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Towards a European Contract Law for Consumers and Businesses: A Trojan Horse?

Introduction

English law remains one of the United Kingdom's leading invisible exports in the professional services sector. Many international contracts contain an express choice of English governing law, notwithstanding that the parties may be established or resident outside the United Kingdom and the subject matter of the contract itself may have little significant connection with the UK. This is particularly true in the world of international finance and in the maritime industry. The main reason for this is that English common law, long in its evolution, has established itself as a fair, reasonable and certain system of law for regulating a variety of contractual relationships between persons (particularly in the business context). Additionally, the court and arbitral systems, as well as the developing alternative dispute resolution (ADR) system in the UK, provide both efficient and reliable fora and processes for the resolution of cross-border disputes. Now it seems the European Commission may have in view the removal of this advantage for the United Kingdom under the guise of "modernisation" of contract law removing the existing advantages of legal certainty inherent in its common law system. if these proposals are left unchallenged, other countries with common law systems: Ireland, Cyprus and Malta, could find a civil law approach being imposed on them, while civil law systems would face the uncertainty of having to dismantle long established national codes and principles in favour of a new and untested European standard. There is also the risk that more general principles, such as the English law of tort and general laws of obligation and property law, may also become unbalanced or subsumed within the "European Civil Code" notion being put forward as one of the options canvassed in the Commission Green Paper of 1 July 2010 on this subject.

Status of the EU's Proposal

Following the issue of a Commission Communication on European contract law in October 2004,[1] on 3 September 2008 the European Parliament adopted a Resolution for a common frame of reference (a "CFR") on European contract law. The European Council's conclusions on this were released on 27 and 28 November 2008.[2] An "academic" draft of a CFR was then produced on 23 December 2008[3] financed by the Commission with some further Council conclusions on the subject released in June 2009. The academic draft contained provisions for both commercial and consumer contracts and covered principles, definitions and model rules for both contract and tort law.

Meanwhile, outside the EU framework UNIDROIT had developed its principles of International Commercial Contracts representing model rules, not only for the sale of goods, but also for the provision of services, and the UN Commission on International Trade Law (UNCITRAL) had created a standard for business-to-business sales of goods—the Vienna Convention on International Sales of Goods—which although ratified by many

1 This had been preceded by the Commission's 2001 Communication on *European Contract Law (COM (2001) 348, 11.7.2001)* which proposed to improve the quality and coherence of European contract law by establishing a Common Frame of Reference containing common principles terminology and model rules to be used by the European Union when making or amending future legislation. See now http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0651:FIN:EN:PDF. On 11 October 2004 the European Commission also proposed a similar review in the area of consumer contract law in the EU both to remove inconsistencies and to fill gaps (COM (2004) 651).

2 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295E:0031:0032:EN:PDF.

3 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/104584.pdf.

countries, notable exceptions included the UK, Ireland and Portugal in the European Union.

Importantly from the UK's standpoint, the House of Lords' EU Committee reported critically on the EU developments in June 2009. This report is discussed in further detail below. Further, the Vienna Convention only applies by default when the parties have not chosen another system of law and no mechanism exists to ensure its uniform interpretation by the ratifying states.

The European Parliament's Legal Affairs Committee ('JURI') on 3 September 2009 discussed the then current state of play with the EU's proposals, and commissioned a study of the draft CFR and its relationship with the Consumer Rights Directive on 15 October 2009. Consolidation of the Council's conclusions took place on 21 October 2009 and the proposals were included in the Stockholm Programme for 2010-2014 of 11 December 2009[4] for future work. The Commissioner-designate for Justice, Fundamental Rights and Citizenship included this subject as one of her priorities on 7 January 2010[5] and it also featured in the Commission's Communication 'Europe 2020' released on 3 March 2010.

By the time the draft CFR had been published, however, attitudes to European contract law had changed significantly, at least at the EU level. The European Parliament had by then given its backing to the idea of an optional European contract law in its resolution of 25 November 2009. As part of the Europe 2020 strategy that was launched in March 2010 by EU President José Manuel Barroso and subsequently endorsed by the European Council in June 2010, the European Commission announced its intention to work on harmonised solutions for consumer contracts, EU model contract clauses and to make progress towards an optional European contract law. In May 2010 the European Commission followed up this statement by launching a new expert group to convert the draft CFR into a non-binding instrument that could be used by Community legislators to improve the quality and consistency of Community legislation relating to contract law. The Commission also stated that the creation of an optional contract law instrument was a key action in its Digital Agenda for Europe.[6] The Commission has also set up an Expert Group on this subject (discussed further below). Finally, on 7 July 2010 the Commission published its Green Paper on developing European contract law, one of the purposes of which is to better inform the work of the Expert Group. This is considered further in this *DechertOnPoint*, but first more detailed aspects of the background to these proposals need to be considered.

Background Steps Towards the Green Paper's Proposals: Some Further Details

With regard to the earliest proposals, the Commission's 2001 Communication received a considerable response from governments, businesses, legal practitioners, academics and consumer organisations, and led the Commission to issue an 'Action Plan for a more coherent European Contract Law' in 2003. At the heart of this Action Plan was the concept of a Common Frame of Reference to establish common principles and terminology to be used by EU or national legislators when making or amending legislation. The CFR was also intended to form a basis for reflection on the need for an optional contract law instrument (that is, an instrument that would exist in parallel with, rather than instead of, national contract laws). By that time however, there had also been resolutions of the European Parliament encouraging work towards a "European Code of Private Law" and a "greater harmonisation of civil law". At the time of the Commission's 2002 Communication on European Contract law, in the United Kingdom the House of Lords' EU Committee had reported that whilst there were inconsistencies in European legislation of both substance and terminology the removal of which would be welcome, there was no demonstrated need for any new comprehensive legislation at the European level. Indeed this possibility had also attracted widespread criticism from business, legal practitioners and even from academics,[7] and thus there was no visible support for the kind of European Civil Code which the European Parliament by then had also been advocating.

When its 2003 Action Plan was followed by a further European Commission Communication in late 2004 suggesting that the CFR should be developed as a

4 http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf.

5 http://www.europarl.europa.eu/hearings/static/commissioners/answers/reding_replies_en.pdf.

6 This initiative, adopted under the European 2020 strategy, aims at delivering benefits from a digital internal market by eliminating legal fragmentation and refers to "an optional contract law instrument to overcome fragmentation of contract law, in particular as regards the online environment."

7 See, for example, 'Vom akademischen zum politischen Draft Common Frame of Reference', ZEUP (4/2008).

"toolbox" of fundamental principles of contract laws, model rules of contract law and model definitions, the Commission did not rule out the possibility of using the CFR as an optional European contract law instrument, although, at that time, it was emphasised that it was not "the Commission's intention to propose a 'European Civil Code' which would harmonise contract laws of Member States" (a message it subsequently repeated in 2007).

Work on the CFR did not begin in earnest until December 2004 and this resulted in the presentation of the academic draft Common Frame of Reference to the Commission in December 2008. In February 2009, responsibility for the CFR was transferred from the Commission's Consumer Affairs Directorate to its Justice, Freedom and Security Directorate (with its wider responsibilities). The draft CFR was subsequently published in early 2009. The CFR sets out principles, definitions and model rules of civil law, for both contract and tort, and in respect of commercial and consumer contracts, and also deals in part with the law of finance and securities, intellectual property rights and software, and unjust enrichment thus going well beyond its original more limited intended scope of contract law.

When, on 23 December 2008 the European Commission received the final version of the academic draft of the CFR, it contained recommendations on model rules, principles and definitions (with detailed footnotes explaining the basis for such recommendations) for contract law terms across the EU Member States. One of its purposes as previously mentioned was for the drawing up the "political" CFR called for by the Commission. In effect, at that stage, the Commission was merely carrying out a process to determine which parts of the "academic" CFR could be useful for European legislators to use when drawing up the necessary legislation. However, it began to set alarm bells ringing again in the UK in both Whitehall and Westminster.

On 5 June 2009 the Justice and Home Affairs Committee of the European Parliament adopted further conclusions on the form of the guidelines for the CFR for European contract law. Principally these were that:

- it should have a three-part structure, namely, definitions of key concepts in contract law, common fundamental principles of contract law and model rules: certain fundamental principles would then apply to **all** stages of the contractual relationship including the pre-contractual stage, namely, party autonomy and legal certainty;
- the model rules should be general in nature so that they can apply to **all** contracts;
- it was too early (at that stage) to decide on the form in which the CFR should be presented; however, the form would be such as to allow a non-binding instrument to be drawn up comprising a set of guidelines which Community legislators would then use at the level of the Council, European Parliament and the Commission as a common reference in the future legislative process.

The House of Lords Report

On 10 June 2009, as was mentioned above, the UK's House of Lords' Committee on European Union matters published a report "European Contract Law: the Draft Common Frame of Reference". (This followed an assessment of the draft CFR commissioned by the Ministry of Justice from the University of Oxford which was published in November 2008). In it, the Committee:

- noted the differences between the draft CFR's model rules and the provisions of English common law and also those of the laws of the other Member States;
- restated its opposition to a harmonised code of European contract law, observing that "lack of harmonisation of substantive law is not normally identified as a main obstacle to the good functioning of civil proceedings in the Member States, even in a cross-border context"; but
- considered that the development of a "toolbox" to assist European legislators could be useful merely to aid mutual understanding of the diverse legal systems of the EU and to improve the quality of European legislation to which the law of contract is relevant.

The House of Lords' Committee's Report points out several areas in which the current common laws of contract in England and Wales differ from other national laws in the EU. Significantly, the civil law approach tends to offer less commercial certainty and make contractual obligations easier to avoid.

The Concept of a Contract

This in English law is one of a bargain (a typical example being a supply for a consideration, such as of goods and services, for a price), whereas in civil

law the concept may extend to one-sided transactions such as an agreement for a gift. The CFR adopts the civilian approach.

Pre-contract Negotiations

With limited exceptions, evidence of such negotiations is not admissible in English law as an aid to interpretation, a rule once described by Lord Steyn as "a sacred cow of English contract law". It is an approach which is not generally shared by civil law systems, but traditionally is justified in an English context as promoting certainty and avoiding costly, lengthy and often inconclusive investigations of pre-contractual discussions and subjective intentions. The model rules in the draft CFR again adopt the civilian approach of admitting such negotiations as an interpretative tool.

Mistake as a Ground for Setting Aside a Contract

The much broader scope of the doctrine of mistake incorporated into the draft CFR is in contra-distinction to the narrower structure of the doctrine in English law.

Other areas where draft CFR deviates from English contract law include:

- its rules on pre-contractual liability for breaking off negotiations;
- there is no doctrine of consideration in the draft CFR;
- there is no parol evidence rule in the draft CFR;
- a limited bindingness for contractual offers in the draft CFR;
- the adoption of a "knock-out rule" rather than the "last shot rule" in cases of the "battle of forms" in the draft CFR;
- a relatively broad scope in the CFR for conferral of contractual rights on third parties; and
- a general availability of a remedy of specific performance.

This list is by no means comprehensive.

The draft CFR has also been the subject of considerable criticism, not merely in the UK, but also in Germany and France as well, both as being too detailed and at the same time, paradoxically, as involving too much discretion, and so uncertainty, by the use of an astonishing number of vague and ambiguous terms, and concepts such as 'reasonableness' and 'good faith'. In contrast to English contract law, the draft CFR also contains an overarching principle of good faith and fair dealing, which applies to the process by which a contract is brought into being as well as to the performance of the contract's obligations. This particular feature of the draft CFR has also been the subject of particular criticism by distinguished German professors, demonstrating that not only common lawyers feel a certain unease in relation to the current CFR. The professors comment:

> "...the verdict on the published Draft must be negative. The text suffers from a great number of serious shortcomings. These include unresolved or unconvincing policy decisions as much as ill-adjusted and inconsistent sets of rules. Especially alarming is the fact that the Draft paves the way for a massive erosion of private autonomy which goes far beyond existing tendencies to "materialise" private law. Good faith and fair dealing are no longer merely taken to guide the interpretation of contracts and the process of determining issues which the parties have failed to regulate. Rather, the content of what the parties to a contract may agree upon appears to be placed under the general proviso of good faith, fair dealing and general usage. Moreover, to a considerable extent, contract law is no longer conceived as providing rules which parties may or may not choose to accept as suitable for their transaction, but as regulatory *ius cogens*. Thus, the responsibility for the content of a contract is shifted from the parties towards the law and the judiciary. This is all the more alarming as the Draft lacks clear core aims and values on the level of both principles and rules. Given the arbitrary nature and the catalogue of core aims set out in the Introduction, the abundance of the general provisions and open-ended legal concepts signifies a massive expansion of uncontrolled judicial power."[8]

[8] "The Common Frame of Reference for European Private Law Policy Choices and Codification Problems' by Professors Eidenmüller, Faust, Griegoleit, Jansen, Wagner and Zimmermann. *Oxford Journal of Legal Studies* Vol 28, No 4 (2008).

The Expert Group

The European Commission on 26 April 2010 decided to set up an expert group to assist it in the preparation of the proposal for the CFR on European contract law, including consumer and business contract law.[9]

The objective of this project then, as has been noted, was to produce a non-binding instrument, which could be used by Community legislators to help improve the quality and consistency of Community legislation relating to contract law. The expert group intends to use the draft CFR as its starting point, and to take into consideration other research work conducted in this area, as well as the *acquis communautaire*. The group is intended to help the Commission select those parts of the draft CFR which are directly or indirectly relevant to contract law, and to restructure, revise and supplement those selected parts.

The expert group will comprise twenty members from the following categories:

- scientific and research organisations and academia;
- legal practitioners; and
- "experts representing civil society".

The members of the expert group are being appointed by the Director General of DG Justice, Freedom and Security at the Commission and their mandate will run until 26 April 2012. As with similar groups, no members of the group are nominated by the individual EU member states themselves. This is hardly surprising, however, at a time when no member state is banging at the door of the Commission asking for a European contract law.

Subsequent Developments

On 3 September 2009, JURI (the Legal Affairs Committee of the European Parliament) emphasised the importance of the Parliament being involved in the CFR process. On 15 October 2009, the study previously commissioned by the Parliament comparing the provisions of the proposed CFR and the Consumer Rights Directive was published.[10]

However, on 21 October 2009 the General Secretariat of the European Council published a consolidated version of the conclusions of the Council on the CFR. It emphasised (pleasingly from the UK's standpoint) that the option of using the CFR to harmonise the contract law of Member States by creating a "European Civil Code" was to be rejected. Likewise, the option of a CFR consisting of a complete set of standard terms and conditions of contract law, which could be chosen by companies and trade associations as the law applicable to a specific contract was also rejected. The Secretariat then reiterated that the work should concentrate on the establishment of a "toolbox" for lawmakers at Community level to use when drawing up or revising existing EU legislation. (So far, so good then from a UK perspective).

On 11 December 2009 the European Council reaffirmed in the Stockholm Programme for 2010 to 2014 that the common frame of reference should be **non-binding** and comprise a set of fundamental principles, definitions and model rules to be used by lawmakers at EU level to ensure greater coherence and quality in the law-making process. (The UK could also drink to that).

The (More Alarming) Next EU Development

Despite all of the foregoing, the Commissioner-designate for Justice, Fundamental Rights and Citizenship, Viviane Reding, then asserted that she intends to move from what she terms "the first building blocks of European contract law" (i.e., the common frame of reference together with some standard terms and conditions for consumer rights) to a **European Civil Code**. Reding envisaged that this could take the form of a voluntary tool to improve coherence, or an optional contract law regime, or "an even more ambitious project". No doubt such a project, if agreed to by the European Council, could ultimately see the common law system of contract law in the United Kingdom being subsumed into a predominantly civil law code and London's effectiveness as an international law, arbitral and ADR centre damaged (along with other aspects of the UK's position as the leading financial and professional services centre in the European Union following other recent attacks mounted in Brussels).

9 Commission Decision of 26 April 2010, *OJ 2010 L 105*.

10 This study was presented at a meeting of JURI held on 10 November 2009 at which it was suggested that some amendments to the Consumer Rights Directive based on the CFR should be made.

The Commission's Green Paper[11]

The European Commission on 7 July 2010 then published a Green paper setting out its options for making progress towards European contract law. Suggested options range from the publication of a "toolbox" based on the draft CFR for European Contact Law, which the EU institutions would then use when making or amending legislation, to a full European Civil Code, which would "replace national laws and cover not only contract law but also tort law, property law and the law of general obligations". A possible middle way could be the creation of an optional European contract law instrument, which parties could choose to have govern their contract. The Green Paper has launched a consultation on these options, which runs until 31 January 2011.

Supporters of a more closely integrated Europe have long held the ambition to create a European contract law. However, previous attempts to move towards a European contract law have met opposition from the EU member states, and it is by no means certain that attitudes have softened as the Commission may have assumed when it drafted this Green Paper.

The Commission now believes that the differences in member states' national contract laws "create legal uncertainty and additional transaction costs for businesses, and cause a lack of confidence in consumers". As such, it is argued that they inhibit cross-border trade within the EU's Single Market. To remedy this, the Commission is now hoping to create a European contract law instrument, which it believes will remove (or reduce) these problems. This has lead to its publishing the recent Green Paper setting out a number of possible forms that such an instrument could take. These are the main options now being offered by the Commission.

Option 1: Publication of the Expert Group's findings

The conclusions of the Expert Group established by the Commission could merely be published without endorsement at EU level, and could be used by European and national legislators as a source when drafting legislation. Although, in the long term, this might encourage the convergence of national contract laws, the text would have no formal authority or status for courts or legislators. (The UK might well agree to this without too much soul-searching).

Option 2: A binding or non-binding "toolbox" for legislators

The European Commission could adopt a Communication or a Commission Decision on European contract law which it could then use as a reference tool for drafting or revising legislation. The advantage of such a "toolbox" is that it would be effective immediately after adoption by the Commission, without the approval of the European Parliament and the European Council. However, Parliament and Council would not be required to apply the toolbox concept when tabling legislation.

Alternatively, the toolbox could be the subject of an inter-institutional agreement between the Commission, Parliament and the Council. The obvious advantage of that approach would be that all three bodies would be obliged to refer its provisions when drafting and negotiating legislative proposals. However, a proposal for an inter-institutional agreement would require negotiations between the three bodies before it could become effective.

The disadvantages of any toolbox solution are that it would not remove divergences in national laws, and that it would not ensure a convergent application and interpretation of European contact law by the courts. However, again the UK might find this Option more attractive than any of the ones that follow it. The House of Lords' EU committee already appears to favour this approach.

Option 3: A Regulation establishing an optional European contract law instrument

An instrument of European contract law could be attached to a Commission Recommendation addressed to the member states, encouraging them to incorporate the instrument into their national laws. This would allow member states to gradually adopt the instrument into their national laws on a voluntary basis, and the ECJ would have jurisdiction to interpret the provisions of the Recommendation. (This approach has worked in the United States, where the Uniform Commercial Code has been adopted by all but one of the fifty states). However, such a Recommendation would not be binding on member states and this approach might result an incoherent approach between member states.

11 European Commission Green Paper on Policy Options towards a European Law for Consumers and Businesses (COM (2010) 384), 1 July 2010.

Option 4: A Regulation establishing an optional European contract law instrument

A Regulation could be adopted that sets up an optional contract law instrument. The Regulation would insert a comprehensive and self-standing set of contract law rules into the national laws of member states, which could be then chosen by parties as the law regulating their contracts instead of their own national laws or law (depending on whether this optional law applied in cross-border transactions only, or in both cross-border and domestic contracts). In order to be effective, such an optional instrument would have to offer a high level of consumer protection and would have to affect or restrict the application of mandatory provisions of national law, including those on consumer protection. It would also have to be sufficiently clear to the average user and would need to provide legal certainty. However, such an instrument is likely to be criticised for complicating the legal environment and reducing overall legal certainty in the area.

Option 5: A Directive on European contract law

A minimum harmonisation directive on European contract law would achieve a degree of convergence between national contract laws, whilst still allowing member states to retain more protective rules, subject to compliance with the European Treaty. However, such an approach would not necessarily result in uniform implementation and interpretation of the rules. A claimed advantage, however in the case of business-to-consumer contracts, is that such a directive would be based on a high level of consumer protection and would compliment the consumer *acquis* including the provisions of the proposed Directive on Consumer Rights.

Option 6: A Regulation establishing a European contract law

A regulation establishing a European contract law would replace national contract laws with a uniform set of rules, including mandatory rules according a high level of protection for the weaker party. Such rules would apply to contracts as a matter of national law, and their application would not depend upon party choice. The regulation could replace national laws in cross-border transactions only, or in both cross-border and domestic contracts.

Although this solution would remove fragmentation in the field of contract law, it could raise political issues of subsidiarity. In addition, to replace national laws with a single set of rules might not be a proportionate method of overcoming obstacles to trade in the internal market, particularly if the regulation covered domestic contracts. This must be strongly resisted by the United Kingdom in our view.

Option 7: Regulation establishing a European Civil Code

This solution goes a step further than the option of a regulation, as it would cover not only contract law, but also other types of rights and obligations (for example, tort, gifts, property law and laws of general obligations). The European Commission itself however admits that the extent to which a European Civil Code could be justified has yet to be established. Hopefully, that option will be treated as stillborn by other member states as well as the UK. We regard it as too far-fetched and not properly thought through by the Commission to merit further consideration.

Indeed, using the CFR to develop a European Code of contract law to replace, wholly or partly, the national laws which presently occupy the ground which such a code would cover should now be regarded as essentially a red herring, albeit one still being encouraged by the Commission and European Parliament with their aspirations that the EU might undertake a large-scale harmonisation of contract law despite the apprehensions voiced by stakeholders. The case for such a new European *ius commune* has in no way been made out in our view. Whether and how far there is a significant problem arising from disparate contract laws of the member states is a question to which even the Commission does not appear to know the answer, let alone whether there are issues which require harmonisation. Indeed general harmonisation of contract law would present enormous problems until a body of settled EU case law had developed. The present position is that any move towards general harmonisation would be highly questionable in terms of not only *vires*, but also value and efficacy. Fortunately the UK Government has previously rejected harmonisation. The then Lord Chancellor, Lord Falconer of Thoroton, made this clear in a speech in 2005, where he said:

> "We are opposed to a harmonisation of contract law across the Member States on either a compulsory or a voluntary basis other than where there is a clear benefit of harmonisation, and that remains our position"

Lord Bach, then a Minister at the Ministry of Justice, in his evidence to the House of Lords' EU Committee in 2008 said that [the Government] "see the availability of different contract laws across Europe

[as] a strength rather than a weakness for the European Union". We agree with his assessment.

Other Issues Raised in the Commission's Green Paper

The Commission's Green Paper also raises a number of related questions regarding the scope and application of any proposed solution, including whether the instrument should cover both business-to-consumer and business-to-business contracts and whether it should apply to both cross-border and domestic contracts. As regards its scope, the Green Paper questions whether the instrument should be limited to rules such as those relating to formation, representation, invalidity, interpretation, performance and remedies, and whether it should focus on mandatory consumer contract laws which give rise to internal market barriers. The instrument could also cover related areas, such as restitution, non-contractual liability and proprietary security in movable assets. Again, these proposals do not appear to have been fully thought through by the Commission.

Conclusions

It has been noted that supporters of a more closely integrated Europe have long held the ambition to create a European contract law. However, previous attempts to move towards a European contract law have met with opposition from EU member states. It is by no means certain that such attitudes are now softening. Certainly, as at June 2009, the EU Committee of the House of Lords remained opposed to any European Union harmonisation of contract law. There now needs to be increased awareness and public support for that view.

The Commission's proposal to introduce a fully fledged European Civil Code is clearly even more ambitious, and it seems very unlikely that this will be welcomed by any stakeholders outside some sections of the academic community

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