The Draft Common Frame of Reference: Building Block or Stumbling Block for a European Civil Code?

1.   In December 2008, a Joint network of seventeen universities and associations (CoPECL) presented a Draft Common Frame of Reference (DCFR) to the European Commission.[1] A year earlier, an interim report had already been presented. At the time of writing, an Outline Edition is available. This is in English only and without comments. Publication of a six-volume set containing the comments and notes is anticipated later this year.[2]

2.   What will be the political fate of the DCFR: is it a stepping stone towards a European Civil Code, or at least a Contract Code? Or will it end up in the drawers of the Brussels bureaucracy? Even the most ardent codificators now seem content that a Code for all of Europe does not appear imminent. Their hope is that the present text may inspire the European Union and Member States when they adopt new legislation on private law. Even this hope may yet be too far-fetched, witness the fact that the European Union's proposal for a Directive on Consumer Rights does not even mention the DCFR. On the other hand, it appears quite certain that the DCFR will play a major role in academic discourse in the coming years.

3.   This at least is what this special issue of ERPL sets out to contribute to. After a public call for papers, several contributions were submitted. Three papers of a more general nature were written by Antoni Vaquer, Chantal Mak, and Matthias Storme. Antoni Vaquer discusses the use of legal terms and more particularly analyzes the consistency of the use of legal terms in the text of the DCFR. Chantal Mak observes that the present DCFR does take into account some fundamental rights but that this could and should be much more extensive. In a comment in a German volume, Hugh Beale, one of the principal draftspersons of the DCFR, has submitted that the European Commission had suggested doing more with fundamental rights but that the editors for practical reasons refrained from doing so.[3] Contract matters are usually presented as two-party relations. Matthias Storme shows us how multiparty relations may be dealt with under the DCFR.

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[1] Christian von Bar, et al. (eds), *Principles, Definitions and Model Rules of European Private Law/ Draft Common Frame Of Reference (DCFR)/Outline edition* (München: Sellier, 2009), 643.

[2] Christian von Bar, Eric Clive & Hans SchulteNölke (eds), *Principles, Definitions and Model Rules of European Private Law/Draft Common Frame of Reference (DCFR)/Full edition*, vol. 6 (München: Sellier, 2009), publication announced for October 2009, approx. 6100.

[3] Hugh Beale, 'The drafting of the academic common frame of reference', in *Der Gemeinsame Referenzrahmen/Entstehung, Inhalte, Anwendung*, ed. Martin SchmidtKessel (München: Sellier, 2009), 3547.

4.   Carlo Castronovo shows how the DCFR provisions on information duties and precontractual good faith – Articles II-3:101 ff. – result from the merging of the work of the Lando Commission, continued by the Study group on a European civil code and that of the Acquis group.

5.   Kåre Lilleholt and Anders Bernhard Mikelsen discuss the DCFR rules in Book III on unexpected difficulties in performance and a possible distinction between obligations to achieve a specific result and obligations to use reasonable efforts. One of the main stumbling blocks for harmonization of private law in Europe, it is often submitted, is the gap between civil law and common law. One area where the gap is apparent is that of specific performance. Gerard de Vries concludes that the gap is not as wide as might have been expected. He analyses why the DCFR's Articles III-3.301 ff. reiterate the compromise reached in the Principles of European Contract Law (PECL) but deviate from it in the end. On the same issue, Martijn van Kogelenberg prefers the solution of the PECL. This author criticizes the DCFR's lack of attention for procedural issues. Ole Lando provides us with an in-depth analysis of English, French, German, and Nordic law with regard to foreseeability and remoteness in contracts between businesspersons. The international instruments including Article III.3:703 DCFR, which he discusses, are quite similar but not identical.

6.   One of the innovations of the Consumer sale directive was the introduction of a regime for consumer goods guarantees. The Study group on a European Civil Code went for a more detailed regulation, which was the basis for the DCFR's Articles IV.A-6:101 ff. Christian Twigg-Flesner criticizes these detailed rules, which in his opinion lack a sound basis. Andreas Fötschl compares the DCFR rules on leasing in Chapter IV.B with the Unidroit Convention on International Financial Leasing.
     Although he finds great similarities, this could have been even better. Benoit Kohl discusses Chapter IV.C-3 on construction law, which in his view could well serve as a model for a future reform of Belgian construction law.

7.   Guillermo Palao Moreno explores the non-contractual liability rules in Book VI of the DCFR, especially in the light of conflict of laws (the Rome II regulation).

8.   The newly introduced Book VIII on acquisition and loss of ownership of goods raises some questions, witness the paper by Arthur Salomons. Torgny Håstad concludes that as far as derivative acquisition is concerned, Chapter 2 of Book VIII should have taken an issue-by-issue approach rather than a general unitary rule.

9.   Putting together this Special Issue has mainly been the work of Dr Martien Schaub, our former Managing Editor. Martien has recently left us to accept the

position of Academic Manager of the freshman year of Utrecht University's Civil Law Department. We are most grateful to her for her work for ERPL.

10.   Martien's successor is Dr Chantal Mahé, equally of Utrecht University. Chantal read law in Rennes, Paris, and Utrecht, where she also obtained her PhD (on 'La résolution du conflit de conditions générales/Une étude comparative'). She presently is lecturer in law in Utrecht. We wish her a fruitful time with us.

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Co-Editor in Chief