

**THE VIEWS EXPRESSED IN THIS PAPER ARE PERSONAL.
THEY ARE NOT TO BE TAKEN TO REPRESENT THE VIEWS
OF THE LAW SOCIETY OF IRELAND.**

EUROPEAN CONTRACT LAW

VIENNA

25 MAY 2006

**REVIEW OF CONSUMER ACQUIS
AND THE COMMON FRAME OF REFERENCE**

PANEL DISCUSSION - ISSUES ARISING FROM ONGOING CFR WORK

PAUL KEANE

**LAW SOCIETY OF IRELAND
REDDY CHARLTON MCKNIGHT**

**12 FITZWILLIAM PLACE
DUBLIN 2**

TEL: +353 1 661 9500

FAX: +353 1 678 9192

DX: 109027 FITZWILLIAM

EMAIL: rcmck@rcmck.com

WEBSITE: www.rcmck.com

REVIEW OF CONSUMER ACQUIS AND THE COMMON FRAME OF REFERENCE

PANEL DISCUSSION - ISSUES ARISING FROM ONGOING CFR WORK

PAUL KEANE

1. EXPERIENCE SINCE LONDON

Last year, discussion at the workshops and in London was dominated by arguments as to the purpose of the CFR, and in particular whether it was code and what was the meaning of a tool-box. We also had a series of problems with the process adopted, such as the content and the manner of presentation of the material from the researchers, the time for preparation and the lack of any apparent logic in the order in which topics were scheduled.

I attended the workshop on insurance law (general) in December 2005 and the workshop on European sales law in January 2006.

While the final purpose and shape of the CFR remains a live issue, undoubtedly a number of the issues that had caused problems in the earlier workshops had been resolved. Participants at the workshops had become used to the system and accordingly, the workshops ran more or less to schedule. We no longer had interminable debates on code, optional instrument or handbook.

However, the material to be dealt with was so vast that it was only really possible to deal with issues on a fairly superficial basis.

2. THE NEW APPROACH - Priority to Consumer Acquis

Arising from our last annual meeting, and the various consultations on the structure of the CFR, the Commission published its information notice setting out the new approach to CFR workshops. This was based on the Commission's conclusion that there was an emerging consensus that the CFR should contain the topics directly related to the existing consumer contract law acquis as a priority, possibly in combination with some general contract law issues which are relevant for the Consumer Acquis.

We are now familiar with the tri-partite division of material to be furnished at each workshop into "Acquis Revision", "Directly Relevant" and "Essential Background".

I have not had the opportunity to participate at a workshop where this new approach has been implemented. However, it is clear from the materials that have been circulated, that the volume of paper that is required to be digested has been considerably reduced. This is very much to be welcomed.

However, the new approach calls for necessarily arbitrary distinctions being made between materials which deal with topics in the Consumer Acquis and other topics of general contract law which are directly relevant to the Consumer Acquis. Thus in materials relating to the workshop on Damages and Producer Liability,

similar topics are dealt with in the Acquis Revision texts and in the Directly Relevant texts. Moreover, the language used for similar rules differs between the two parts, which adds to the reader's confusion.

It must be said, however, that terms of the accessibility of the material, the new approach is a vast improvement.

3. **OVERALL STRUCTURE OF CFR**

3.1. **Prioritisation of the Consumer Acquis, but will result be the same?**

The CCBE European Contract Law working group organised a most interesting meeting with Professor von Bar in April 2006. From the notes of that meeting it would appear that Professor von Bar contemplates the CFR as being a coherent set of rules covering all areas in one document drafted as a code and accompanied by comments and notes. For this purpose, he indicated that PECL is to be updated for the draft CFR. Hugh Beale's vision of CFR presented at our London meeting reflected broadly similar views.

It is no surprise, accordingly, that the draft report on Damages for Consumers and Producer's Liability follows a similar line. Although the Acquis Revision texts are based on the acquis, the Directly Relevant text is based on PECL, and contemplates that at a later stage the two texts would have to be combined in order to produce the draft CFR. Accordingly, although the Consumer Acquis issues are being prioritised for this year, ultimately it is intended that the current work should form part of a greater whole.

3.2. **Coherence**

The main objective of the CFR is to make the acquis more coherent. It is difficult to resist the argument that coherence can only be achieved in the context of a systematic statement of the principles and rules that are relevant to the acquis.

Whether that systematic statement is called a code, handbook or tool-box is probably irrelevant, except for the sensitivities that the name arouses.

The key debate will be in relation to how wide the net of relevance will be cast.

3.3. **B2B and B2C**

I would support the approach taken by the researchers of stating the general legal position and dealing specifically with those areas that require adjustment for B2C.

However, I would favour restricting the CFR to those areas that are necessary (or perhaps to use the Commission's phrase, directly relevant) to the Consumer Acquis. In this regard, I would be guided by the principle "If in doubt - leave it out."

4. **NOT AN OPTIONAL INSTRUMENT, BUT AUTHORITATIVE**

The Commission has repeatedly said that the decision on the use of the CFR as an optional instrument has not yet been made. Professor Hesselink in a most useful contribution to the debate¹ points out that the CFR, although not formally enacted as a codification, will have indirect effect through the directives based on it. The CFR, although not an legal instrument, or indeed an optional instrument, will have enormous importance as a basis of interpretation of directives and other instruments enacted by reference to it.

5. **ARE WE ALL WASTING OUR TIME?**

Professor von Bar, at the CCBE meeting, seemed to be of the view that the involvement of stakeholders at this stage is premature, and that it would have been better to present a complete draft from researchers as a basis for discussion.

Undoubtedly the Commission would have been heavily criticised if it did not consult at an early stage and it was clearly under political pressure to press on with the initiative

I think that there can be little doubt that it would it have been better to have based our debate on material that forms part of a document that had been completely revised with the requirements of the CFR in mind and to have had that material presented to us in a logical order.

Although participation in the workshops is very stimulating, I wonder whether or not the European tax payer or the stakeholders are getting value for the enormous resources that are being committed to the organisation and participation in the workshops.

On the more general question of whether or not the European Contract Law project is worthwhile, I do not entertain the same doubts. The project is important and will be useful to lawyers, business and consumers. It must, however, continue to guard against the danger that over-ambition in timetable and scope will lead to paralysis.

PAUL KEANE

¹ The idea of codification and the dynamics of Europeanisation - the Dutch experience. European Law Journal Volume 12, No 3, May 2006.