

**COMMUNICATION FROM THE COMMISSION TO THE
EUROPEAN PARLIAMENT AND THE COUNCIL – A MORE
COHERENT EUROPEAN CONTRACT LAW – AN ACTION PLAN,
Brussels, 12 February 2003, COM (2003) 68 final.**

CONTRIBUTIONS FROM:

Pablo Amat Llombart

Associate University Professor of Civil Law

Universidad Politécnica de Valencia, Spain (pabamlllo@urb.upv.es)

Juan Bataller Grau

Associate Professor of Commercial Law

Universidad Politécnica de Valencia, Spain (Juan.Bataller@uv.es)

Nuria Latorre Chiner

Associate Professor of Commercial Law

Universitat de València, Spain (nuria.latorre@uv.es)

Guillermo Palao Moreno

Associate Professor of Private International Law

Universitat de València, Spain (guillermo.palao@uv.es)

Professor Francisca Ramón Fernández

Assistant Professor

Universitat Jaume I de Castellón, Spain (framon@dpu.uji.es)

Members of the Valencian University European Private Law Group.

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Improving the quality of the Acquis communautaire in the field of contract law

Prof. Dr. Juan Bataller Grau

Associate Professor of Commercial Law

Universidad Politécnica de Valencia

Member of the Valencian University European Private Law Group

The Communication from the Commission to the European Parliament and the Council of 12 February 2003 (COM [2003] 68 final) on a more coherent European contract law: an Action Plan, proposes a combination of regulatory measures to resolve the problems raised therein. This (brief) discussion is focused entirely on the first measure:

I. One of the motives behind the Communication is the observation that legal obstacles are a disincentive to cross-border trade, which is why legislation needs to be improved. However, we think that in order to solve the problem a **series of measures to deal with it from an overall perspective are needed**. For example, there would still be a need to consider whether it is enough simply to draw up a uniform law or whether it needs to be combined with some sort of appeal procedure to prevent disagreements on the interpretation of case-law.

However, above all, we think that the key to the issue is the **effectiveness of the law**. Not only does a law have to be technically perfect, but also make it easy for individuals to make claims. One of the problems that is increasingly raised is the practical impossibility of making claims because it generates excessive difficulties. For example, the position of an insured person is weakened as a result of the possibility of a foreign insurer being '*delocalised*' (=

not being nearby). Community directives have, however, given insurance companies a duty of information aimed at reducing this problem¹.

We think that these legal precautions alone are insufficient, especially when the insurer is acting under the freedom to provide services. The duty of information means that the insured can be aware of the problem, but does not arbitrate the procedure for solving it. While a claim with a nearby insurer is already complicated, the difficulties are increased when a foreign insurer does not have a presence anywhere where the insured can actually submit the claim, a premise that generally refers to presence within the national territory. In short, the insured may have been informed as to where and how to make the claim, but can he *actually* submit it when the insurer is *delocalised*? The problem has been raised with regard to vehicle insurance and solved by requiring that at least one representative be named with whom the injured third party may make claims. It is true that the underlying nature of vehicle insurance is the protection of the victim (= injured third party), but we think that its advantages should be extrapolated to the other insurances held by an insured person.

II. In order to draw up a common frame of reference it is essential to start with in-depth reflection, which requires maturity, or in other words, the necessary composure to prevent hastiness. As the Communication itself suggests, we think that the best option is to leave this first phase to legal science. In our opinion, in order for the doctrine to achieve optimum results, there needs to be considerable prior research. Obviously, the final text must come from a body that gives it legitimacy, but in this preliminary task of putting

¹ This duty requires insurers to indicate the following data to the policy-holder before a life insurance policy is concluded: name of the undertaking; legal form; the name of the Member State in which the head office and, where appropriate, the agency or branch concluding the contract is situated; the address of the head office and, where appropriate, of the agency or branch concluding the contract; the arrangements for handling complaints by policy-holders, lives assured or beneficiaries including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings; law applicable to the contract; and, finally, various significant issues on the content of the contract. The information is considerably reduced for insurance other than life insurance, which need only mention the law applicable and the arrangements for handling complaints by policy-holders including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings.

together materials we think that legal experts in general and doctrine in particular need to play a central role.

In this respect, it should be pointed out that **some texts of undoubted value** because of the quality of the contributions **have already been produced** – or are about to be completed (*Principles of European Contract Law* by the Lando Commission, *Study Group on a European Civil Code* led by Von Bar, Preliminary Draft of a European Contract Code led by Gandolfi, etc.) which will help with subsequent work. **However, there still seems to be a long way to go**, because such an important goal requires greater research, which has its own pace.

III. One of the questions that is still open is that relating to the area in which work is needed. The Communication itself raises this, but we think it is an issue of the utmost importance. In our opinion, the need to improve the *acquis communautaire* is not felt in the same way in all areas of contracts.

IV. Stating that the process of building a common frame of reference requires well thought-out work in advance does not mean that the process has to wait until those results are achieved. In our opinion, a task that **should not be put off is consolidating, codifying and, above all, recasting the existing instruments**. In some areas there have been a number of successive regulations amending what was previously laid down, but without arriving at a single text, a legislative technique that has generated unnecessary difficulties. However, this process of clarification should be used to fill the current gaps and remove inconsistencies.

In our opinion this process should go beyond the harmonised fields and begin to construct a common frame starting, as far as possible, with individual matters. Here we are not advocating drawing up each and every contract individually, but we do think it is appropriate to develop these when there are instruments that have provided premises from which to start. In this respect, we

consider this to be a good time to go beyond the existing instruments and finally achieve a consumer statute regulating the general rights and duties of consumers. Also, regulations on contracts in the financial system need to play the role of predecessor, or of a general test if preferred, for other contracts. This is what has occurred on many occasions in national legislation, so it seems logical for it to happen at Community level. However, as we have suggested, we do not think that the work should be confined to the areas indicated in the Communication, but that the ideal would be to extrapolate this work to other areas in which the existence of prior instruments has provided a degree of maturity. For example, there is the development of a text including representation, mandate, commission and agency. In short, in this way we would also be contributing to constructing the renewed common frame of reference, because subsequently this progress on individual matters would simply have to be incorporated into the final text. This conclusion is not contradicted by the belief that this is not the definitive solution either, as we need to go further. We simply need to keep going.

Standard contractual clauses at Community level

Professor Dra. Nuria Latorre Chiner

Associate Professor of Commercial Law, Universitat de València

Prof. Dr. Juan Bataller Grau

Associate Professor of Commercial Law, Universidad Politécnica de Valencia

Members of the Valencian University Private European Law Group

The Communication from the Commission to the European Parliament and the Council of 12 February 2003 (COM [2003] 68 final) on a more coherent European contract law - an Action Plan, raises various issues. This (brief) contribution is entirely focused on the second issue raised:

In trade, both national and trans-national, it is well known that the use of standard clauses and conditions is increasingly frequent because of the cost savings involved. The principle of contractual freedom, which as stressed in the Communication from the Commission (point 4.2; no 81) is the centrepiece of contract law in all Member States, enables contracting parties to conclude the contract which most suits their particular needs. It is precisely when exercising that freedom that the parties tend to prefer to use standard clauses and conditions which undeniably save transaction costs. However, this type of practice requires us to consider certain issues:

1.- The application of standard clauses and conditions is obviously optional for parties, who will freely decide whether or not to be bound by them. However, the fact that they are discretionary raises some obstacles:

- a) At sectoral level, we will find that standard conditions, which are perfectly possible in certain areas of negotiation, are difficult to incorporate into others. For example, it is very well known that international trade in goods is normally done through the Incoterms, and that it is possible to

apply these because of the discretionary nature of regulations on commercial trade in the different legislations. In other sectors, which have a partially or entirely mandatory system (such as, for example, some insurance contracts that contain protective regulations), the use of standard conditions would be somewhat limited.

- b) Following on from the above, at national level, we could find some clauses that would be permitted by some Member States as they do not contravene their mandatory regulations but which clash with the legislation of other Member States. The same standard conditions could thus be used by citizens of some countries while being discarded by nationals of other countries, encouraging differences between cross-border transactions. The Commission could play an important role here: the Communication itself highlights the intention to create a web page listing the different initiatives under way on this type of contract practice, and we think that this resource could be used in order for operators, academics and other interested parties to draw attention to the problems that would be raised in applying specific clauses in their respective legislations.

In short, standard clauses and conditions can be very useful as long as the two parameters mentioned are borne in mind, both of which are associated with the scope and limits of contractual freedom. On the one hand, it needs to be taken into account whether this optional instrument is possible in all sectors, and to try to specify the sectors in which it is not possible. On the other hand, it needs to be considered whether the various legislations could accommodate standard contractual clauses so that they can be applied in all EU countries.

2.- The second issue to raise is regarding the way in which the clauses should be written. As with legislation, the way that certain standard clauses are written can lead to discrepancies in interpretation between the contracting parties, who may not attribute the same meaning to the same legal term. This

possibility raises the question as to whether the clauses should entail an interpretative explanation in the form of a *restatement* (the clauses would cease to be concise in order to be more precise), or whether on the contrary the Incoterms formula should be adapted, in which each 'standard contract' would specify in minute detail each and every one of the obligations of the parties. The Commission could probably also play a significant role here (either directly or indirectly, through those writing the clauses) by providing guidelines for interpreting standard clauses.

3.- Finally, we think it is appropriate to make a suggestion regarding how the Commission should contribute to the drawing up of contractual conditions. Based on the web page that the Commission plans to create and the initiatives that will be discovered through that page (it is likely that the various initiatives will come from those operating in the sector, either individually or through their associations), the Commission should monitor the content of the clauses being created, not only giving guidelines or recommendations in advance for writing the clauses (taking into account the specific characteristics of each sector), but also subsequently examining the viability of the clauses in each and every one of the legislations of the Member States. This is undoubtedly an arduous task which could be supported by legal experts and members of the academic community through communication to the web page, so that everyone together (operators first, then monitoring bodies) can create effective standard conditions that are in line with current law.

**Reflections on the Communication from the European Commission "A
more coherent European contract law - An Action Plan"**

Prof. Dr. Pablo Amat Llombart

Associate University Professor of Civil Law

Universidad Politécnica de Valencia

Member of the Valencian University Private European Law Group

I. This contribution focuses in particular on paragraph 4.2 of the Action Plan proposed by the European Commission for a better and more coherent European contract law, with regard to promoting the elaboration of EU-wide standard contract terms, with special reference to contracts for agricultural and food products.

We think that the most suitable initial approach for the overall interests that the Commission is pursuing in this field is to start from a sectoral or specialised view of the various spheres of consumer goods and services that are going to be affected by the decisions to be adopted in the future on contractual regulation.

This is a task of colossal proportions being considered by the European Commission, although it will be practically achieved over a period of time, which requires detailed partial and sectoral approaches, in order to then be able to tackle the greater task, if it is possible and advisable, of arriving at common contractual principles and rules, or at least some that can be broadly accepted by the different production and commercial sectors in the European environment.

Our second consideration concerns the role that those involved in contract transactions, i.e. those operating in the sector, should play on the road towards solving the problems of contractual cohesion and restructuring. In our view, we should not lose sight of the fact that in order for any reform of contracts to be accepted to a satisfactory level, we must always have the opinions and, more importantly, the active participation of representatives of the

production and commercial operators, as they are ultimately the ones who have the best knowledge of the daily workings of transactions, who bear the excess costs and difficulties caused by cross-border transactions, and who are most interested in ironing out these types of difficulties. They are the ones who will apply and will be able to put into practice in their day-to-day business the 'theoretical' measures that may be formulated through legal thinking in the future.

Also, if they do not play a role, there would be the undesirable risk of devoting research, personal effort and funding to arrive at or adopt measures that could then end up remaining just written law that is not transferred to the reality of our markets and commercial operators.

II. Based on the above general, introductory comments, we will now reflect on a specific sector, contracts for agricultural and food products, with which we are particularly concerned.

Within the agricultural and food system, which includes the agricultural and fisheries production sector and the processing and marketing sectors for their products, I think that it is worth evaluating a contract system which has been operating for a few years with some degree of success, in order to draw out the positive conclusions and possibly use them for a possible European contractual measure.

I am referring to the existence of "standard contracts for agricultural and food products", established for commercial trade in certain products or in certain markets, which are made up of common, standard pre-established clauses and stipulations².

The potential and effectiveness of these contracts made up of standard clauses is based on various considerations.

² The basic regulation in Spain is in Law 2/2000 of 7 January regulating standard contracts for agricultural and food products.

On the one hand, the initial proposal for one of these model contracts comes from the "agricultural and food inter-trade organisations"³, whose scope is at State level or greater than that of an Autonomous Community, and which were in turn established by organisations representing the aforementioned sub-sectors of the agricultural system. Organisations representing the production sector and the processing and marketing sector can also propose them separately. In any case, the success or failure of the use of these contracts is based on the level of representation of the body promoting them.

Also, before they can be implemented, these contracts have to go through an 'approval' procedure with the Ministry of Agriculture, Fisheries and Food, which involves a mechanism for reviewing and improving the content and form of the contract, and some sort of 'recognition of its legitimacy' by the public authorities.

Thirdly, they have considerable potential as a model to be freely and voluntarily adopted by the operators to use for their private law contracts if they wish. They are therefore an optional instrument and in no way obligatory.

Finally, a 'Monitoring Commission' is established (a private, not-for-profit, representative legal entity), one of the purposes of which is to monitor the effectiveness of the contract, promote its use and even to be some sort of 'first instance' for settling disputes arising from the interpretation and execution of the contracts and their clauses, thus speeding up the possibility of the parties then going to arbitration.

III. The possibility of incorporating systems similar to that described above at Community level and from the point of view of the agricultural and food sector, does, however, raise some questions and difficulties.

On the one hand, there is the current existence in the European Union of "Common Organisations of the Market" (COM) for some agricultural and food products, which could involve certain contracts or clauses being made

³ Regulated by Law 38/1994 of 30 December, regulations adopted by Royal Decree 705/1997 of 16 May. This proposal is one of its legally established purposes.

mandatory for commercial transactions. However, a possible solution would involve trying to move towards agreements leading to standard contracts that respect the minimum standards required by the Community COMs, in order to prevent distortions and duplication.

Another problem is based around the difficulties in establishing bodies that are sufficiently representative of the particular sector or sub-sector, which are capable of bringing together diverging interests and directing them for the common benefit towards contractual agreements with minimum standards. Here national, regional and local interests need to be overcome in order to move towards a renewed European Community spirit that is currently perhaps too vague and insubstantial.

Finally, the question would be raised as to how to define this hypothetical institution with sufficient capacity to 'standardise' and 'certify' a standard contract or the standard clauses agreed by the representatives of the sector in order to be implemented in legal transactions, and even whether it really needs to exist and whether it would have a genuine function at European level.

Contribution to the Communication from the Commission to the European Parliament and the Council. A more coherent European contract law - An Action Plan. Brussels, 12.2.2003 COM (2003) 68 final

Prof. Francisca Ramón Fernández

Assistant Professor

Universitat Jaume I de Castellón

Member of the Valencian University Private European Law Group

I. In the field of agricultural law, taking into account the characteristics of the products and their importance in terms of legal transactions, as they involve multiple operators and are subject to the fluctuations in supply and demand that occur in that sector, and the fact that it is difficult to know what transactions are taking place because so many operators are involved, which leads to a lack of transparency in the market, the possibility could be considered of establishing **officially approved standard agricultural and food contracts** at Community level, similar to those that exist in Spanish legislation for agricultural and food products. Establishing a standard contract would ensure coherence between the different, possibly conflicting legislations, by establishing a single contractual model regulating it.

This implementation system would achieve a level of agreement between the different operators in the market, benefiting consumers and achieving the participation of the interbranch agricultural and food organisations.

By establishing a standard contract system there would be a system for officially approving the contracts, seeking participation from the representative organisations in proposing the official approval of the standard contracts.

In the same way, in order to settle any disputes that may arise in the interpretation and execution of contracts, especially in sale contracts that are in

line with the officially approved standard contract, an alternative system for settling disputes could be established, such as arbitration.

The input of the monitoring commissions in each of the countries would be of fundamental importance for these standard contracts, as they are a key element of the contracts and would form a link with the interbranch agricultural and food organisations, which would be authorised to propose standard contracts and appoint a monitoring commission.

II. In order for agricultural and food products to have the approval of all consumers, we could look at establishing a **single product quality mark**. The various reasons behind establishing this distinguishing mark as a mechanism for protecting consumers are the new conditions under which trade is being conducted, the internationalisation of the market, the emergence of new contractual techniques and increasing public protection of consumers.

Creating a single quality mark for agricultural and food products across the whole of the Community would create a clientele for the products, providing consumers with an easy and convenient way of identifying the product that they are going to purchase. The mark would also act as a guarantee or quality sign for new products that a previously accredited company places on the market. The increase in trade has demonstrated the need to provide greater protection for products that are placed on the market. The aim is to have a dual protection mechanism, on the one hand for the owner of the products and the company responsible for offering products that are placed on the market, and on the other hand to protect the interests of consumers who use the product or service, informing them of the company that they have come from, giving them the required confidence and responding to the expectations generated about the product or service protected by the mark, and unequivocal sign that there is business backing behind it.

From this point of view, the single quality mark for agricultural and food products at Community level will seek to identify types of products that are characterised by a special production system, introducing a very important

element in terms of food safety. It would become a suitable option for companies working in that context. The incipient agricultural and food system is based around the quality mark for products, and it should be pointed out that the companies that make up the agricultural and food industry are going through a process of adapting to changes in their environment in order to be more competitive in the products they offer to the consumer.

Establishing a single quality mark would also mean establishing quality control and safety mechanisms in order to ensure that the food sold is safe, healthy and suitable for human consumption, by establishing a food safety plan. This would ensure greater controls on labelling of products and protection of them through a technical and commercial distinguishing mechanism. These products, which because of the way that they are produced or processed have specific quality characteristics, have to be distinguished in order to protect their uniqueness, preventing unfair competition and giving consumers an indication that easily differentiates them from the rest.

Adopting an optional instrument

Prof. Dr. Guillermo Palao Moreno

Associate Professor of International Private Law

(Universidad de Valencia, Spain)

Member of the Valencian University Private European Law Group

This contribution does not intend to be more than an initial approach to the possibility raised by the Commission (in support of some of the arguments made in response to the Communication in 2001) of creating an "optional instrument [in the area of European contract law], which would provide parties to a contract with a modern body of rules particularly adapted to cross-border contracts in the internal market." (Communication, no 90). This is a contribution which perhaps raises more questions than it answers, which aims to introduce some ideas for the subsequent debate. We will follow the order of the questions raised by the Commission in order to present these reflections: its opportuneness, the legal form that should be adopted, its contents and the legal basis that would justify its creation.

Opportuneness

In our opinion, it will be opportune to create this instrument, as long as certain premises are taken into account.

1) On the one hand, it needs to be done in order to increase the legal security of those who are involved in this type of international transaction, familiarising them with this type of transaction in order to ensure that they have confidence in them and that their participation in the internal market is increased (Communication, no 91). Therefore, the fact that this "optional instrument" is part of a "facilitative approach" which can prevent disagreements on the legal framework governing the contract and that it provides the contracting parties with a 'neutral' framework and will help predict solutions, are all positive elements to take into account in favour of creating it.

2) However, it also needs to be taken into account that, in order to carry out this regulatory task, two elements need to be taken into account that are of primary importance: the importance of the global aspect, and the need for the "optional instrument" to coordinate with and complement other Community measures aimed at creating a "European Contract Law".

a) With regard to the first element (coordination *ad extra*), on many occasions we have seen the dangers and risks that come with 'regional' regulation, when we are talking about international contracts that have to work in a global context. I therefore do not think that the "optional instrument" has to try to find new answers for this type of contract, as there are already effective solutions to those problems in other current texts, not so much in Community law but particularly in other frameworks which have been governing international contracts for years, such as UNCITRAL (e.g. CISG), the ICC (e.g. INCOTERMS) or the UNIDROIT 'Principles' (in line with what is said in the Communication, no 96). We would therefore have to avoid unnecessarily duplicating efforts, take into consideration the experience built up in those forums (or use it to complement Community measures), and enable all the current initiatives to complement each other, in order to begin to efficiently create an "optional instrument" that will be effective for traders operating in the cross-border context.

b) Along with this, with regard to the second element (coordination *ad intra*), creating a European contract law requires the best possible coordination and interconnection between the different initiatives that are currently being discussed within the Community institutions (both legislative and academic). In other words, there needs to be greater mutual understanding and coordination between the various initiatives that are currently being discussed, such as: as well as this action plan, the Green Paper on European Union consumer protection and, in particular (with regard to the issue that we are dealing with), the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. Also, from an academic perspective, initiatives such as the PECL (drawn up by the Lando Commission) or the work done by the Study Group on a European Civil Code can also be used as a model or reference for creating this "optional instrument".

Legal form

With regard to the form that could be taken by the "optional instrument" (Communication, no. 92), there are basically two options for legislative techniques that would lead us to opt for either a recommendation or a legal guide (alternatives linked to Soft Law); or a Community directive or regulation (in line with the solutions that are more associated with Hard Law). In any case, State law would not be displaced by this new framework. Which of them is chosen will depend on factors such as: how legally binding the "instrument" is to be and how much obligation it is to entail (for private individuals and States); the final objective of the instrument (i.e. whether it is meant to be 'regulatory' or 'informative', in order to help businesses with international contracts); its relationship with the "general frame of reference"; whether it is 'permanent' or 'transitory' (while the "general frame of reference" is drawn up or with a view to becoming permanent) and, finally, its place among all the Community initiatives on "European contract law". In any case, we need to start from the idea that it will only operate insofar as it serves the interests of contracting parties and if they so wish.

The fact that we are seeking a framework that will give confidence to contracting parties in cross-border transactions and is essentially optional for the contracting parties (contractual freedom being one of the guiding principles, as indicated in the Communication, no 93), enables us to deduce that we do not need to use one of the mechanisms of Hard Law. Consequently, I think that a more flexible and entirely optional formula could be adopted, such as: principles (or Restatement), a resolution or recommendation, or also a model law or legal guide. If the option was ultimately for a more legally binding formula (e.g. a directive or regulation), I would consider it preferable to use a regulation rather than a directive. This is both because of the problems and limitations that have arisen from the latter in practice, and because it would be appropriate to bring the "optional instrument" in line with other initiatives (such as the future Rome I Regulation).

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Regarding the contents of the "instrument", we mainly need to consider its material scope of application. However, first of all we think it is advisable to mention the problems that could be caused by defining its territorial scope of application.

1) In this respect, in our opinion, the Communication's reference to "cross-border contracts in the internal market" raises two fundamental problems.

a) On the one hand, the actual definition of cross-border transactions, because of the fact that on some occasions it is difficult to define which situations are purely internal and which should be described as 'intra-Community' (in this respect, the option of Article 1 of the Rome Convention of 1980 – "choice between laws" – is an option to be taken into account, but it would go further than the intention indicated by the Commission).

b) On the other hand, it is also problematic to limit it to contracts linked to the internal market. It would therefore be advisable to also use the instrument for contracts involving third countries. That is, at the risk of creating an exclusively 'regional' instrument to operate in a 'global' market, it is better for it to apply to all types of international contracts. Consequently, mentioning the "internal market" could give rise to definition problems, and also its optional nature would make it difficult to limit its use to that geographical area, and would also prevent it from being 'exportable' (to be used by operators in international trade).

2) With regard to defining the material scope of application of the "optional instrument", there are also, in principle, two options: creating an autonomous, overall and complete regulation or a text with partial scope (in terms of the matters to be ordered). On this matter, we do not think that it is currently very viable to create a horizontal and complete text for international contracts. We therefore think it would be more effective to order those aspects of international contracts that are most problematic or are not currently effectively ordered. This is something which, as has already been indicated, would mean:

a) On the one hand, keeping in mind and coordinating the choice of aspects with the aforementioned Community and international initiatives. In this respect, the "optional instrument" should make special mention of defining mandatory rules governing international contracts (Communication, no 94), thus identifying the areas that are optional for the contracting parties and clarifying the 'hard core' of aspects on which there is no choice and discretionary matters. Along with this, it would also mean examining those aspects that already have legislative provisions (and verifying their effectiveness in international trade), and deciding whether the extremes that do not yet have legislation should be regulated. In this respect, texts such as the CISG, the PECL or the UNIDROIT principles could be of some use (their solutions could be adopted directly, incorporated via a reference in the "instrument" or the answers in other frameworks could be clearly linked and coordinated with those in the "instrument"). However, it should be kept in mind that the CISG only covers contracts for the sale of goods and the "optional instrument" needs to aim to be broader as it needs to be horizontal, and therefore applicable to all types of international contracts.

b) On the other hand, its partial nature (which is almost essential), would require reference to a law (not necessarily State law) to provide subsidiary regulations for the contract. Consequently, creating an "optional instrument" could again raise the importance of private international law in the creation of European contract law. We would therefore also advise that the "optional instrument" be brought into line with the work leading towards the creation of a Rome I Regulation. This would enable the "general frame of reference" to play a subsidiary role, at the appropriate time, in regulating the contract, and also other legislation or texts that may be appropriate for fulfilling the objectives set.

Legal basis

The broad range of terms used by the Commission to refer to the "optional instrument" mean that, in principle, there are various articles of the EC Treaty that could enable this type of legislative action. The possibility could be considered of using Articles 65, 95 or 308 of the EC Treaty in order to undertake this initiative. However, perhaps it would be more appropriate, owing

to the "cross-border implications" of the instrument, to use Article 65 of the EC Treaty to create it.