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**PRESS PACK**

**“WHICH EUROPEAN CONTRACT LAW FOR THE EUROPEAN UNION?”**

**Université de la Sorbonne**  
*47 rue des Ecoles*  
**Paris 5<sup>ème</sup>**

**23<sup>rd</sup> and 24<sup>th</sup> October 2008**



## CONTENTS

- Press release
  
- Conference programme
  
- Existing work
  
- Background
  
- The construction of contract law in three European countries



## PRESS RELEASE

### “Which European contract law for the European Union?”

**On 23 and 24 October 2008, the French Ministry of Justice is organising a conference at the Sorbonne University in Paris on the theme 'Which European contract law for the European Union?'**

This conference, which has been organised in partnership with the Slovenian, Czech and Swedish Ministries of Justice and the French Bar, and with support from the European Commission, will expand discussions on two main questions: How can we devise a common frame of reference for contract law within European institutions? How can this frame of reference respond to the difficulties practitioners experience in the field of contract law?

The specialist nature of legal rules in Europe and the increasing disparity in the ways goods and services are exchanged are forcing us to question the need to simplify and coordinate EU legislation. As the chief instrument of civil and commercial relations, the contract has been the main focus of attention.

In 2003 the European Commission launched an action plan for a “more coherent European contract law” that called for a “common frame of reference” that would consist of a set of common definitions, general principles and model rules in the field of contract law. Implementation of this frame of reference is an essential step in improving the quality of EU legislation.

Several pieces of academic work proposing draft common frames of reference are now available. Discussions now have to be taken further in order to decide how we can build this common frame of reference so that it is both effective and respects the legal traditions of the twenty-seven Member States of the Union.

The common frame of reference is designed primarily for EU legislators with the objective of improving the coherence and quality of legislation as it is revised or created. It could also be used in the longer term by national judges, legislators or jurists as a source of inspiration or as a reference.



MINISTÈRE DE LA JUSTICE

## PROGRAMME

# “Which European contract law for the European Union?”

### Université de la Sorbonne

47 rue des Ecoles - Paris 5<sup>ème</sup>

Thursday 23 October:

#### Open to the media

**9.00:** Welcome

**9.45:** Opening addresses

**Ms. Rachida DATI**, Minister of Justice, France  
**Mr. Lovro STURM**, Minister of Justice, Slovenia  
**Mr. Tomas BOCEK**, Deputy Minister of Justice, Czech Republic  
**Mr. Magnus G. GRANER**, Secretary of State for Justice, Sweden  
**Mr. Christian CHARIERE-BOURNAZEL**, President of the Paris Bar

**10.45:** Roundtable: *General introduction on European contract law and the common frame of reference*

**Prof. Ole LANDO**, Professor of Comparative Law, Copenhagen Business School  
**Prof. Hugh BEALE, QC FBA**, University of Warwick  
**Prof. Bénédicte FAUVARQUE-COSSON**, University of Panthéon-Assas, Paris II  
**Prof. Dr. Hans SCHULTE-NÖLKE**, European Law Institute, University of Osnabrück

**11.30:** Roundtable: *Development of the common frame of reference: method and potential obstacles*

Representatives of the European Commission  
**Prof. Simon WHITTAKER**, Professor of European Comparative Law, University of Oxford  
**Prof. Jacques GHESTIN**, Emeritus Professor at the University of Panthéon-Sorbonne, Paris I  
Moderator: **Mrs. Claudine JACOB**, Justice Advisor, French permanent representation to the European Union

**14.30:** Roundtable: *Political common frame of reference: vision of European institutions*

**Ms. Diana WALLIS**, Vice-President of the European Parliament  
**Mr. Jacques BARROT**, Vice-President of the European Commission  
**Mr. Jacques TOUBON**, Member of the European Parliament  
**Ms. Pascale FOMBEUR**, Director of Civil Affairs and Seal Directorate  
Moderator: **Mr. Marc PAOLINI**, Journalist

**16.30:** Roundtable: *Legal policy for the common frame of reference. Illustration: plan, guiding principles*

**Prof. Dr. Nils JANSEN**, Westfälische Wilhelms - Universität Münster

**Prof. Dr. Christian VON BAR**, European Law Institute, University of Osnabrück  
**Mr. Guido ALPA**, Lawyer admitted to the Genoa Bar, President of the *Consiglio Nazionale Forense*  
**Ms. Leena LINNAINMAA**, Director of Legal Affairs, Finnish Chamber of Commerce (Eurochambres)  
Moderator: **Mr. Michel BENICHO**, Grenoble Bar, Director of the French Delegation of the Council of Bars and Law Societies of Europe

## FRIDAY 24 OCTOBER

### Open to the media

- 9.30:** *Roundtable: Contract formation: negotiation, conclusion of the contract*  
**Prof. Judith ROCHFELD**, Professor of Private Law, University of Paris 1-Panthéon-Sorbonne  
**Prof. Dr. Reiner SCHULZE**, Westfälische Wilhelms-Universität Münster  
**Mr. Bernard VATIER**, Paris Bar  
**Prof. Dr Peter LIMMER**, Notary in Würzburg  
**Mr. Johan GERNANDT**, Partner at Gernandt and Danielsson, Stockholm  
Moderator: **Jean-François GUILLEMIN**, General Secretary of Bouygues
- 11.30:** *Roundtable: Content and performance of the contract: change of circumstances, abusive clauses, implicit obligations*  
**Prof. Anna VENEZIANO**, University of Teramo  
**Prof. Claude WITZ\***, Professor of Private Law at the University of Sarre  
**Mr. Marc FRILET**, Paris Bar, French Expert on the Council of Bars and Law Societies of Europe's European Contract Law Committee  
**Mark Lane**, Partner at Pinsent Masons, London  
Moderator: **Mr. Graff VON WESTPHALEN**, Lawyer admitted to the Cologne Bar, President of the Council of Bars and Law Societies of Europe's European Contract Law Committee
- 14.30:** *Roundtable: Breach and remedies: liability limitation clauses, foreseeable nature of the loss, forced performance*  
**Prof. Lubos TICHY**, Charles University, Prague  
**Mr. Damjan MOZINA**, Assistant Professor in the Faculty of Law at University of Ljubljana  
**Prof. Eric CLIVE**, University of Edinburgh  
**Mr. Fernando POMBO**, Lawyer admitted to the Madrid Bar, President of the International Bar Association  
**Carol XUEREF**, Director, legal affairs and group development, Essilor  
Moderator: **Lord MANCE**, House of Lords
- 16.00:** General summary of the discussions: **Mr. Denis MAZEAUD**, Professor at University of Panthéon-Assas, Paris II
- Addresses by the Czech and Swedish presidencies:**  
**Mr. Tomas BRICHACEK**, Czech Ministry of Justice,  
**Prof. Jan KLEINEMAN**, University of Stockholm
- Closing address:  
**Ms. Pascale FOMBEUR**, Director of Civil Affairs and Seals Directorate,  
**Mr. Dominique VOILLEMOT**, President of the Delegation of French Bars in Brussels  
**Press update**

\* subject to confirmation

## EXISTING WORK

Several attempts have been made over the past twenty years to harmonise contract law and these can be used as the basis for discussion on the construction of European contract law:

- ❑ The **Principles of European Contract Law (PECL)**, established by the Commission on European contract law, founded in 1980 under the aegis of professor Ole Lando. The first section on performance and breach was published in 1995; the second section on contract formation, validity, interpretation, content and power of attorney was published in 1998, while the third section on part of the general system of obligations was completed in 2001.
- ❑ **The European Contract Code**, sometimes known as the **Gandolfi Code** from the name of the Professor who supervised the work; drawn up by the *Académie des Privatistes Européens*, also known as the Pavia Group. In 2001 this Group published in French Book 1 of the Code on general contracts and is currently working on Book 2 on special contracts, of which the first part on selling was published in 2006.
- ❑ The **UNIDROIT** principles for contracts relating to international trade, drawn up by the International Institute for the Unification of Private Law. These principles were originally published in 1994 and were revised in 2004 particularly to incorporate the requirements of e-commerce. A third version is now being prepared to cover subjects such as condition, plurality of debtors and creditors, unlawfulness and restitutions.
- ❑ The **Draft Common Frame of Reference (DCFR)**. Under its “Sixth framework programme for technical research and development”, the European Commission mandated a group of researchers known as the Common Network on European Contract Law to draw up a common frame of reference on contract law. The authors of the project are primarily the Study Group for a European Civil Code, the European Research Group on Existing EC Private Law, known as the Acquis Group, together with a group dedicated to insurance law, the Insurance Group. The DCFR published in January 2008 comprised 7 books of rules and an appendix of definitions; the definitive edition will consist of 10 books. The scope of the DCFR is very broad: general contract rules, law of obligations, special contracts, case management, tort law and unjust enrichment; property law, sureties and trust will be dealt with later.
- ❑ The **Association Henri Capitant** and the **Société de Législation Comparée** (Comparative Law Society) have written a two-volume draft common frame of reference entitled *Terminologie contractuelle commune* (common contractual terminology) and *Principes contractuels communs* (common contractual principles). This work, which takes a comparative law approach, revises the Principles of European Contract Law and gives definitions of key terms and the fundamental principles of contract law.

## BACKGROUND

### ➤ Early 20<sup>th</sup> century: emergence of European contract law

The movement to harmonise European contract law started in the early 20<sup>th</sup> century through the drafting of academic projects: for example, a draft code of obligations and Franco-Italian contracts was published in 1929, or a draft common code of obligations in Europe was proposed in 1953 by the Association Henri Capitant. More recently, a “Principles of European Contract Law” and a “European Contract Code” were drawn up on the initiative of professors Lando and Gandolfi. But it was not until the end of the 20<sup>th</sup> century that the idea of harmonising contractual law in Europe really took shape under the aegis of the EU institutions.

In 1989 the European Parliament published a resolution calling for the harmonisation of certain sectors of private law. It reaffirmed this desire in 2006 through two resolutions dated 23 March and 6 September respectively.

### ➤ Towards a definition of European contract law

For its part, in July 2001 the European Commission published a document entitled “Concerning European contract law” and launched a widespread consultation on the advisability of introducing a European contract law in order to eliminate potential stumbling-blocks to the proper working of the market. This provoked lively argument within the European legal community and many reservations were expressed about the project. In its second communication paper, dated 12 February 2003, entitled “**A more coherent European contract law. A plan of action**”, the Commission, taking account of the scepticism expressed, suggested three areas of work: the construction of a “common frame of reference”; the drafting of model contractual clauses and conditions; the adoption of an optional instrument in the field of European contract law. Then, on 11 October 2004, in a third communication paper entitled “**European contract law and review of the framework. The way forward**”, the Commission stated that it “did not envisage proposing a European civil code to harmonise the law on contracts of the Member States” and that the “way forward” was that of the common frame of reference, to which an optional instrument might be added.

### ➤ **Creation of a draft common frame of reference**

The Commission then appointed a group of researchers known as the Common Network on European Contract Law to draw up a draft common frame of reference on contract law. The Commission's first and second progress reports on European contract law and the revision of the framework (23 September 2005 and 25 July 2007) stressed the priority accorded to consumer law in order to contribute "in due course to the revision of the framework on consumer protection". The Commission stated that the results of work on the common frame of reference were intended to be included in the revision of the EU framework on consumer protection that is the subject of the Green Paper published on 7 February 2007. In the context of the revision of the consumer framework, the common frame of reference would thus constitute "a manual that the Commission and European legislators could use during the revision of existing legislation and the drafting of new instruments in the field of contract law".

### ➤ **Completion of work and analysis**

The work of the network of researchers appointed by the Commission was officially submitted on 31 December 2007. It comprises the Draft Common Frame of Reference (DCFR) together with the work of the Insurance Group and the *Groupe Association Henri Capitant – Société de Législation Comparée*, "Common Contractual Terminology" and "Common Contractual Principles".

The Commission now has to examine this work and select those parts which it considers the most relevant. Workshops have again been organised to contribute to these discussions. The European Parliament is also continuing its work through the group created within the European Parliament Committee on Legal Affairs and in the Council through the Civil Law Committee.

## The construction of contract law in three European countries

Contract law is conceived of differently in France, Germany and Great Britain, each country having constructed its rules in line with its history and culture.

□ **French law** was influenced by Roman and canon law. The very notion of the contract and the differences between various types of contract come from Roman law. The idea that agreements must be kept (*Pacta sunt servanda*) comes from canon law and finds its fullest expression in the French Civil Code and the notion of binding force: that which has been freely done by the parties must be performed as such and may only be undone or modified by the same parties. It is for this reason that one party cannot unilaterally set a price. It is the principle of binding force together with the historical wish to place the judge outside the law between the parties that explains why a judge cannot revise a contract if there is a change of circumstances.

□ **German law** is another descendant of Roman law, as codified in the *BGB* (*Bürgerliches Gesetzbuch*), the equivalent of the French Civil Code. Although like French law, German law is also based on the principle of contractual freedom and the wishes of the parties, German law gives judges a greater role in ensuring contracts are balanced. This is seen particularly in the interpretation of an agreement in the light of concepts incorporated into the *BGB* such as good faith or principles of constitutional value. The binding force of contracts has been eased by admitting the notion of frustration of purpose into German civil law: where economic circumstances have changed radically, a judge may modify the content of a contract in order to re-establish the economic balance the parties originally intended.

Another special feature of German law concerns determining of price. The price is not, generally speaking, considered an essential component of a contract and its absence does not result in the automatic invalidity of the agreement. Furthermore, this view of price as being of secondary importance allows for generalised indexing or revision of the price under a clause of the contract as such modifications are not limited by any provisions of the Civil or Commercial Codes.

□ **English contract law** is not based on Roman law but was developed as from the Seventeenth Century out of the case law of the royal courts. It is based on practice and procedure. A contract is defined as “an agreement whose consequences bind the parties equally”. It therefore implies an offer (the desire to enter into an undertaking) and the acceptance thereof. A fundamental concept is the “consideration” under which an obligation only exists where there is valuable *quid pro quo* in accordance with law. Consequently English law does not recognise unilateral undertakings or gratuitous acts and the emphasis is on the breach of undertaking and the resulting impoverishment (detriment). The chief sanction is the awarding of damages which limits the binding force of a contract and gives it its economic aspect. A contracting party knows that breaching the contract can only cost it damages; under French law, the contract must primarily be performed in kind as decided when the parties entered into their agreement. Although fairness in business is upheld, English law takes no moral view of the contract, being more interested in the concrete situations created than how they came about. It is for this reason that English law contains no obligation to inform or pre-contractual responsibility; no contract has yet been created. Moreover, the desire to perpetuate business relations makes it possible to maintain a sales contract that includes no price by finding a reasonable price.