



English Law as an element of the contract, is not present; nor is the Continental concept of obligation. All the problems on the Continent concerning obligations are regulated in the area of the effects and performance of the contract. Thus the obligation is a simple consequence of the contract without dogmatic superstructures. We must also say that to draw up rules acceptable in all European States, the Academy has adopted these solutions: when, in the various systems, different ways are foreseen to obtain the same results, the Draft provides for all the various ways as possibilities, and with the same result. To give an example, for assignment of claims, the French and German methods are both admissible and thus the claim may be assigned either merely by the contract or by effecting, after the contract, a further act which assigns said claims. Of course a rule foresees which of the two ways is valid in case of doubt.

A clear and explicit style of language has been adopted to facilitate the application of the rules in the various States of the European Union and all implicit concepts, which there are in the various systems, have been avoided.

For some years the Academy has been drawing up Book Two of the Code concerning the specific contracts, the unilateral acts, and the problems of the tort liability.

S.25 **VII. Plan of Action for a Coherent European Contract Law – Observations**
Stefan Grundmann*

1. Further Development of Existing European Contract Law

In a first pillar, the plan of action follows the main findings of scientists and practitioners with respect to existing European Contract Law and that is to improve consistency and so build system bridges. The main points of confusion or inconsistency are not insignificant, but neither are they so numerous nor so substantial that the task seems hopeless. Two points should be emphasised, one on the development of this task so far and one on its contents in the future:

a. The Origins and Significance of the Task and the Current Situation

First the origins of the task and the current situation. The Commission has frankly admitted since 2001 at the latest that there are problems of consistency, on the other hand scientists had to move as well. Up until 1998, when I was preparing the Commentary on the whole of European Contract Law (“Europäisches Schuldvertragsrecht”, de Gruyter 1999), I couldn't find a single reference which would not have condemned European Contract Law as fragmentary, pointillistic and inconsistent. At that time, scientists did not even think of the *lex lata* as a developed concept of European Contract Law. Today the *acquis* is accepted as a set of Contract rules which, although there is room for improvement, seems to be remarkably consistent. At least since 1998 there have been pleas to start system building (and indeed this was the title of the Hallenser lecture circle of that year) and system building has been tackled in several post-doctoral theses. Riesenhuber's post-doctoral thesis

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“System and Principles of European Contract Law” is organised like a textbook and works through the contract rules of the *acquis* methodically and thoroughly, from the pre-contractual phase through to the formation of the contract, its execution, substandard performance and on to the end of contract. On the basis of this detailed map, consistency should no longer be such a Herculean task. The *acquis communautaire* group is now also pursuing this issue. And the second edition of my European Contract Law is currently being prepared, now also in English.

b. Focus of the Task

And now on to the focus of the task for the future. The Commission has settled on a joint cooperation with scientists. This is understandable. Consistency and system building are generally the province of scientists.

The proposal which has to be emphasised is that instead of resolving the inconsistencies individually, the Commission now intends to develop a “common frame of reference”. In this way the concepts would be defined and a map of Contract Law developed from the present rules. For example, it wants to define technical terms like “contract” and “damages”. This is a welcome development and is particularly important in that these should also form the basis of a European codex.

Nevertheless, if the common frame of reference is intended to develop into a kind of master plan, it does not go far enough. Much more would then need to be considered and that is the basic concept of European Contract Law – and as we are dealing with law in action and in development all this should of course be done within a framework of interdisciplinary discussion. To give some examples: The role of information rules for preserving freedom of contract and at the same time for the protection of the weaker party must be considered; similarly the role of general clauses, for which questions they can be used at the European level and for which not, which socio-economic consequences their adoption could have; and as well the relationship between consumer protection and market order, especially competition law, i.e. the two most important pillars of regulation in Contract Law (because regulation and to a lesser extent enabling law has up to now been the main focus of the *acquis communautaire*); and, for instance, also the question whether the Sales Law Directive, as with UN Sales Law, can be accepted as a model for a general Contract law and where the borders lie – you notice that I quote from the events and publications catalogue of SECOLA.

If the common frame of reference thus goes beyond a comprehensive clarification of terms and cartography (although these are naturally important), a further question will arise: whether the European legislator should work in cooperation with scientists or whether this should not instead first be a genuine area of scientific research (which should then possibly be supported more intensely in the future). Should one group or even a few groups be assigned to not only develop concrete laws, but also to define the common frame of reference for the entire future European Contract Law, then discussion in the core area of progress will inevitably be severely restricted, and any new ideas smothered - and this not even five years after the concept of an already existing European Contract law was first put forth.

2. Creation of an Optional Contract Law Codex

In a second pillar, the plan of action opts for the development of an optional Contract Law codex. Until a few years ago it was never considered that the codex could be optional. It was not until the Conference in Leuven in December 2001 (SECOLA/Centre for a Common Law of Europe) that the idea gained general acceptance. Now all legislative bodies and the vast majority of scientists accept this idea and this is probably the most important finding for the future.

a. Optional Instruments of Law

If a European codex were indeed optional, then competition would develop. Competition may be left without a regulatory framework of rules. This was status of the law in 1900, competition was still unregulated. Since then all the industrialised nations have developed a legal framework for competition. It may not yet be completely clear which exactly are the parallels between normal competition in product markets and competition between legislators (sets of legal rules). However, to simply ignore this issue is to ignore the central theme of economic law development in the 20th Century. This issue has to do with what has been called internal market conflict of laws, a topic which will be addressed tomorrow. Until now only SECOLA has tried to discuss such a common frame of reference (a “constitution” in the sense of constitutional economics). The SECOLA and Centre for a Common Law of Europe Conference in Leuven was the first ever to discuss the idea of an optional codex in detail, with quite different design alternatives considered. And this year SECOLA will host a follow-up Conference, smaller and more focused, to discuss a set of more concrete suggestions and framework rules.

A very simple example: with the Financial Services Distance Selling Directive the European legislator has departed from the principle of minimum harmonisation. As a result, no state can experiment with more consumer protection, and this is a problem. On the other hand, when each state applies its own strict laws, companies still have to offer their products under 15 different regimes. And this was the argument for the Commission to reject minimum harmonisation. Obviously it was not appreciated that there is a compromise solution which can serve both interests. This is the concept of minimum harmonisation flanked by the principle of (mutual) recognition of the standards of the country of origin (home country). Under this concept a company can market their products across the whole of Europe under their own national law and the national legislator in the guest state can offer higher standards of protection nevertheless, which may, however, not apply to foreign suppliers. At the same time, one set of consumers can still choose a level of protection known in the guest states while other, more confident consumers, may opt only for the minimum standard. If the questions of framework for competition are considered, the optional European codex would not be conceived as standing alone but as a core part within a European System of Contract Laws.

It should also be noted that the optional legal instrument itself can only be one which is directly applicable, i.e. either a Regulation (this instrument would be easily manageable) or a treaty. The Directive would be inappropriate, but not because the

concept of minimum harmonisation would be obsolete. The reason the Directive is inappropriate is that it does not offer legal certainty and for the European Code to be thus introduced and to be directly applicable would result in a competitive disadvantage that would be very difficult to overcome. The optional legal instrument cannot also be merely a recommendation if, and this alone is convincing, the option between national law and European Code should be left to the parties and not to states. Giving a right to vote alone infringes on national law, which the recommendation – which cannot bind national legislators - cannot do.

b. Contents

I have a great respect for the basic idea of developing the structures and solutions of a future European Code from the existing *acquis communautaire*. SECOLA was founded exactly for this idea, and my Commentary on European Contract Law was written from this perspective. It is also correct that we have entered into a new phase, where European Contract Law which mainly consisted of regulation in Contract Law is extended and is being transformed into a comprehensive Contract Law. Again there is considerable need for discussion. Two examples mentioned in the plan of action: the plan of action asks the question whether a codex could be drafted with the exclusion of the b2b and the b2c contracts. Such a code would apply to approx. 5% of all contracts. Many authors (myself included) have settled firmly on integration. Only an integrated codex could reflect the reality. The plan of action also considers a codex with only a general part. This is possible, but then most of what has been harmonised so far would be excluded; and the approach would no longer be to include at least or even to concentrate on the truly international, the numerous and the large volume contracts. Concentrating on generalisation only in an increasingly complex and diversified world would seem to be problematic. Practically speaking, collateral is very important. Restitutions seem less important a cross border problem to me but could well be seen as a contract question proper. One general thrust would. However, it seems to me to be important – for the sake of simplicity of the system and for the sake of political practicability: The annexes to a European Contract Code should be kept as restricted as possible and be confined to what is strictly necessary. For the sake of systematic clarity, one could even discuss whether collateral could not even be regulated apart (and earlier!).

If one wants to sum up and stress the main point, one could say: were the European codex to represent a clear step over the present status, were its influence possibly even to extend beyond Europe, then it must be an extensive Contract Law codex – possibly with the annexes absolutely needed – and it must be an integrated work also in the sense that its framework lays down when it is applicable. Because this is characteristic of internal market conflict of laws, substantive law and conflict of laws are much more integrated than in classic conflict of laws. It should not simply be a further classic “national” codex, but should instead have a flexible system with both unity and openness.

c. The Players

The Lando Commission and the v. Bar-Commission have prepared an astonishing amount of groundwork. Gandolfi has prepared the first detailed codex (draft).

Nevertheless it does not necessarily follow, that with one or two attempts the issues are all resolved. Consumer protection played absolutely no part at the beginning of these projects. And still today it plays a subordinate role only, relational long term contracts and contract networks still do not feature at all, although both are seen today as driving forces behind the economy. The idea of an optional codex – better described as a European system of contract laws - and the idea that the *acquis communautaire* could serve as the starting point are not reflected in the initiatives to date. There are still far too few action groups. It would be no big effort to integrate the known action groups into a network. In my opinion it is more difficult, although at least as important, to stimulate rivalry, which is not to say that findings and ideas should not be exchanged. It is far too early to subordinate all research to a “plan”, basically fixed at the beginning. There should be more than just the possibility to modify through experience. Centralised plans always have failed for national economies, as they increase in size they become even more fruitless. As regards content, I think it would be a fatal error to establish such a plan now (in Brussels?) and to choose a few groups (and sponsor them) which would then be “responsible” for sub-parts of the master plan. The whole purpose of the internal market was to dismantle market restrictions, barriers to market entry. It would be absurd if the European Contract Law Code, which could become the “flagship” of internal market private law, was to be developed in a way which protects the market against the entry of new ideas, discussion and scientific research – a market which has developed only a few years ago.

3. Proposals Concerning the Role of Scientific Circles Such as SECOLA and also of the Commission

From the above, six proposals arise, the first two concerning the role of SECOLA primarily with the further development of the current *lex lata*, the next three concern primarily SECOLA's potential role in the development of an optional European codex and the last concerns the plan of action.

a.

A whole common frame of reference should not be fixed by a group of ten or twenty persons, instead the efforts today should primarily concentrate on opening and promoting dialogue. It should be international and interdisciplinary. Some people will research the system alone, others will work in groups, but the broad exchange of views must remain central. This is the main aim of SECOLA, perhaps the number of conferences which is currently one or two each year should be increased and smaller workshops should be added as is currently planned. SECOLA is currently the only enduring, genuinely international forum for open dialogue in European Contract Law.

b.

The common frame of reference should not be restricted to defining technical terms and drawing a map of existing rules, but instead also be aimed at clarifying basic concepts. When the socio-economic consequences and the relationship of the individual areas to the entire system call for extensive discussion, it is scientific research which is needed - again through open dialogue. In this, it would be

counter-productive to reserve a lead role for just one body, perhaps even bureaucratic. SECOLA is to my knowledge the only group with a broad interdisciplinary base and open to anyone who wishes to contribute.

c.

Were a European codex optional, competition would develop. This could be improved considerably through the development of a common frame of reference for competition (a “constitution” in the sense of constitutional economics). To date only SECOLA has made investigations into such a framework, albeit as the only interdisciplinary initiative. The SECOLA meeting in Leuven was the first. It discussed the idea of the optional codex in detail, with quite different design suggestions and this status would still have to be reflected both in general discussion and in plans of action. And SECOLA this year will hold a further event with a core discussion group to discuss more concrete design suggestions and a few particular areas.

d.

The idea of SECOLA was from the beginning to discuss all aspects of European Contract Law: existing community law, the *ius commune* and restatements of the law, suggestions for a codex, the interdisciplinary theory for forthcoming contract law for the internal market, two-tier legislation. An optional European codex is in my opinion clearly less than ideal unless all these components are included. Splitting up the task means neglecting all the links between the components and it is the links in particular which are new and therefore might need particular investigation. Going through the whole task in different competing groups and then comparing the results would clearly be worthwhile. Perhaps such a model, which combines competition with an exchange of ideas, will be considered too idealistic.

e.

If the plan of action prompts an abundance of ideas for each of the issues, then the existing open forum for the exchange of ideas must play a central role. SECOLA is this forum. The forum for dialogue would function better the more “blue chips” are traded in it, i.e. the core ideas of core players are exposed to discussion there. Functioning as a forum for discussion is a completely different task from that of developing components in the two areas named: system building in the *lex lata* and drafting parts or whole projects for an optional codex. Members of SECOLA are also researchers and research groups which work on these two core components. So far, centres of interest have been research into a common frame of reference for competition (constitution for a two-tier legislative system) and the *acquis communautaire* and the potential it has for a general European Contract Law, with particular emphasis on European Sales Law.

f.

From the above arises a proposal for what might be a proper role for the Commission: stimulating networks is very helpful, broad stimulation of the process

is at least as important. The Commission should not set up any barriers to access to the marketplace for the next five years. And in an area which has been discussed only for the five years, it is practically impossible for a legislator to fix the corner stones of the whole system yet, i.e. to fix the framework for a European Code and even a European System of Contract Laws. The Commission should, however, continue its quite successful approach of problem oriented legislation in particular fields – now taking into consideration what has already been developed as suggestions for achieving more coherence.

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VIII. Network on European Contract Law - The Proposal of the Institut Charles Dumoulin, Contrats internes et internationaux

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1. Introduction

The *Institut Charles Dumoulin* is establishing a database on comparative national case laws. This proposal answers to proposals already made by the Study Group on European Contract Law, the Acquis Communautaire Group, the Effective implementation of directives and general contract law. It aims to show how the research of the *Institut Charles Dumoulin* fits into the preparations of the CFR and where the *Institut Charles Dumoulin* see possibilities to collaborate with other initiatives on European Contract Law.

2. The Common Frame of Reference Regarding a Database on National Case Laws

In its action plan on a more coherent European contract law (OJ 2003/ C63/01), the Commission emphasises the necessity not only to improve the coherency of the existing *acquis communautaire*, but also to avoid obstacles and disincentives to cross-border transactions deriving directly or indirectly from divergent national contract laws or from legal complexities of these divergences which are liable to prohibit, impede or otherwise render less advantageous such transactions. Particularly, the Action Plan pointed out the difficulties arising from divergent requirements regarding the formation of contracts, the divergences of rules in the inclusion and application of standard contract terms, the divergence of national rules as regards clauses excluding or limiting contractual liability, difficulties regarding contractual liability, problems of transfer of property and so on. One of the means to avoid those divergences would be to create a “Common Frame of Reference” (CFR). This CFR is expected to contain some elements, especially general rules on the conclusion, validity and interpretation of contract as well as performance, non-performance and remedies as well as rules on credit securities on movable goods and the law of unjust enrichment, considering several basic sources:

- Existing national legal orders to find possible common denominators, to develop common principles and, where appropriate, to identify best solutions;