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**The Common Frame of Reference
as a tool for the Review of the
Consumer Acquis**

Panel Discussion

Vienna

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10:00 – 11:15 hrs

Redezeit: sieben Minuten

- Es gilt das gesprochene Wort -

Ladies and Gentlemen,

There is a Chinese saying that the journey of 1000 miles begins with the first step.

In spite of the explanations and clarifications we will hear this morning about a Common Frame of Reference (CFR) on European Contract Law, there is still a long way ahead of us before the envisaged toolbox is given its proper shape and content. “Ceterum Censeo” we should keep in mind the CFR-process was never meant to be and never should be a legislative process, but rather a guideline supporting the executive and the legislator to find useful measures in the field of European Contract Law and to facilitate better law-making.

The Commission’s first and a crucial step on this long journey to a policy on a more coherent European Contract Law through the introduction of the CFR was a big one. This

first step presenting extensive and voluminous texts not systematically but on various topics of contract law - mostly written by scholars - raised a lot of suspicions by the legal community, especially the users. There is an assumption on the part of the legal community that scholars harbor an undisclosed agenda within the CFR process and aim for a European Codex on Contract Law.

This first step did not really coincide with the Action Plan the Commission had published earlier. But in any case it was a measure to get the project started and to begin the discussion with the stakeholders' network.

Later papers were added by the European Acquis Group since the acquis, the total legislative work in the field of contract law achieved so far in the European Union, consists to a large extent of ten to twelve different Directives. Most of these had as a

goal, the protection of the consumer against the professional party. It is only consistent to include this field in the ongoing general examination and review of the existing acquis as mentioned in the Commission's Action Plan. But I doubt that this examination will lead to a European Code on Consumer Contract Law. What can and should at least be achieved is an ironing out of inconsistencies, examples of which include the time-frame for revocation and elaborate definitions of contract terms, such as damages, interest, compensation etc.

But still the minimum-harmonisation-concept is one of the inherent obstacles in achieving a level playing field in Europe.

Very clearly the Commission had stated in its earlier Communication that there are already legal frameworks such as the Vienna Convention on the Sales of Goods and the Rome Convention on Private International

Law, which touch directly on cross boarder business transactions and which should be regarded too. 50 years of prospering cross boarder trade in the European Union lead me to the conclusion that no European Civil Code on business transactions is really needed. My suggestion is rather:

- Let us make an outline on implementing existing rules on consumer protection in the EU Member States, namely in the enlarged European Union. Clear, short definitions and indications of examples for the consumer, reasonable limitation periods and appropriate liability schemes leaving room for the other party's interests and risks can be useful. This would help to bring into line various legal interpretations and practical implementations as exist in countries shaped originally by different legal cultures.

- Let us be aware of the conditions and processes already successfully in place in industry and trade. Stick to a Common Frame of Reference as a toolbox to assist interpretation of the existing acquis and support coherent legislation. Companies have not only crossed the borders within the European Union but have gone far beyond all over the world. The freedom to conclude a contract and to negotiate the contract terms as a fundamental principle, especially in the business to business sector, is of tantamount importance. Therefore the process should clearly distinguish between legal provisions applicable to the b 2 b sector and those applicable to the b 2 c sector. Those two sectors have to be separated systematically. Business in the relevant specific sectors has developed its own standards (b 2 b) which take into account the general risk of a transaction, the price, the situation of

the other contracting party and, of course the worldwide competition. Those standard forms such as the Fidic Conditions are generally accepted and in use worldwide.

If mass production or consumer products are in question, contracts are standardised or backed by general standard clauses which are widely accepted because of their rationalising effect and quite often due to their clearance by the regulatory agencies.

International contracts on items of expenditure, construction and large scale machinery are the result of detailed negotiations and are drawn up carefully. Neglecting the interests and possibilities of the other party can endanger the whole construction of a good deal or ruin a good business connection. The supplier, usually seen as the “weaker

party”, is not only protected by the general rules of fair trading but also by the hard facts that the strong assembler is dependent on his goods or services. Late or no delivery endangers the production process because quick replacement is usually not at hand. Especially under the “just in time” concept. As a rule, compensation for damages such as in cases of recall are neither asked for nor enforced. Such measures could and would force the supplier into chapter eleven i.e. insolvency. If the sneaking aggravation of the duties (information, liability, performance etc.) of the industrial provider as outlined in the researchers’ papers were transformed into principles for b 2 b transactions by the Common Frame of Reference or even written into a European Civil Code, companies would even more than now escape from the European legal system and search for a

more appropriate legal environment - like the Swiss Civil Code, which guarantees a balanced structure and the equilibrium of contracts. As the Swiss law has kept up a systematical distinction between the b 2 b and b 2 c sector, many German and other European companies are using the right of the choice of law and the right to opt out of the ordinary court system and are agreeing on Swiss substantive law and an arbitration proceeding in Switzerland. "He who does not resign himself to the law must leave the country where it is in force" said Johann von Goethe – not only a poet but a lawyer – 200 years ago, as if he had anticipated today's situation. By the way, he also stated that the time consuming study of all the regulations can keep you from obeying them."

In today's language, the CFR-process should be lean, the toolbox should restrain from being and becoming a codex.

It may be useful to bring into mind again that the acquis based on the provision of the EC-Treaty (art. 95) was - in the view of the European Commission - intended to eliminate obstacles to the good functioning of the internal market due to the existence of different national rules on contract law. At the outset it was not meant to foster the noble idea of protecting the weaker party. Therefore, today, we should not solely focus on the protection of the "widows" and "orphans" but establish a level playing field for fair and free trade within the internal market. Therefore we should avoid any deviation from an already ambitious goal and not enlarge the scope of work for the CFR by adding additional topics, like aspects of property law.

Taking all that into account UNICE will certainly be a reliable and constructive partner in the process to come to a convincing CFR.