

Panel-discussion: Issues arising from ongoing CFR Work
Initial Statement
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1. Previous work in the CFR

The work in the CFR-network from my point of view has two contrary aspects: On the one hand, members could learn very much about how others countries' lawyers approach the same practical problems – and mostly reach the same or at least similar results. On the other hand, just from the beginning, the CFR-work had no clear objective. We started with the idea of a toolbox, which in matters of European legislation is a strange feature. Of course, all legislators try to copy legislative models, wherever they can, because in copying you make fewer mistakes than in inventing a new model, which has to survive a practise test. However, as legislator, you are only able to decide whether to copy an old model or whether to invent a new one, if you know what you want to regulate. This crucial question still is to be answered.

2. Need for an objective

For the future work in the CFR, we need a clear objective. Without such clear objective, the CFR-work will not be able to produce usable results. The researchers must know to which purpose the texts they deliver shall serve. It does not make sense to produce a text, which is intended to be part of a common European law of contract and then to start a debate on what should or could be changed in the relevant EC-directive.

3. Parallel objectives

In my opinion, we need a parallel objective:

First, we need an examination and amelioration of the *acquis communautaire*. We all are aware of this need and we all know already, what should be altered. I will present you the key issues in this regard. This amelioration of the *acquis* is an urgent and short running project.

Secondly, we need a common juridical language and we must know how contract law works in the member states. We therefore should proceed gradually and may, but must not end in writing a common European contract law. This is, I dare to say of course, is a long-term aim.

4. Amelioration of the *acquis communautaire*

As we all know the EC-directives have grown following the need of or partly call for regulation and not following a master plan. Therefore, they are not harmonized and have lacunas. This harmonisation and completion is to be done now. In order to illustrate what this could mean, I would like to present you four proposals:

A *Directive on the consumer's right of withdrawal*

Several EC-directives grant to the consumer a right of withdrawal. The objective is always the same: the consumer shall be able to get out of contract he or she concluded rashly or by surprise. But the way in which this right of withdrawal is regulated varies from directive to directive without any material reason and, as we learned from the famous Heiningen Case (or better Cases) of the European Court of Justice, important details of what withdrawal from a contract really means are not regulated by any of these directives. We should alter this and create a directive, which establishes a uniform set of rules that apply whenever a right of withdrawal shall be granted to the consumer. In addition, this set of rules should also fill up the existing lacunas.

B *Directive on selling goods and services outside a shop*

The existing directives grant to the consumer a right of withdrawal only in doorstep and distant selling. This causes the need of distinguishing. The Heiningen Case, I just referred to, once again shows very impressively what this can mean: In this case the German Federal Court of Justice presented a doorstep situation to the European Court of Justice in order to answer very important questions concerning the application of the doorstep-selling directive. The European Court of Justice having answered these questions, the Federal Court of Justice reversed the decision of the Court of appeal, who, in rehearing the case, found that there was not a doorstep situation at all. I think we could simplify the handling of such situations by finding another, more clear distinction. We should not look for a situation of surprise or lack of information. We should simply ask whether the good or service was sold in a shop or not. By this approach, we could melt the doorstep-directive and the two distant-selling-directives to one single directive with a simple distinction (selling inside or outside a shop).

C *Consumer service contract directive*

Years ago, the Commission presented a proposal for a Consumer service contract directive. It is the only proposal for a directive the Commission has withdrawn formally. However, it was not the objective, which was wrong. Wrong was the approach, which was contrary to the principles of the relevant Civil law respectively common law of all member states. Now we have a new chance. Now we have a directive, which leads us to an approach that convenes with the principles of the

civil and common law of the member states: the consumer goods directive. This is a difficult project, but it is worth working on.

D Cross-border Sales Ordinance

I personally think that we also need an ordinance, which regulates cross-border sales contracts in a uniform and immediate way. The model for such an ordinance should be the CISG and the consumer goods directive. This ordinance should include all cross border sales, b2b, b2c and c2c. Of course, it should follow the CISG and grant the freedom of contract in the b2b and the c2c context. However, it should include all relevant EC-consumer acquis in the b2c context. Such an ordinance is very important for the small enterprises, for whom the necessary juridical advice is too expensive, and would on the other hand give the necessary freedom to the big enterprises.

5. On the way towards a common European contract law

From my point of view, we should take the way towards a common European contract in three steps with clear objectives:

A Common understanding of crucial juridical terms

First, we need a common juridical language. The contract law of the member states derives in very large parts from the Roman law. That means, on the one hand, that we have common terms and structures. However, we may not forget, on the other hand, that these laws developed differently. In consequence, concluding a contract or damages does not mean the same in all our countries. Without common terms and common understanding, we cannot create a common European contract law. We need such common understanding even if we do not come to a uniform European contract law. Different understanding of juridical terms also creates difficulties in writing contracts for enterprises.

B Overview on the results of European contract laws

In a second step, we need a framework of reference that tells us, to what results our civil and common laws come in the different important fields of contract law. The working groups of the council spend very much time to explain to the others their national background so that the others understand why one delegation wants to alter a Commission's proposal for an EC-directive in one way and proposes to alter other delegation want to be implemented. We would simplify our work if everybody could get an overview of how the contract law works in our countries. Of course, this overview must restrict to key issues for remaining understandable.

C *Creating a contract law*

In a last step, we could and, from my point of view should, create a common European contract law. This is an ambitious aim and it needs preparation and time. In the end Europe will have a modern uniform contract law, which other countries in the world will be interested in. I think this is a task worth to work on. However, we will have to decide that after having done the first two steps.