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The European Civil Code Movement and the European Union's Common Frame of Reference

This is the inaugural Willi Steiner Memorial Lecture given by Professor Hugh Beale[1] at Freshfields, Bruckhaus Deringer on May 12, 2005, in memory of one of the most distinguished law librarians of our generation.

Introduction

It is a very great honour to be invited to give this lecture in memory of Willi Steiner. I was not privileged to know him personally but I have long been aware of the enormous contribution that he made to the development of the Squire Library in Cambridge and the library of the Institute of Advanced Legal Studies, of which I have been a grateful user for many years. I am also very aware of Willi's contribution to legal scholarship in general and in particular to comparative law. His work on the *Index to Foreign Legal Periodicals* is just one example. I hope and believe that the topic on which I am going to speak tonight would have interested him.

Hugh Beale

"European private law": EC legislation

Perhaps a more accurate title would be "The Rush to Discover (or to create) a European Private Law". In one sense we already have a European private law in the form of the legislation from Brussels. Firstly, some of the articles of the Treaty, for example those dealing with competition, give direct rights of action to those who are injured by anti-competitive practices. Secondly, there are many regulations that affect matters of private law, for example in the field of jurisdiction.[2] Thirdly there are the European directives, which Member States are obliged to implement, though the precise means of implementation is left to the Member State.

European law in this sense has had a very considerable impact on what can be done by contract – I am thinking, for example, of the law of competition – and on the contracting process: here I am thinking of the many directives on public procurement.[3] The impact of European legislation on our private law itself and in particular on our law of contract is more limited. It is mainly in particular sectors, especially consumer contracts. There are only two directives (the Commercial Agents Directive,[4] which again is narrowly sectoral, and the Late Payments Directive[5]) that affect commercial contracts. Within the field of consumer law, European law is very significant and some of the consumer rules are of sufficient importance to be treated as part of the general law of contract. The prime example is the Unfair Terms in Consumer Contracts Directive[6] and the Regulations that implement it.[7]

"Common principles of European private law"

However it is European law in a different sense on which I would like to concentrate tonight. This is the question of whether, despite the apparently enormous differences between the various laws of the Member States, there are common principles that are shared by each of the different laws and can be called 'European Private Law'. Of course there is a great deal in common between jurisdictions which are in the same "legal family" – for example, Belgium, Luxembourg and Spain share a great deal of their private law with France; Portugal and Greece with Germany; the Scandinavian countries have many rules in common; and we share much of our law with Ireland and to a lesser extent with the 'mixed' system of Scottish law. But between these different legal families, is there a common heritage of rules?

"Common core" projects

Willi Steiner had a great interest in comparative law. I would be very keen to know what he would have made of what I think are two new strains in comparative law. The first of these is to use traditional methods of seeking out commonalities between the systems specifically within Europe. For example the project which led to the great publication by Schlesinger on *Formation of Contracts*[8] involved taking typical fact situations, often derived from decided cases, and asking how they would be solved in each jurisdiction. This methodology is currently being used by the so-called Trento project, but focussing on Europe. You may have seen the results of the project in the series of volumes published as Cambridge Sudies in International and Comparative Law: Whittaker and Zimmermann's *Good Faith in European Contract Law*;[9] Gordley's *Enforceability of Promises in European Contract Law*;[10] Kleininger's *Security Rights in Moveable Property in European Private Law*;[11] and most recently, Sefton-Green's *Mistake, Fraud and Duties to Inform in European Contract Law*.[12] It is very interesting to note the name of the Trento project. Its official title is the *Common Core of European Private Law*. I may add that at least some of the participants in the project reserved their position as to whether there is a common core.

Secondly there is a series of casebooks that set out side by side similar cases from different jurisdictions. There is one on tort edited by Van Gerven and Jeremy Lever;[13] one on *Unjust Enrichment* by Beatson and Schrage[14] and one on *Contracts* in which I was involved.[15] Again the title of the series is revealing. It is called the *Ius Commune Case Books on the Common Law of Europe*. There is nothing new about casebooks, or even casebooks on comparative law, but the title is suggestive.

Restatements: Unidroit and the PECL

The second strain involves a relatively new methodology. These are projects which aim to produce "restatements" of the common principles of European private law, very much along the model of the Restatements of American law produced by the American Law Institute. I believe I am right in saying that these projects started as attempts to draw up rules for international transactions. Many of you will know the United Nations Convention on International Sale of Goods, 1980 (often called the Vienna Convention or 'CISG'). That dealt only with sales but it led to another project by Unidroit to produce *Principles for International Commercial Contracts*.[16]

Those efforts were entirely international in their outlook. In 1980 a breakaway group from Unidroit, led by Professor Ole Lando and self-styled the 'Commission on European Contract Law', aimed to produce principles that are specifically European. We have to remember the context. Before 1989, the countries of the communist block were very active participants in the Unidroit process and seemed to have considerable influence on the draft principles. One reason for breaking away was that it was thought that the result might not be suitable for the European internal market. In fact before any of the work was completed the communist regimes fell and the two sets of principles have ended up being very similar. Another was that the work seemed to be progressing slowly – though in fact the Unidroit Principles were published before its competitor's.

The work produced by the Lando group, the *Principles of European Contract Law*, (PECL) are actually much closer to the American Restatements than are the Unidroit principles. This is because the PECL do not only contain articles and a commentary, explaining how the articles are supposed to fit together and the scheme as a whole work (these you will find in Unidroit) but, like the Restatements, contain also notes, comparing the rules of the various jurisdictions and showing the sources from which the rules have been chosen.

The *Principles of European Contract Law* appeared in three phases. The first, dealing only with performance and remedies, was published in 1995.[17] Part I was re-issued combined with a new Part II, so that nearly all the general parts of contract were covered, in 2000.[18] Part 3, dealing with additional topics, appeared in 2003.[19]

New groups

At least in academic circles, the Principles of European Contract Law has become well known and strangely influential in the sense that they have spawned a veritable industry of restatements.

Most directly, they have been succeeded by a much larger project headed by Professor Christian von Bar of Osnabrűck and entitled rather grandly - or perhaps threateningly - the *Study Group on a European Civil Code*. This has a number of teams working on different topics. For example von Bar's group in Osnabrűck has worked on torts, unjust enrichment and what our continental neighbours call *negotiorum gestio* (to be translated as 'benevolent intervention'); a group under Professor Drobnig at Hamburg is working on personal security (or guarantees) and security over moveable property; there are three groups in Holland working on sales, services contracts and long term contracts; and there are groups working on the transfer of property and so on.[20] The group has subsumed the Commission on European Contract Law, Lando having surrendered his powers to the wider group.

In addition there are a number of quite independent groups. Thus the Academy of European Private Lawyers, headed by Professor Gandolfi, has produced a rival *Code of Contract Law*[21] which, interestingly, draws heavily on the draft code of contract produced by Dr Harvey McGregor for the Law Commission back in the 1970s.[22] There is a rival group on tort and insurance law headed

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by Professor Spier, which has just published its *Principles of European Tort Law*;[23] there is a group working on insurance contracts run by the late Professor Reichert Facilides and now by Professor Heiss.[24] In addition two groups have been working to try to unearth any principles that may underlie the existing European Law or *Acquis Communitaire*. These are called, appropriately enough, the Acquis Group[25] and the Terminology in European Contract Law Group.[26] There are a number of other groups as well. In addition to the Trento group and the case book series that I have mentioned, there is a Society of European Contract Law;[27] the Association Henri Capitant is active in France;[28] a new research group on the economic assessment of contract law rules has been set up[29] and lastly there is a group that calls itself the study group on Social Justice in European Law.

Why is the latter so much enthusiasm for European private law? And what is the purpose of producing these restatements or, if you are sceptical of a common core, these artificial creations that purport to represent European law?

The purpose of restatements

I believe that the people involved are working for a number of different purposes. For some, the purpose is purely academic. They see the production of statements of what we have in common, and the working out of what differences there are in substance between the legal systems, as a fascinating academic exercise. Indeed it is. At the other extreme there are those who firmly believe that sooner or later (and preferably sooner for some of them) we must unify private law across Europe. This may be because they think this is the only way to make it easier to trade in Europe; or because they think that this will help to develop a genuinely European legal culture; or again because they have an overtly political purpose. Some people believe that having unified law will help to cement an ever closer European Union. You may know how important the German Civil Code was thought to be at the turn of the last century in unifying what had been a disunited country.

However I think there is a third group, in which I count myself. This group does not believe in unifying our law across Europe; indeed many of them are positively hostile to it. However they think that these restatements can serve practical purposes as well as being a purely academic exercise.

Willi's wife Barbara and members of his family at the lecture

Firstly, in international contracts it is not at all uncommon to find an arbitration clause in which the arbitrator is instructed not to apply the law of one or other of the parties but to apply a neutral system such as "internationally accepted principles of contract law". Sometimes the old Latin phrase the *Lex Mercatoria* is used. That is all well and good, but where is the arbitrator to find a statement of internationally accepted principles or of the modern *Lex Mercatoria*? Sets of internationally agreed principles, such as the Unidroit Principles or the Principles of European Contract Law provide an obvious answer.

Secondly it is possible for the parties to a transnational contract, when neither is willing to adopt the law of the other state, to adopt such principles expressly. This does not enable the parties to escape national law entirely. As yet, such "soft law" principles cannot supplant the mandatory rules of the national system of law that would otherwise apply. However, at least in business to business contracts, most systems have relatively few mandatory rules and generally allow the parties to agree what rules they want to govern their relationship. So adopting, say, the Principles of European Contract Law to govern your contract will in effect replace a great deal of the law which might otherwise apply.

Thirdly, these restatements of European Principles are very often an attempt not only to state what is common but, where there are differences (and occasionally, even when there aren't differences), to state what is thought to be the best, most modern rule. As a result they are thought to be very suitable as models for legislation. When the Principles of European Contract Law were being finalised, members of the Commission were very aware that the then new democracies of Central Europe were busy reforming their civil codes. I know that the Principles have been extensively considered in some of the revision processes.

However, there are two more uses which are more relevant to my theme tonight. The first is that at least the Principles of European Contract Law, with their national notes, can be used as a translation tool, as a method of moving from one legal system to another without losing your way. Let's suppose that a lawyer wants to discover what the law in Germany is governing a case of what in England we would call 'innocent misrepresentation'. They will not find, in all probability, an entry in the indices of German books for 'misrepresentation', let alone a chapter heading. If however they find where

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misrepresentation is dealt with in the Principles of European Contract Law, by looking through the relevant national notes, they will then find the equivalent German rule (in this case, it would be part of the chapter on mistake) set out in the same note. As one of my Dutch colleagues put it the other day, we envisage a day when a lawyer can sit at her computer and, via the Principles, can interrogate the law of any other Member State.

Lastly, restatements like the Principles of European Contract Law can be used as a guide for European legislation that does not amount to a civil code but is merely the kind of sectoral harmonisation that we are used to in the area of consumer contracts. Let me take just two simple examples. The Directive on Unfair Terms in Consumer Contracts contains a test of when a term is fair. The test is repeated word for word in the Regulations[30] and you will see that it refers to the concept of 'good faith'. Now in English law we would not use the concept of good faith in this context. We did not have a direct equivalent to the Unfair Terms Directive before it was implemented here but our Unfair Contract Terms Act overlaps with it to some extent. That Act uses a test of whether a clause is fair and reasonable. Is that the same test as whether a clause is consistent with good faith? Or is it something different? It is quite hard to tell. The learned editor of the relevant chapter in *Chitty on Contracts*[31] takes the view that the two sets mean virtually the same thing and I am glad to say that the Law Commissions agreed with him.[32] (If they had not, as general editor of *Chitty*, I would have been in a rather awkward position). It would have been a great deal easier if we had had a set of principles which explained what good faith means in European Law.

Or take a second example, beloved of the European Commission. The Package Travel Directive[33] says that in certain circumstances the consumer is entitled to be compensated for 'damage' when he or she has not been given the holiday that was promised.[34] What does 'damage' mean? The problem arose that though in many countries, including this one, the loss recognised by the law and compensatable in 'damages' would include compensation for simply having a poor holiday, in Austria, non-pecuniary loss is not allowed for mere breach of contract.[35] I suspect that if the directive had been drawn up against the background of a set of common principles, that problem would have been spotted and the Directive would have spelled out what it meant by way of damages.

So I think that statements of common principles can be very useful, first, for drafting directives. I know from personal experience with early versions of the consumer sales directive how difficult it sometimes is to understand what other people are talking about. Secondly, common principles can help us to interpret what the legislator in Brussels has said, so that we know what changes are needed to implement the directive in our legal system, and, if the implementing legislation is itself unclear, how it should be interpreted.

EU developments

That of course depends on whether the legislators in Brussels will make any use of these so-called European principles, and now I turn to the reaction of the various European institutions. They vary enormously.

For some years in the Parliament there has been a rather vocal group in favour of unifying at least the law of contract, if not the law of obligations generally. A resolution to that effect was passed as long ago as 1989, and has been repeated on occasions since then.[36] The real power-house of the European Union to date, however, the Commission, has been much less enthusiastic. Initially the Legal Services Branch supported the work of the Commission on European Contract Law, providing both money and encouragement. However, after the Treaty of Amsterdam that support was withdrawn on the grounds that supporting the project was inconsistent with the new principle of subsidiarity. Quite how the drafting of International Principles is better carried out by the Member States was never explained.

Communication on European Contract Law

More recently, however, the Commission has been showing a new interest. This is particularly so with the Director General for Health and Consumer Affairs but it has the support of a number of Directorates-General. In 2001 the Commission published a *Communication on European Contract Law*.[37] This asked first whether there was any evidence that differences between the legal systems were hindering trade within the internal market. It then set out four options. These were:

1. No action.
2. To promote the development of common contract law principles, leading to more convergence of national laws.
3. To improve quality of the legislation already in place and
4. To adopt new comprehensive legislation at the EC level.

The Communication produced a very large number of responses, which can be found on the Commission's website.[38] There was certainly evidence that in some sectors differences between the legal systems were indeed causing additional costs in trade between Member States, though the degree of the hindrance was estimated very differently by different respondents. As to the options, there were very few who said nothing should be done. Almost everyone agreed that the quality of the existing legislation should be improved. Many people supported the development of common contract law principles though some, including our government, doubted whether convergence of national laws should be seen as an end in itself. As to the question of comprehensive legislation at EC level, there was a wide

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variety of opinion from those who wanted a civil code as soon as possible to those, again like our government, who were opposed to option 4 "in any of its forms".

Action Plan on a More Coherent European Contract Law

In 2003 the Commission published a second document its *Action Plan on a More Coherent European Contract Law*.[39] This proposed essentially combining the second and third options. It suggested that the existing *acquis communautaire* should be improved and future legislation should be drafted by using a Common Frame Of Reference (CFR).[40] The CFR is in effect the restatement referred to in the second option of the earlier paper. The CFR would not have independent legal force but would be a guide or tool-box for legislators. The paper also suggested promoting European Community-wide contract terms (the Commission's involvement was to be limited providing a website on which information about contract terms could be exchanged); and that there should be 'further reflection' on the need for an optional instrument. The notion of an optional instrument was however somewhat refined. It became clear that the Commission is thinking of something rather like the Convention on International Sale of Goods for dealing primarily with cross-border contracts, though it might also be applied to purely domestic contracts. It might be a scheme which the parties had to opt into or one that, like the Vienna Convention, would apply unless they opted out.

European Contract Law under the Revision of the Acquis: the Way Forward

Further details of the Commission's plans were set out in a document in 2004, *European Contract Law under the Revision of the Acquis: the Way Forward*.[41] This suggested that the Common Frame of Reference should contain common fundamental principles of contract law, definitions and some model rules. An annex to the document suggested the possible content of the CFR. The Commission envisages that the CFR will cover the general parts of contract law (the annex reads very much like the table of contents to the Principles of European Contract Law) plus provisions on consumer law. That is an important addition since the PECL deliberately did not cover consumer law. Further, there might be provisions on specific contracts – sales and insurance being mentioned. Meanwhile, eight directives are to be reviewed and these can then be revised in the light of the CFR.

The Common Frame of Reference

In terms of the form of the CFR, it seems that the general rules of principles to which the document refers are meant to be simply basic rules like one that freedom of contract should apply except where the rules provide otherwise, and the principle of good faith. The definitions would in practice be in the form of a series of rules. For example the Commission suggest there should be a definition of when a contract is concluded. I do not know how to define that save by laying down a set of rules to govern the topic.

How is this common frame of reference to be produced? The Commission made it clear that they did not wish to reinvent the wheel. They would draw on existing research projects. What they have done is to encourage many of the existing groups to form themselves into a joint network, to be funded by a different Directorate General under the Sixth Framework Programme. Of the groups drafting principles, the Study Group on the European Civil Code, the Insurance Group and the Acquis Group have joined the network. In addition there are a number of "evaluative" groups. The group dealing with economic analysis will do as its name suggests; the Association Henri Capitant will consider the differing philosophies of the various contract laws and of the draft CFR; and the Trento group will test the draft rules produced by the groups drafting principles against recurrent fact situations. There are also two supporting groups which will provide a database and conferences.

Meanwhile, the Commission has set up a network of 'stakeholders'. The researchers are to present their drafts to meetings of the stakeholders and to receive comments which, so far as time permits, they should take into account in preparing the CFR. There are also working groups of experts from the various member states.

The joint network is to submit a draft common frame of reference and evaluative commentary to the Commission by the end of 2007. The Commission will then organise a consultation process on this and produce the common frame of reference.

Therefore it looks as if the Principles of European Contract Law and the principles being drafted by the other groups will receive official recognition, at least in a modified form. They will not become law but they should become a standard set of principles, concepts and terminology against which the existing European legislation can be revised or, when new legislation is contemplated, drafted.

Legitimacy of the CFR

Does this count as a European private law? If it does, then I think the way in which the CFR is being produced would be worrying. I referred earlier to the Social Justice Group. That group has published a manifesto[42] in which it points out that legislation is not purely a matter for technocrats or academics. It involves important policy choices and indeed choices between competing values. The Group points out that legislation therefore must have a democratic input.

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I agree with this; and there is certainly no way in which the researchers producing the common frame of reference can claim to have any democratic mandate. However, I think the objection is premature. The common frame of reference will in the first instance be at best 'soft law', as it is only to be a guide for legislators or a 'tool-box'. There is nothing requiring European legislators to use the CFR. They remain sovereign in that they will be free to adopt it or reject it. Therefore the question of the democratic legitimacy of the CFR itself does not really arise. Indeed I suspect the problem will be precisely reverse, that the Commission will find it very hard to get the Council to abide by the terminology and concept of the Common Frame of Reference. Frequently the problems with directives is that carefully-prepared drafts have been amended at the last moment, often as the result of some political compromise, and the amendments are not legally coherent and certainly not consistent with the terminology of the rest of the directive.

On the other hand, the purpose of the CFR as a tool box does have implications for its content. It would not be enough to have articles and comments. It seems to me that the national notes will be absolutely vital for a number of reasons. First, we must enable legislators and users to understand how the principles relate to the various national laws and therefore how a draft directive drafted in the light of the common frame of reference will impact on any particular national law, and so how to implement the directives correctly in the various national laws. Secondly, and more importantly, the Notes should point up to legislators where there are differences between the various national traditions and, in drafting the CFR, what choices have been made. The Commission says that the common frame of reference should reflect common principles or, where the principles vary from one member state to another, the "best solutions" found in the legal orders of the various member states. It will be absolutely vital for the note to explain what the choices were and why the rule in question has been selected by the researchers as the "best" rule.

The Optional Instrument

If at a later stage the common frame of reference is to be used as the basis of an optional instrument, then I think that the Social Justice Group's points will be valid. But first I need to explain what I think is meant by the optional instrument. I should stress that these are just my views; I have heard many different opinions. My understanding is that the optional instrument would be a system of law which could be chosen by the parties, particularly for international transactions, instead of choosing the law of one of their countries or of a third country. So it would replace national law for the contract in question. If you like, it would form a 26th legal system within the European Union, (There are in fact many more than 25 existing systems already).

Let us suppose that a seller in Ruritania is negotiating with an English buyer. Neither may be willing to accept the other party's law. They could adopt instead the optional instrument. This could apply not only in business-to-business contracts but also in consumer contracts. Like most national systems, the optional instrument would probably, when it applies to business contracts, contain mainly default rules. In consumer contracts, in contrast, national laws contain many mandatory rules, and this would also be true of the optional instrument. After all, many of the mandatory rules of the national consumer laws are of European Community origin. Even in business-to-business contracts there are some mandatory rules, for example the rules against penalty clauses. My understanding is that the parties would be free to choose the optional instrument to replace the national law which might otherwise apply, but they will not be free to pick and choose parts of it so as to avoid the CFR's own mandatory rules.

To achieve this, Member States would have to legislate so that the optional instrument became a part of each Member State's law. Needless to say, this would require a new treaty. I see no legal basis for an optional instrument within the existing European treaties.

The impact on English law

Direct impact

What would be the impact of this on us? Curiously I think that the law itself might be more affected by a common frame of reference used as a tool-box than it would be by an optional instrument. Let me explain.

The common frame of reference would first of all be used as a guide to the interpretation of European legislation, so that when European legislation provides, for example, that a consumer is entitled to 'damages', this would mean (unless otherwise stated) damages calculated according to the rules of the common frame of reference. In other words phrases like 'damages' within European legislation would acquire an autonomous meaning, a meaning that is not the meaning in any particular national law but a specifically European meaning. Secondly, the directives might explicitly incorporate the common frame of reference and say, for example, that damages under article X of the directive shall be calculated according to chapter Y of the common frame of reference. Any implementing legislation, and its interpretation, would be directly affected by the common frame of reference. It would thus become part of English law by being incorporated into the directives and having to be implemented in our law.

In contrast, an optional instrument would be merely another system of law. This is very important to us because, as you will know, English law is a law of choice in the sense that very many parties choose English contract law to govern their relationship even though they have no other connection with England. There are a number of

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reasons for this. One is that English law is very highly developed; a second is that it is sensitive to commercial needs; and a third is that our lawyers and our courts have a very high reputation for honesty, skill and efficiency.

Were English law to be replaced by a new "European Civil Code", we would have very serious worries. The poor quality of the existing EU legislation might lead us to worry that the civil code would be half-baked. Even if it were well done, there would inevitably be a long period of uncertainty while the courts worked out the precise implications of the different provisions. It might well be that the provisions of the code would be less favourable to commercial contracts than our current law.

However that is not what we are faced with. The Commission is quite adamant that the optional instrument would not replace any national law and that parties will remain free to choose English law, or any other law, if they wish to do so. If indeed the optional instrument were such a feeble and imperfect document as many of its critics suggest, I can see no earthly reason why anybody would choose it and there would be no threat whatever to English law.

In fact I do not see the optional instrument as a threat so much as an opportunity. If English lawyers would join in the process of creating the optional instrument wholeheartedly, first, they could make it a much better instrument and, secondly they could become expert in its application and then sell that expertise.

Indirect impact

However, I think that an optional instrument would have some indirect impact on our law. First of all it would provide competition. It's all very well to say that English law is the law of choice for commercial transactions. It is true that historically it has been a very popular choice. We must not, however, rest on our laurels. If it is to remain the law of choice it is very important that we keep English law in good order. There is some evidence to suggest that certain areas of English law are now out of date or so out of line with those of our continental neighbours and even, in some cases those of our North American friends, that parties are moving away from English law to other systems. For example it is well known that our insurance contract law is weighted very heavily in favour of the insurer. There is some evidence that one reason for our loss of market share of marine insurance is that people taking out insurance, if they are sufficiently sophisticated to know the difference between the various laws of insurance, prefer to do so under some other law than English law. That is one reason why a review of insurance contract law is one of the items on the Law Commission's Ninth Programme of Law Reform.[43]

However even if the common frame of reference is only ever used as a tool box and we never have an optional instrument, I think it will have the effect of making us more aware of other laws and more critical of our own law.

First, it will certainly engender a new demand for information. There will be a flood of new publications. Much of the literature will be in English (indeed I think that the fact that most of the restatements are in English is one reason why the European contract law movement has been so popular). In addition, I suspect people will want to research into the origins of the various rules so they will need access to the original laws of the various member states. I think this will increase the demand for books on foreign law, foreign legal periodicals and primary material very significantly. I think that we will see a growth in training course for practitioners who wish to learn something about the common frame of reference to understand its meaning better. We will undoubtedly see new courses in the universities dealing with European contract law.

Some of this is already taking place but we can be sure that if the common frame of reference becomes an official document, the demand for literature and the number of courses will increase dramatically. But I also think that in what I might call 'the world of thinking lawyers' - not only the universities but the leading law firms and chambers – there will be a new enthusiasm. What is important about the study of law at university, and what is so impressive about at least the larger firms and the leading sets of chambers, is that there are so many people who are not just concerned with what the law is, but are genuinely thinking about the law in a critical way. To my mind, the most important aspect of a university education in law is that you think about the subject critically. The critical standpoint varies and is perhaps less important. In the 1960s and '70s it was "Law in Context"; that was replaced by "Law and Economics" and then by "Cultural Studies" and postmodernism. In a sense each was just the latest 'fad' but each had the merit of making people step back from the law and think about it. I believe that European Private Law and the Common Frame of Reference, by providing an alternative to our existing law, will have the same effect of making people think about our law. Why do we have this rule? Is it better than the rule in the common frame of reference, or not so good?

Conclusion

To me the creation of a CFR is a fascinating project. I like to think that it is one that Willi Steiner would also have been very excited about. I only wish he were still with us to take part in it and to lend us his wisdom.

Notes

[1]Law Commissioner for England and Wales; Professor of Law at the University of Warwick. He was a Member of the Commission on European Contract Law, 1987–1999 and is a Member of Steering Group, Study Group for a European Civil Code. On these bodies see below.

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[2]See Council Regulation (EC) No 44/2001 of December 22, 2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

[3]See *Chitty on Contracts* (29th ed, 2004), para 10-026.

[4]Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed agents, [1986] OJ L382/17.

[5]Directive 2000/35/EC of the European Parliament and Council of 29 June 2000 on combating late payment in commercial transactions, [2000] OJ L200/35.

[6]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L95/93.

[7]Unfair terms in Consumer Contracts Regulations 1999 (SI 1999/2083), as amended by SI 2001/1186. The 1999 Regulations replaced earlier ones of the same name, SI 1994/3159.

[8]*Formation of Contracts: a Study of the Common Core of Legal Systems*, conducted under the auspices of the General Principles of Law Project of the Cornell Law School, general editor: Rudolf B. Schlesinger (Oceana, 1968).

[9]CUP 2000.

[10]CUP 2001.

[11]CUP 2004.

[12]CUP 2005.

[13]W van Gerven, J Lever, P Larouche (eds.), *Tort Law* (Hart, 2000).

[14]J Beatson and E Schrage *Unjustified Enrichment* (Hart, 2003).

[15]H Beale, A. Hartkamp, H. Kötz and D. Tallon, *Contract Law* (Hart, 2002).

[16]1994, with a second edition in 2004.

[17]O Lando and H Beale (eds), *Principles of European Contract Law, Part 1: Performance, Non-performance and Remedies* (Martinus Nijhoff, 1995).

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[20]For more details see http://www.sgecc.net

[21]The draft proposal for a general part of European contract law was published in *Giuseppe* Gandolfi (Ed.), *Code Européen des Contracts - Avant-projet*, Giuffré, Milan 2001. See also: Schulze/ Zimmermann (Ed.), *Basistexte zum Europäischen Privatrecht*, 2nd Ed., Baden-Baden 2002.

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[23]Springer, 2005. See http://civil.udg.es/tort/

[24]See http://www2.uibk.ac.at/zivilrecht/restatement/

[25]See http://www.acquis-group.org/

[26]See http://www.uniformterminology.unito.it/

[27]E.g. S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (Kluwer, 2002). See http://www.secola.org/

[28]See http://membres.lycos.fr/HenriCapitant/sommaire.htm

[29]Research Group on the Economic Assessment of Contract Law Rules

[30]Reg 5(1) provides that "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

[31]*Chitty on Contracts* (29th ed, 2004), para 15-068 (the editor of the chapter is Dr S Whittaker.)

[32]Law Commission and Scottish Law Commission, *Unfair Terms in Contracts, a Joint Consultation Paper* (LC CP no 166, SLC DP No 119, 2002), para 3.71.

[33]Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L158/90, 59.

[34]Art 5(2).

[35]See Case C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I-2631.

[36]Resolution of 26 May 1989, OJEC C 158/401 of 26 June 1989; Resolution of 6 May 1994, OJEC C 205/519 of 25 July 1994.

[37]COM (2001) 398 Final.

[38]http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf

[39]COM (2003) final, OJ C 63/1 ('AP').

[40]AP para 72.

[41]Communication from the Commission to the European Parliament and the Council, COM(2004) 651 final, 11 October 2004.

[42]Social Justice in European Contract Law: a Manifesto, *European Law Journal*, Vol 10, No 6, November 2004, pp 653–674.

[43]Law Com No 293, 2005, paras 1.12 and 3.24-3.28.

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