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'The Common Frame of Reference and the Future of European Contract Law' – Society of European Contract Law (SECOLA) Conference, 1 and 2 June 2007, Amsterdam

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In relation to contract law, the EU has to date followed a sector specific approach. This has resulted in various legal instruments, mainly directives, that cover certain topics in the area of contracting, for example directive 1999/44/EC on certain aspects of the sale of consumer goods and directive 1997/7/EC on distant selling. A need is felt for more coherence in this fragmented legal landscape that has arisen on an EU level. To this end, the Commission has undertaken several initiatives. Two of these initiatives, the Common Frame of Reference (CFR) and the review of the consumer acquis, were the topic of the SECOLA conference that took place in Amsterdam on the 1st and 2nd of June 2007. The venue was the historical Trippenhuis, home to the Royal Netherlands Academy of Arts and Sciences.

The CFR is to provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EU acquis and on best solutions found in Member States' legal orders. The review of the consumer acquis aims to simplify and complete the existing regulatory framework and covers 8 directives which concern consumer protection. At the time of the SECOLA conference, both the CFR and the review of the consumer acquis, were still work in progress. The conference focused on main themes such as structure, legitimacy, underlying principles, aims and scope rather then the content.

In his opening and welcome C.E. Perron, the dean of the law faculty of the University of Amsterdam, underlined the relevance and the impact of Europe. He was followed by Ole Lando (Copenhagen), the first speaker of the day. The title of his speech (the values of the CFR) did not entirely cover its contents. He started by stating that he has no doubt that the CFR will be a work of high quality, then he continued by enumerating a series of critical remarks. His critique related to the structure, the level of abstraction, but also the content. He noted some differences with the PECL; differences he did not entirely understand, for example the limitation of the principle of good faith and its accompanying explanation. Notwithstanding these serious question marks he finished in the manner he started, expressing his confidence in the quality of the work and the value of the product.

The second speaker, Gösta Petri (Commission DG Sanco), gave an introduction to the review of the consumer acquis. He explained why the review is needed (new market developments, fragmentation of the rules, achieving confidence in both business and consumers, and finally, better regulation) and gave an overview of the issues raised in the Commission green paper. The Commission is studying the responses to this paper; a summary of the responses is expected in October, probably followed by a proposal.

Hans Schulte-Nölke (Bielefeld University) addressed the formation of contracts in the acquis. He noted that the EU approach has resulted in a high density of EU regulation affecting the pre-contractual phase. Then there is a gap in EU-regulation which concerns the moment of contract formation. The post-contractual phase, relating to performance and remedies, shows a medium level of density in EU-regulation. Coordination between national law and EU law is necessary where there is a high density of regulation. Another matter requiring coordination is the rules concerning the B2B and the B2C relation, as these are not strictly separated areas. He feels there is a need for a completion of the regulation by filling in the gaps. He remarked that the restatement of the acquis and the CFR can be helpful instruments, but problems and barriers will remain even after the revision of the acquis.

After some discussion with the audience, the series of presentations was continued by Gerrit De Geest and Mitja Kovac (both University of Ghent). They addressed the formation of contracts from a law and economics perspective. The speakers collected a number of principles from the law and economics literature relating to contracting. For example, the party that has the cheapest access to information concerning the contract (the least information cost gatherer, in most cases the seller) should produce and communicate the information. Another principle is that there should be no duty to reveal entrepreneurial information, which could mean a little lying is required to protect your interests. A remarkable finding (disagreed upon by some members of the audience) was that the difference between giving wrong information and concealing information during contract formation is irrelevant. They also found that intentionally or negligently giving wrong information is irrelevant, except for the remedies. From an economics perspective, besides the duty to inform doctrine, there is no need for separate doctrines on mistake, fraud, misrepresentation or latent defects. Additionally, the condition that a contracting party would not have entered the contract with better information is analytically imprecise and unnecessary. Many of these findings undermine the assumptions in contract law or label the legal conditions as irrelevant and imprecise. They finished by presenting an outline of an optimal doctrine on the duty to inform in contract law and commented on several of the (draft) articles of the CFR from this perspective.

The next speaker, Thomas Wilhelmsson (University of Helsinki) commented on the values of the consumer acquis, with particular emphasis on the formation of contracts. He started by expressing his doubts with regard to the use of the concept 'coherence in law'. What exactly is meant by this and what do we want to achieve with it? Although he does not oppose to the use of the concept, he feels that it is too easily used without a proper definition. Moreover, many issues that confront us are political issues rather then coherence issues. Furthermore, he expressed his opinion on dualist thinking, i.e. thinking in terms of freedom versus individuality, individualism versus altruism, freedom of contract versus regard and fairness, liberal versus social, etc. Dualist thinking, in his view, does not help when analyzing contract law. Context of the rule is also relevant: what is liberal in one country, might be considered welfarist

in another, it all depends on your point of view. Possibly, certain rules with social purposes only favor the wealthy in a society, thereby aggravating the problem concerning the distribution of wealth. After setting out several varieties of welfarism, he concluded that, in the end, it is unavoidable that various kinds of rules are based on various constellations of values. In other words, there can be no such thing as 'coherence in law'. This, at most, can be achieved in sub-areas of law.

Giorgio Monti (London School of Economics) investigated the revision of the consumer acquis from a competition law perspective. A division can be made between consumer law (the demand side) and competition law (the supply side), which appears to be a clear division. However, consumer law affects the supply side and vice versa, competition law affects the demand side. First he considered consumer law from a competition law perspective. For example, rules of the unfair contract terms directive can be used to address the problem of a non-competitive market. In the so called 'bargain-rip-of-scenario', a customer is offered a good deal in the purchase of a product, but is confronted with expensive and exclusive after sales services. Possibly, these practices, which exclude any competition in the after sales market, are found to be unfair as meant in the unfair commercial practices directive. In his view, the good faith principle of the unfair practices directive seems out of place. It appears to be irrelevant when analyzing the use of market power. Rethinking the directive from a competition law perspective might give rise to a reduction of the conditions as to what is considered 'unfair'. Second, he considered competition law from a consumer protection perspective. Addressing questions such as: does consumer law limit competition? Does enforcement of competition law benefit the consumer? He argued that in competition law the question is not 'is it fair?', but it poses the question 'does it cause harm?'. Rather then looking at the form of activities, competition law looks at the harm caused by them.

In the afternoon, Hugh Beale (University of Warwick, English Law Commission), excused Christian von Bar (Osnabrück University), who, due to circumstances, could not be present. Beale included the main points of von Bars' speech in his own speech on the CFR. He noted that the Commission seems reluctant in setting out precisely the intention of the CFR. Two functions are commonly mentioned: the toolbox function and the function to serve as an optional instrument. However, it remains unclear whether it should encompass model rules, merely a set of definitions or a set of principles. Contributing to the lack of clarity is that the project got mixed up in the review of the consumer acquis, when this latter project was speeded up. Originally, the outcomes of the CFR project were to be used in the review, but both projects now run simultaneously. As it is all still work in progress, no clear picture can be presented. He summarized some of the problems the project group on the CFR is faced with, such as: the approach (pragmatic or principle based), the content of the principles (good faith or freedom of contract), the coverage (likely to be narrow due to lack of political consensus) and the structure (hierarchical or horizontal). A more fundamental question that can be raised is the legitimacy of the CFR. At the moment,

it is the work of a group of academics. The intention is not to usurp the legislative function, but to present a theoretical book. It is up to the legislator to adopt it as law or not. Nevertheless, certain choices are made within the work. These choices should be documented and explained, so that the legislator is not misled and shown the alternatives that were discarded by the academics. In relation to the future of the CFR, Beale is confident that the project is going somewhere. Even if it were to end in tears, it is worthwhile because of the academic efforts made in the field. It has facilitated a much better dialogue between colleagues from across borders.

After some lively discussion that followed Beale's entertaining speech, the last speaker of the day, Marieke Oderkerk (University of Amsterdam) dealt with the comparative law method. A relevant speech, as the comparative law method is used in the CFR project. She discussed the method starting with the preparatory phase, followed by the search and description phase, the comparison phase, the phase of explanation and finally, the phase of evaluation. She stressed that the purpose for which the comparative law method is used should be made explicit. This purpose influences the choices that will be made in the different phases. She noted several problems that occur in the CFR-project: what criterion is used to determine what is the best solution? How many systems of law should have a certain solution to be able to consider it a common core of the EU? Explicit evaluation criteria seem to be lacking.

At the end of the first day, the SECOLA general assembly determined the topic of the conference of 2008. The next conference will (again) cover the CFR and the review of the consumer acquis. By that time, the work can be discussed more in depth, on a content level.

On the second day, the conference was continued at the law faculty of the University of Amsterdam. Aneta Wiewiorowska (Warsaw) gave an insight into the perspective of Poland. She noted that it is an enormous challenge to transpose the EU legislation in a limited amount of time, with a lack of experience in the field. One of the problems faced in Poland are general clauses in EU-legislation, as in Poland they are used to literal interpretation of the law. Another issue is applying the underlying ideas of the EU legislation. Even if it is properly implemented, that does not mean it is effectively applied. Especially consumers experience difficulties when trying to enforce their rights. She explains that a lot of confusion is raised by the EU-approach with regard to the harmonization process. Lawyers do not see the distinction between the (many) EU projects such as, for example, the CFR and the revision of the consumer acquis.

Stefan Grundmann (Berlin) addressed alternative ways to European contract law codification. He expressed his disappointment in the present procedure (where several academics are in on it and the rest of us will have to wait and see), but also admitted that there are probably no other ways. Contract law is not simple and has developed and changed over decades. Tricky and fundamental questions have to be dealt with. Transparency is needed, but difficult to achieve. What is more, the process

will take a lot of time. The current process raises the issue of legitimacy: leaving it to the academics is hardly democratic. On the other hand, the project is not workable if everyone has input. One way of resolving this is to consider the academics as agents of the lawmakers and the lawmakers as agents of the public. Another manner is to have an optional system; the choice for the system then provides it with legitimacy.

During the discussion that followed, the point was made that although we call it a research project, it is very likely that it will have some normative effect. In fact what is then happening at the moment is lawmaking and not merely an academic endeavor.

Meglena Kuneva of the Commission addressed the audience and answered some questions. She stipulated that the Commission favors the mixed (vertical and horizontal) approach. She found the term 'full harmonization' confusing and called upon the audience to suggest other terms, for example 'targeted harmonization'. As for the future steps, the Commission will now first await the first findings of the academics, then identify the common legislative objectives and focus on what is really needed for the policy making purposes. She emphasized that she is focused on achieving results that benefit the consumer before the end of her mandate. This means a focus on relatively short termed goals. Long term goals include engaging various European institutional, market and academic players in the common goal of shaping European contract law.

The conference was concluded with a panel discussion. The panel consisted of Karl-Heinz Oehler (ministry of Justice, Germany), Menno Bouwes (Ministry of Justice, The Netherlands), Jorge Liz (Social and Economic Committee) and Thomas Wilhelmsson (Helsinki). Each of the members shortly expressed their opinions on several issues after which the floor was open for comments and questions from the audience.