

**The European Union Common Frame of Reference (CFR):
An Inspired Idea or a Distraction?**

If you open that bloody Pandora's box, you will find a field of Trojan horses.

- Ernest Bevin, UK Foreign Secretary 1945-51¹

The Common Frame of Reference has been awash in controversy ever since its inception. Originally proposed by the European Commission as an attempt to deal with issues surrounding the divergence of national contract laws, the Common Frame of Reference (CFR) includes common fundamental principles of contract law, definitions of key concepts, and model rules.² The CFR is intended to be used as a “toolbox” to improve existing Community contract law, in particular the *acquis* (consumer protection directives), as well as an aid in drafting future legal instruments.³

A laudable idea so far – but the Commission does not stop there. The CFR, in context of enhancing the consumer *acquis*, is but the first of three proposals for the reform of contract law; the others are the promotion of European-wide standard contract terms and conditions, as well as the possible development of an “optional instrument” – a set of rules on contract law which would apply unless its application is excluded by the parties (opt-out) or would only take effect if elected by the parties (opt-in). The CFR would be

¹ Quoted by Lord Thomson of Monifieth in *European Contract Law: The Way Forward?* House of Lords European Union Committee 2004-5, HL Paper 95, Evidence p. 20.

² “European Contract Law and the revision of the *acquis*: the way forward” (hereafter known as *Way Forward*), COM (2004) 651 final, para 3.1.3, p.11

³ *Way Forward*, para. 2.1.1, p3.

likely to serve as the basis for this optional instrument.⁴ These proposals have been the focus of intense debate. The crucial question is what this essay will explore: what is the CFR meant to achieve?

One major criticism of the CFR is its primary purpose lacks clarity. If it is intended as a “toolbox” for better legislation, how would this *raison d’etre* fit in with the other two goals? In particular, the Commission has stated that it has not yet made any decision about the preparation of an optional instrument, but on the other hand it also wishes to have an EU-wide system of law. As one key stakeholder has pointed out, the two may not be compatible.⁵ The second area of concern is that there is much nervousness arising from the potential spectre of a European civil code. Although the Commission has stated that it has no intention to propose a civil code that would harmonise the contract laws of Member States, fears have been expressed that what initially would start off as optional may later become mandatory. Finally, the scope of ambition of the CFR has been criticised: is it either necessary or practicable for the CFR to attempt to reform the whole of contract law, when the Commission in practice is most likely to need this clarification for consumer protection measures?⁶ In other words, is the CFR an inspired idea or a distraction?

This essay will address these issues, then will turn to the relationship and points of intersection and divergence between the CFR and international commercial law, such as

⁴ *Way Forward*, para. 2.1.2, p5.

⁵ *European Contract Law: The Way Forward*, supra, Evidence of Susannah Haan, CBI (Confederation of British Industry), p. 39.

⁶ *Ibid*, Evidence of Lord Borrie, para. 43 and Evidence p.5

the PECL (Principles of European Contract Law), UNIDROIT principles, and the United Nations Convention on Contracts for the International Sale of Goods (CISG). It will be argued that the CFR, through its programme of revising both the consumer *acquis* as well as wider contract law, has the potential to benefit the internal market among member states. However, in doing so, the Commission must clarify how it intends the CFR to work in practice, as many questions remain unanswered, particularly with respect to the “optional instrument” – and pose a risk of hiding the merits of the CFR under a bushel. I will conclude with an analysis of how the interface between the optional instrument and mandatory national laws may feasibly co-exist.

The CFR: an inspired idea or a distraction?

The Second Progress Report on the Common Frame of Reference reiterated the goals of the CFR as of 2007: “The Commission considers the CFR a better regulation instrument. It is a longer-term exercise with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law.”⁷

This wide-ranging ambition must be read in light of the Commission’s goals vis-à-vis the consumer *acquis*. It explicitly stated that its key goals are to “enhance consumer and business confidence in the internal market through a high common level of

⁷ European Commission, Second Progress Report on the Common Frame of Reference, COM(2007) 447 final, p.8.

consumer protection and the elimination of internal market barriers and regulatory simplification.⁸ Thus the main purpose of the CFR appears to be consumer-driven through its revision of the *acquis*, i.e. to identify problems within EC consumer law.

One possible role for the CFR in relation to the *acquis* would be to inspire the European Court of Justice when interpreting the *acquis* on contract law.⁹ This is already happening to an extent. Advocate-General Verica Trstenjak cites a number of cases where the ECJ has utilised the Principles of European Law (PECL)¹⁰ – the backbone of the proposed CFR - and Draft Common Frame of Reference (DCFR) as an aid to interpretation.¹¹ In *Annelore Hamilton v Volksbank Filder eG*¹², Advocate-General M. Poiares Maduro cited the PECL and DCFR in support of his interpretation of Art. 4 para 3 of the Doorstep Selling Directive. Meanwhile, in *Leitner*¹³ a parallel to PECL Article 9:501(2)(a), on damages, arose. Under Austrian law, “damage” did not include non-material damage. Therefore, the question for the ECJ was whether the consumer’s right to damages under Article 5 of the Package Tours Directive¹⁴ should be interpreted as “conferring on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday.” The ECJ thus extended the unclear concept of compensation in the directive to include non-pecuniary loss.

⁸ OJ C 137, 8.6.2002, p. 2, cited in *Way Forward*, para. 2.1.1, p. 5.

⁹ *Way Forward*, para 2.1.2, p. 5

¹⁰ The DCFR has derived many of its rules from PECL.

¹¹ Verica Trstenjak, “The Significance of the CFR for the Practice of the European Court of Justice,” lecture, Europäische Rechtsakademie (ERA), Trier, Germany, 6 March 2008. Cases include *EasyCar* (C-336/03), *Quelle* (C-404/06) and *Bonn Fleisch* (C-1/06).

¹² Case C-412/06, opinion of 21 November 2007; PECL Chapter 14 (Prescription) cited.

¹³ Case C-168/00, [2002] 2 CMLR 6

¹⁴ Council Directive 90/314/EEC16.

Beyond the remit of the *acquis*, the Commission suggests several other uses of the CFR, including its use in the preparation of an “optional instrument”; as a tool for national legislators when transposing EU directives in contract law into national legislation; and as an instrument for application in arbitration.¹⁵ In addition, Christian von Bar, Chairman of the Study Group on a European Civil Code, which along with the Acquis Group¹⁶ prepared the DCFR, waxed lyrical about what the draft CFR, if implemented into the “political” CFR, could ultimately become:

“For the first time for approximately 200 years, students from all over Europe could be taught parts of the law in all European universities on the basis of an identical text. Whether they go to Uppsala, Edinburgh, Budapest or Amsterdam, they...would study there exactly what they would have studied at home.”¹⁷

Von Bar adds that the CFR could not only contribute to a modernisation of European national private law systems, but also provide a meaningful framework for principles of contract law of countries ranging from China to Russia.¹⁸

Add this to the other lofty ideals that the CFR is supposed to fulfil and a risk emerges: the possibility of a CFR that may fall short of expectations in its quest to be all things for

¹⁵ *Supra*, para. 2.1.2, p.5.

¹⁶ Also known as the Research Group on EC Private Law.

¹⁷ Christian von Bar, “An Introduction to the Academic Common Frame of Reference,” conference paper, Europäische Rechtsakademie (ERA), Trier, Germany, 19 September 2007. The DCFR, which has been prepared by academics, is a draft for drawing up the political (or actual) CFR.

¹⁸ *Ibid*, p.2.

everybody. The Law Society of England and Wales raised the concern that even though the CFR would not be ready until 2009, this should not stifle much-needed reforms of the *acquis* in the interim.¹⁹ Thus, if the stated focus of the CFR is the *acquis*, which, as consumer law, is a relatively narrow area of contract law, then how does this fit in with the Commission’s broader objective to use the CFR as a basis for a potential “EU contract law”?

With every subsequent Communication, the constantly changing nature of priorities of the CFR seems to emerge. This “moving target” approach has created uncertainty. As the Study Group on Social Justice in European Private Law believes, the Commission has deliberately left it open as to whether the CFR is “little more than a legal dictionary” or “merely another name for a comprehensive code of contract law, which will secure coherence and harmonisation.”²⁰ Other experts have conflated the “toolbox” with the “optional instrument”; is the “toolbox” purpose in fact a cover-up for the creation of an optional instrument that, as the CBI put it, may turn out to be “less optional”?²¹ In order to understand the rationale for such anxiety, it is first necessary to turn to the background to the concept of a European contract law.

¹⁹ *European Contract Law: The Way Forward*, *supra*, para. 46.

²⁰ *Social Justice in European Contract Law: a Manifesto*. *European Law Journal*, Vol 10, No 6, p653, at p 662.

²¹ *European Contract Law: The Way Forward*, *supra*, para. 112.

A new idea or a renewal of old thinking?

The idea of a European contract law is not new. In this respect, the CFR can be seen as a renewal of previous attempts over the last twenty years to create a new *ius commune*, or European private law – but with a twist, as will be seen. Taking as their inspiration the original *ius commune* – a combination of canon law and Roman law that formed the basis of a common system of legal thought in Western Europe during the 12th and 13th centuries – several academic projects aimed to produce a code of contract law for common use within the EU. The most prominent of these is the Principles of European Contract Law (PECL), which was drafted by the Commission on European Contract Law (“the Lando commission”), a private network of academic lawyers headed by Professor Ole Lando and published in three parts, with the last in 2003.²² In 131 Articles, the Principles set out general principles and rules for use in the EU Member States, along with a commentary describing how the issues are dealt with in the laws of each Member State.

In 1989 the European Parliament (EP) declared an Action to harmonise the private law of Member States and a request to start preparatory work in drafting a common European Code of Private Law.²³ This action, however, was only the beginning of a rough ride in the tortuous journey toward codification. In 1994 the European Parliament expressed disillusionment at the slow progress of these preparatory works.

²² Hector L. MacQueen, Antoni Vaquer and Santiago Espiau Espiau, eds., *Regional Private Laws and Codification in Europe* (Cambridge, 2003), p. 5.

²³ OJ 1989 C 158/400.

In the Resolution²⁴, the EP stated that “progressive harmonisation of certain sectors of private law is essential to the completion of the internal market”, reiterating its earlier request for the Commission to commence work on the code.

Since the Lando commission was recognised and supported by the European Parliament in the 1994 resolution, it is hardly surprising that the PECL has emerged as the cornerstone of the CFR. Although the Commission has maintained that in its preparation of the CFR, it would use the work already done not only by the Lando group but also that of the Academy of European Private Lawyers headed by Professor Giuseppe Gandolfi, PECL remains its backbone.²⁵

Given that the idea of a European contract law has been around for decades, it is striking how much resistance there is to such a project. For instance, in the UK several business groups expressed nervousness that the Commission had “in the back of its mind the object of moving towards an eventual harmonisation of contract law.”²⁶ They felt that the CFR proposals were a Trojan Horse leading to that outcome. The difference, however, lies in the scope of the CFR. Walter van Gerven defines codification as legislation that is...part of a larger whole and which does not focus on the protection of specific interests, such as consumer, worker or competitor interests, but tries to take a global view of all interests involved.²⁷ Unifying the general part of contract law and certain specific types

²⁴ OJ 1994 C 205/518

²⁵ Giuseppe Gandolfi (ed.), *Code européen des contrats: livre premier* (Pavia, 2001), which is based partly on the Italian civil code.

²⁶ *European Contract Law: The Way Forward*, *supra* note 1, para. 62, p.23.

²⁷ Walter van Gerven, “Codifying European Private Law? Yes, if...!” *European Law Review* (2002), p. 162.

of contract only, is not codification in the proper sense of the word.²⁸ It must be stressed that the Commission has taken pains to emphasize that the CFR is not a large scale harmonisation of private law or a European civil code.²⁹ Rather, the CFR might be better viewed as an exercise in clarification: a possible harmonisation or unification of contract rules that could serve as principles providing comparative information.

The CFR and international commercial law: relationships and implications

Why does the word “harmonisation” cause so many Member States’ representatives to cower in fear? An explanation of the concept would be useful here. “Minimal” harmonisation is that which currently exists, i.e. a basic standard of consumer protection containing an essential core of common rules for the purpose of regulating certain fundamental aspects of the matter.³⁰ Member States can supplement the directive with additional levels of protection through national law. In contrast, “maximal” harmonisation means that Member States may not exceed the level of protection provided in the directive, and this represents the ceiling of allowable consumer protection. Central to the harmonisation debate is what this level should be. Many businesses are understandably keen to keep levels of consumer protection down, and increased harmonisation may reduce complexity and disparity and reduce transaction costs for the internal market.³¹ The counter-argument, of course, is that consumers should have enough protection, so confidence in entering into transactions is not undermined.

²⁸ Ibid.

²⁹ Second Progress Report, *supra*, p. 8.

³⁰ As mentioned in *Leitner, supra*, note 13.

³¹ Fernando Gomez, “The Harmonization of Contract Law through European Rules: A Law and Economics Perspective,” lecture, Draft Common Frame of Reference Conference, Trier, Germany, 6-7 March 2008.

This vagueness can be clarified in some way by reference to international commercial law. Such principles and the CFR can have complementary functions. The Principles of European Contract Law (PECL), a basis for the proposed CFR, states in the Introduction that “[they] will assist both the organs of the Communities in drafting measures and the courts, arbitrators and legal advisers in applying Community measures.”³² Meanwhile, the UNIDROIT Principles, one of the most widely-used instruments for commercial transactions, mention two additional uses - a means of interpreting and supplementing existing international instruments and a model for national and international legislators.³³ As mentioned earlier, one possible purpose for the CFR is as an aid to interpretation of the ECJ. Although UNIDROIT applies, strictly speaking, to international commercial – not consumer – contracts, PECL was designed with UNIDROIT very much in mind, and the formal structure is similar. The Vienna Convention on the International Sale of Goods (CISG), in turn, was a point of reference for the UNIDROIT drafters. Hence, the three instruments, although obviously distinct, are interrelated. The next section illustrates this further.

The CFR, UNIDROIT and other international commercial law principles: points of convergence and divergence

I will examine the points of intersection and deviation between the CFR, PECL, UNIDROIT and CISG. Since this essay has examined how the CFR relates to

³² Principles of European Contract Law, Part I, cit., p. xvii.

³³ Preamble to the UNIDROIT Principles, paras. 5 and 6.

international commercial law, I will argue that each of these rules can serve different purposes, depending on the nature of the contract and the sphere of application. I will concentrate primarily on the first three instruments; as the remit of the CISG is more restrictive – i.e. only for sale of goods – I will cite the CISG as it relates to specific provisions of PECL and UNIDROIT.³⁴ The principles can also exist side-by-side and complement each other, particularly in the case of PECL and UNIDROIT.

Turning first to a comparison between PECL and the UNIDROIT Principles, the key similarities lie in their structure and presentation. UNIDROIT (the 2004 version, which added five new chapters to the 1994 edition), is composed of a Preamble and 185 articles divided into ten chapters, ranging from “General Provisions” (Chapter 1) to “Limitation Periods” (Chapter 10).³⁵ An expanded Preamble and new provisions were added on Inconsistent Behaviour and on Release by Agreement. In addition, the 1994 edition of the Principles has been adapted to meet the needs of electronic contracting.³⁶

The drafting of PECL has remarkable resemblances to UNIDROIT in the way the chapters are organised – Chapter 1, for instance, is also entitled “General Provisions.” Many of these have a counterpart in UNIDROIT. There have been concerns that these similarities would herald an undesired duplication between the two sets of principles. As Michael Bonell aptly puts it, “there is nothing worse than duplication of work leading to

³⁴ For a comprehensive discussion, see M J Bonell, “The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?” 26 *Uniform Law Review* (1996), pp. 26-39.

³⁵ UNIDROIT Principles of International Commercial Contracts, 2004 edition, at <http://www.unidroit.org/english/principles/contracts/main.htm>.

³⁶ *Ibid.*

the adoption of different instruments competing with one another.”³⁷ Such fears, however, are unwarranted. I will argue that the points of divergence are significant enough to avoid repetition and may even encourage co-existence.

One of the most important divergences between PECL and UNIDROIT can be found in the Preamble. UNIDROIT sets forth “general rules for international commercial contracts”, while Article 1:101 of PECL states that it is intended to be applied as “general rules of contract law in the European Community.” Therefore the UNIDROIT Principles, while universal in their geographic application (“international”), are limited to “commercial”, i.e. business-to-business (B2B) contracts. In contrast, PECL, although limited to EU member states, applies to all contracts, including business-to-consumer (B2C) contracts as well as transactions of a purely domestic nature.³⁸ The fact that PECL also applies to consumer transactions and not only B2B means that it cannot presuppose that the parties have the same bargaining power. A consumer will, in most cases, be of unequal bargaining power or negotiating ability with the business with which s/he is contracting. As for the CISG, it only deals with contracts for the sale of goods, and the scope of the UNIDROIT Principles is much wider, no overlap can occur where contracts other than sales contracts are concerned.

The differences in geographic and contractual scope inform the rest of the documents.

One such illustration is the parties’ duty to act in accordance with good faith and fair

³⁷ Michael Joachim Bonell, “The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?” 26 *Uniform Law Review* (1996) pp. 229-246.

³⁸ *Supra*.

dealing, which is stated in general terms (Art. 1:201); the UNIDROIT Principles, however, refer to “good faith and fair dealing in *international trade*.” The two principles also have different emphases: PECL bills itself as a “European *lex mercatoria*”,³⁹ whereas the aim of UNIDROIT “is to establish a balanced set of rules designed for use throughout the world.”⁴⁰

The issue of usages and practices also comes into play. Art. 1.105(1) of PECL states that the “parties are bound by any usage to which they have agreed and by any practice they have established between themselves” and Art. 1.105(2) binds the parties to “any usage which would be considered generally applicable by persons in the same situation as the parties”, meaning that local or national usages are acceptable. The UNIDROIT Principles limits applicable usages, in Art. 1.8(2), to those which are “widely known to and regularly observed in international trade by parties in the particular trade concerned.” Thus, only widespread trade usage is permitted.

Bonell points out that PECL, and not UNIDROIT, will be the obligatory point of reference for the legislative and judicial organs of the European Union when drafting or interpreting Community law.⁴¹ This is because PECL specifically applies to the EU, whereas UNIDROIT is much broader in its scope. Therefore, PECL can be said to fulfil a function within EU law above and beyond other international commercial law principles.

³⁹ Ole Lando and Hugh Beale, eds., *The Principles of European Contract Law*, Part I, cit., Introduction, p. xviii.

⁴⁰ International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, cit., Introduction, p. viii.

⁴¹ Bonell, *supra*, p. 239.

Significantly, the UNIDROIT Principles are not a binding instrument aimed at unifying national laws for international contracts. As the Preamble states, “[The Principles] shall be applied when the parties have agreed that their contract be governed by them.”

Likewise, PECL is non-binding and merely persuasive. However, the binding nature of CISG has been adopted in the form of an international convention, which has been ratified by over 67 contracting states.⁴² This means that CISG would automatically apply unless the contract specifically says that the CISG will not apply or the parties otherwise so indicate.

Meanwhile, it is all too easy to overlook the extent to which the CFR and PECL relate to each other. They are certainly not the same, although a large part of PECL feeds into the work of the CFR – through the Draft CFR (DCFR). Although the DCFR has been alluded to throughout this essay, it is necessary to make the distinction clear between the CFR and the DCFR, as the two terms have often been used interchangeably – a common mistake.⁴³ To clarify, the DCFR is a possible model for an actual or “political” CFR. Drawn up by academics, it presents a detailed concrete text for those deciding the nature of the CFR. The DCFR, however, comes with a hefty risk warning: as Christian von Bar has admitted, “the exact coverage of the CFR is out of our hands.”⁴⁴

The DCFR continues coverage of PECL but goes further. It also covers model rules on “specific contracts”, which includes contracts for the sale of electricity, stocks and shares,

⁴² The UK, however, has not ratified the Convention.

⁴³ A frequent occurrence during the Draft Common Frame of Reference Conference, Trier, Germany, 6-7 March 2008.

⁴⁴ The Draft Common Frame of Reference Conference, *supra*.

and intellectual property rights (IV A – 1:101) and the rights and obligations arising from them.⁴⁵ Moreover, while PECL encompasses consumer contracts through its scope of “all contracts,” explicit provisions relating to consumer protection needed to be included in the DCFR due to the mandate of the CFR to review the *acquis*.

Mandatory rules and international commercial law: strange bedfellows?

It is worth noting at this point that most of these international commercial law principles have non-mandatory rules. A fundamental principle in private law is the freedom of contract. The ECJ has underlined the importance of this principle in the *Alsthom* case, ruling that “the parties to an international contract of sale are generally free to determine the law applicable to their contractual relations.”⁴⁶ Non-mandatory, or default, rules often determine remedies on the event of non-performance or breach of the contract. In B2B transactions, few rules are mandatory, as evidenced by the relevant provisions of PECL and UNIDROIT. In addition, the CISG attempts to respect party autonomy when conflicts on applicable law arise: Art. 7(2) provides for a harmonising mechanism.⁴⁷

Increasingly, however, mandatory rules are being implemented into both EU and national contract law. Many of these provisions relate to consumer law. Article 7 of the Rome Convention defines “mandatory rules” as rules that must be applied whatever the

⁴⁵ Christian von Bar, Eric Clive, and Hans Schulte-Nolke (eds.), *The Draft Common Frame of Reference (DCFR), Interim Outline Edition* (Munich, 2008), para 37, p. 19.

⁴⁶ *Alsthom Atlantique v Compagnie de Construction Mécanique Sulzer*, Case C-339/89, 1991 ECR I-107.

⁴⁷ Art 7(2) CISG: “Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” Cited in Norbert Reich, “A Common Frame of Reference (CFR) – Ghost or host for integration?” *ZERP Diskussionspapier* 7/2006, p. 14.

applicable law. The crucial question, therefore, is how mandatory provisions can be integrated within a primarily non-mandatory international commercial law system.

For instance, Art 1:103(1) of PECL states that “...the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable.” The only exception to this is internationally mandatory rules, which cannot be excluded. A possible solution may be to make PECL only applicable, like UNIDROIT, to commercial contracts; consumer contracts, in which mandatory provisions are most likely to apply, would thus fall outside PECL.⁴⁸ However, ECJ case law concerning the internationally mandatory provisions (i.e. protective provisions on the commercial agents directive⁴⁹) should remain applicable so as to avoid opting out of EC law.

The optional instrument and mandatory national laws: how the interface can be handled

The subject of an “optional instrument” (OI) in the CFR is both an academic and political hot potato. The Commission has stated that an “optional instrument” – a model contract or system of rules applicable to cross-border transactions – is a mere possibility, but this has only stoked the fire of debate. The OI appears to be the single most contentious issue in the CFR discussion. The Law Society expressed concern

⁴⁸ Reich, *supra*, p. 38.

⁴⁹ Directive 86/653/EEC

that it risked becoming a smokescreen to other important aspects of the CFR. As it stated,

“...the notion of the optional instrument is entirely separate from that of the CFR except in so far as the CFR might form the basis of drafting such an instrument. However, the confusion between the two has continually dogged the debate on European contract law and has caused considerable confusion even amongst member states and experts.”⁵⁰

The crucial issue on the OI is whether it would feasibly co-exist with a proposed “Europeanisation” of contract law. Hugh Beale has mentioned one possibility: a system whereby the optional instrument is treated almost as if it were a legal system, i.e. one can be bound by the rules of the OI.⁵¹ Thus, the OI would in fact have its own mandatory rules; as Beale suggests, it could be implemented as an international convention like the CISG and the signatory states would incorporate it as part of their law.

Perhaps a less dramatic approach is that of Dirk Staudenmayer, who advocates for ensuring that the “mandatory provisions included into the OI would correspond roughly to the national protection level, otherwise the consumer would not have the necessary confidence to conclude such a contract.”⁵² The main advantage is that the consumer could have a “greater choice of products and services at presumably lower

⁵⁰ *European Contract Law: The Way Forward*, supra note 1, Memorandum of the Law Society, p. 59.

⁵¹ *Ibid*, Evidence of Hugh Beale, p. 10.

⁵² Dirk Staudenmayer, “The Way Forward in European Contract Law,” 13 *European Review of Private Law* (2005), 95 at p. 104.

prices.” This goes back to the minimum/maximum harmonisation issue, in that the consumer should at least have an acceptable level of protection, while allowing for cost benefits for businesses. Hence, legislators must walk the tightrope between the concerns of Big Business and Little Guy; the right balance, however, has yet to be struck.

Conclusion

It appears that the CFR is *both* an inspired idea and a distraction. Whilst there are elements in the CFR, in particular the review of the consumer *acquis*, that are welcomed, the contentious issue is the wider reform of European contract law.

This is where international commercial law principles can contribute to greater clarity. The four instruments – DCFR, PECL, UNIDROIT and CISG – cover various types of contract through their spheres of application, but each can serve as a useful aid to legislative interpretation. For instance, cross-border contracts between two EU Member States may be guided by the CFR and PECL, while UNIDROIT could be an additional tool if one of the parties is outside the EU.

Fundamentally, however, the Commission should make crucial decisions about what it actually wishes the CFR to be. This essay has discussed various aspects of the CFR and how it relates to EU and international commercial law, but these will undoubtedly develop further as the CFR trundles toward a possible implementation. The “toolbox” where legislators can pick and choose instruments to tinker with various laws seems

innocuous, but this is causing Member States' representatives to break out in a nervous sweat as some believe the "toolbox" masks a hidden agenda by the Commission to effect a sweeping harmonisation of European contract law.

Closely related is the "optional instrument" debate, which some see as a Trojan Horse ultimately leading to the potential "nightmare" scenario of a European civil code. At this point, what the Commission needs is to clarify the remit of the CFR in order to elicit cooperation. If the last thing any of the 27 Member States need is a field of Trojan horses, then the Commission must ensure that it allays these incipient fears - or risk the danger that Member States may fail to appreciate the inherent merits of the CFR.