

Austrian Presidency Contract Law Conference - 26 May 2006, Vienna

First of all I would like to thank the Austrian Presidency. Its commitment and focus on civil and commercial law issues has been unsurpassed and is most welcome. Civil justice has a great impact on daily lives of our citizens and enterprises. As a member of the European Parliament's Legal Affairs Committee, this is my fourth visit here during the presidency; that in itself speaks volumes. Vienna begins to feel a bit like home now so I am sorry that your Presidency is ending.

I am grateful for the opportunity today as a parliamentarian from the perspective both of the Legal Affairs and the Internal Market Committee to be able to provide some reflections on this important project surrounding European Contract Law. In many ways, this is the most important project currently underway in relation to EU civil law.

The European Parliament has a long standing and well known commitment to this project relating to the improvement of European contract law dating back to a Resolution in 1989. In the recent times, we have concentrated much effort, space, words on process and have in some ways been very critical of the processes set up by the Commission. However today I want to start with some positive words on the process and then move on to the other issues identified in the paper or note that has been circulated to help structure today's discussion. As a parliamentarian, I have had perhaps a unique opportunity to watch this very innovative project from various angles and viewpoints. Let me take the academic research groups first.

The research that is on-going is a once in a life time opportunity, indeed a once in a generation chance to have a thorough-going look at EU contract law, it should be done anyway. This updating process will build on PECL, and it is clear as the researchers go along they are discovering new possibilities and new challenges. This is a huge scientific work, absolutely worthy for its own sake. It is of course a huge undertaking probably only possible under the community's research budget.

Of course this means that it is not tailor made, for the CFR, nor for the European legislator. It is inevitable that there will be some tensions, but this should not be allowed to detract either from the need for the research nor its results.

Then the stakeholders groups. I think for once the Commission should be praised for an amazing undertaking in consultation. Of course the more you do the more scope there is for criticism! But lessons have to be learnt along the way. For the future, we need to consider how far stakeholders can or should be involved, who gets a seat at the table, how do you use the input and provide feedback. Stakeholders need to feel valued and that their work is being taken seriously too, or why should they bother to contribute alongside their day jobs. That said they must be clear that they are not the legislators, they do not have the last say, it is merely one of the inputs we receive. This is a valuable and probably the most extensive exercise of this kind; it needs to be recognised as such even by its detractors.

Then the legislators. The European Parliament has been nervous, very nervous. We were worried that the legislative process was being taken away from us. Soft law

makes us nervous. It threatens democracy, some would say. Elected representatives feel their place is being taken by academics and stakeholders. Now of course the European Parliament is fully engaged with a functioning Project Group - and so it must be if we have to approve the final CFR as a binding instrument (although not as legislation). It would be impossible and unthinkable for the Commission to come to ourselves and the Council only at the end of this process. One of the most welcome developments reported on this morning is the meeting of Commissioners (McCreevy, Frattini, Kyprianou); something long argued for by us and which was highlighted in the recent European Parliament Resolution. This project requires, or rather demands horizontal coherence across the Commission.

So much for 'process'. There has been good progress. We are now waiting for the next report from the Commission. But other questions remain unanswered.

More clarity is still needed about what we are finally trying to achieve. Most I believe acknowledge that two central problems which we are seeking to solve through this whole process. Firstly to address the inconsistencies in consumer acquis (it has become messy and incoherent, dogged by sectoral differences) and secondly inconsistencies in EU general contract law which are bad for the good functioning of the Internal Market, which in turn undermines the possibility of fulfilling the Lisbon Agenda. One only has to look at the additional transactional costs revealed in the Clifford Chance survey to see that here is a problem waiting to be solved.

But there are political constraints on solving these problems. Firstly we are caught between two conflicting principles – on the one hand there is the consumer acquis with a high level of consumer protection whereas elsewhere in general contract law and the CFR there is the emphasis on freedom of contract, or party autonomy. We know of course that there is a distinction between tort, or non contractual obligations and contract itself where we want to respect the choice of the parties. Business especially will want to underline this. The difficulties of public policy formulation and the use mandatory rules at a community level are well illustrated by the UK's recent decision not opt into Rome I (a choice I do not support) - but it demonstrates the underlying tension. How far are we prepared to allow the EU legislator to set out the European values that could underpin general contract law.

The second constraint is our legislative ability at EU level - the Member States have in the main made the choice to go down the road of harmonising conflict rules (Rome II + Rome I) and not substantive law. Any legislative or binding instrument on general contract law might seem to fly in the face of this policy choice. Although I for one have always argued that EU conflict rules should point out not only which national law applies to a given situation but also when community law itself takes precedence.

Whatever, we are erecting a very tangled web, a web of conflict rules combined sometimes with a 26th legal regime. We should constantly ask ourselves is this the way to help the Internal Market and to provide the coherence we seek? We need to keep a view, or perspective on the whole not just concentrate on our own little corner of the edifice which we are constructing.

Yet being aware is a good starting point. We know that EU Consumer Law enjoys a high level of harmonisation and a treaty base. Reviewing the consumer acquis is in this sense a straightforward exercise. We are asked should the outcome be vertical or horizontal? Vertical sounds much like business as normal, more sectoral directives. Horizontal: yes let's build on the success of an instrument like Unfair Commercial Practices. But the more horizontal you go the more it begins to look like a Consumer Code. Where, and this is the conundrum, does this exercise or construct leave other contracts, and other elements of contract law? There are other weaker parties (employees, trustees, franchisees, commercial agents, and small business) who also need EU level protection. There should clearly be a B2B element in the horizontal approach, or rather perhaps the question is should B to B also benefit from a horizontal instrument. Where does Consumer Acquis finish and CFR start? There are of course cross cutting issues, but such cross cutting should not lead to a weakening of consumer protection.

This is surely the conundrum. The CFR process should inform the review of the consumer acquis. But how far beyond the consumer acquis do we go bearing in mind the constraints I mentioned earlier (party autonomy, choice of law rules)? If we don't go beyond consumer acquis what exactly are the stakeholders doing? They are mainly from business and professional organisations; there are numerically very few consumer stakeholders. Is this the right method for the exercise? Will it be pushing in one direction that could potentially lead to less EU legislation or regulation, the refrain we constantly hear from business, but in achieving that will it undermine the current level of consumer protection?

Clearly, there are many general principles of contract law where more coherence would help the Internal Market and it is this which the European Parliament should emphasise. The European Parliament project group will focus on a number of key issues and I have no doubt that will address issues that are cross-cutting. For instance we will look not just at the definition of a consumer, but also at the more general concept of a weaker party. We will also look at things like electronic contracts which can of course be B to C or B to B. We have also begun to look at the structure of the CFR, the original proposal for instance probably included to many specific contracts.

Whatever the final shape and content of the CFR it should at its best be able to deliver a huge boost to the whole better regulation agenda. This would be a more than acceptable outcome. However maybe we should have a little more of a vision of what we want EU contract law to be.

A few weeks ago I attended a conference at ERA in Trier on a very specific part of contract law, so called quasi contract; unjust enrichment and benevolent intervention in the affairs of another. This latter concept is more or less unknown to the common law. It was once described by one leading common law commentator as "officious meddling". This set me thinking. I don't want the EU to become an officious meddler in national contract law (although let me be clear my views could not be further from those of my Lord Chancellor as expressed at the London conference). I want the EU to be as an umbrella for national contract law having more the character of a 'caring helpmate'. I chose the words carefully. 'Caring', that does not mean a nanny state but that we should take care through the use of European values in basic contract law of the interests of the weakest and vulnerable, 'help' that EU contract law should be an

additional help or aid, not a constraint in drafting and construing contracts. Lastly wouldn't it be good for once to see the EU in the character of a 'mate', a friend and certainly not as a meddler!

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