- Chapter 2 Obligations of the seller
- Chapter 3 Obligations of the buyer
- Chapter 4 Remedies
- Chapter 5 Passing of risk
- Chapter 6 Consumer goods guarantees

Services

- Chapter 1 General provisions
- Chapter 2 Construction
- Chapter 3 Processing
- Chapter 4 Storage
- Chapter 5 Design
- Chapter 6 Information
- Chapter 7 Treatment

Long-term contracts

- Chapter 1 General provisions
- Chapter 2 Commercial agency
- Chapter 3 Distribution
- Chapter 4 Franchising

Loans

[Chapter headings yet to be completed]

Personal security

Chapter 1 Common rules

Chapter 2 Dependent personal securities (suretyship guarantees)

Chapter 3 Independent personal securities (indemnities)

Chapter 4 Persons requiring special protection

Leasing of movables

Chapter 1 General provisions

Chapter 2 Period of lease

Chapter 3 Obligations of lessor

Chapter 4 Obligations of lessee

Book V Benevolent Intervention in Another's Affairs

Chapter 1 Scope of application

Chapter 2 Duties of intervener

Chapter 3 Right and authority of intervener

Book VI Non-contractual liability for damage

Chapter 1 Fundamental provisions

Chapter 2 Legally relevant damage

Chapter 3 Accountability

Chapter 4 Causation

Chapter 5 Defences

Chapter 6 Remedies

Chapter 7 Ancillary rules

Book VII Unjustified Enrichment

Chapter 1 Fundamental provisions

Chapter 2 Justification and absence of justification

Chapter 3 Enrichment, disadvantage, and attribution

Chapter 4 Reversal of enrichment

Chapter 5 Defences

Chapter 6 Relation to other rules

Book VIII Transfer of Movables

[Chapter headings yet to be completed]

Book IX Security Rights in Movables

[Chapter headings yet to be completed]

Book X Trusts

[Chapter headings yet to be completed]

Annex 1 Terminology / definitions of terms