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THE PRESENT STATE OF EUROPEAN PRIVATE LAW

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REINHARD ZIMMERMANN
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REINHARD ZIMMERMANN

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The Article attempts to assess where we stand today in our endeavors to create a common European private law. General contract law and sales law have been, and will continue to be, at the center of attention. Today we are faced with a bewildering variety of documents purporting to establish common ground, among them the Principles of European Contract Law, the Acquis Principles, the Draft Common Frame of Reference, the Consumer Sales Directive, a Proposal for a Directive on Consumer Rights, the United Nations Convention for the International Sale of Goods, and the Principles of European Sales Law. The Article examines the relationship between these documents and asks to what extent they reflect a coherent and satisfactory picture of *acquis communautaire* and *acquis commun*. In other fields (special contracts other than sale and extra-contractual obligations), the search for doctrinal structures which are both recognizably European and teleologically adequate has only just begun. Finally there are subjects, such as the law of succession, where the very legitimacy of legal harmonization has been questioned. The Article concludes that *all* areas of private law should become the subject of genuinely European, as opposed to national, scholarship but that *none* of them is ready to be cast into an official European instrument, whether under the name of Code, or Common Frame of Reference.

I. INTRODUCTION

Twenty years ago, in 1989, the European Parliament passed a resolution calling for the preparation of a European Civil Code.[1] Fifteen years ago, in 1994, the first edition of a book entitled "Towards a European Civil Code" appeared. It was edited by five Dutch colleagues who had decided to take up the challenge issued by the European Parliament.[2] Ten years ago, in 1999, the Consumer Sales Directive was enacted.[3] That Directive "Europeanized" a core area of traditional private law and precipitated the most sweeping individual reform ever to have affected the German Civil Code of 1900.[4] Five years ago,

1 Resolution of the European Parliament of May 26, 1989 on action to bring into line the private law of the Member States (OJ C 158/89, 400).

2 Towards a European Civil Code (Arthur Hartkamp et al. eds., 1994).

3 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171/99, 12); on which see the commentary by Stefan Grundmann & Cesare Massimo Bianca, EU Sales Directive: Commentary, (2002).

4 Reinhard Zimmermann, The New German Law of Obligations: Historical and Comparative Perspectives (2005) (on liability for non-conformity in German sales law

in the introductory chapter to the third edition of "Towards a European Civil Code,"[5] Ewoud Hondius came to the conclusion: "[C]ontract law is ready for codification."[6] This year, a Draft Common Frame of Reference was published.[7] It is, in all but name, a draft codification covering essential parts of patrimonial law rather than merely general contract law.[8] At some stage the European Community will have to decide whether, or to what extent, it wants to adopt or endorse this draft, the preparation of which it has both commissioned and financed. Thus, now appears an appropriate time to take stock of the present state of European private law. By way of example, we will look at a number of different fields: general contract law, including consumer contract law (part II), non-contractual obligations (part III), specific types of contract (part IV), and the law of succession (part V).

II. General contract law (and consumer contract law)

A. The Idea of a Restatement of European Contract Law

Merchants, in the words of Rudolph von Jhering, have been the protagonists of culture.[9] The interpreter (derived from the Latin *interpres*) was originally a middleman facilitating the exchange of goods.[10] And the exchange of goods is

before and after the enactment of the Directive, see 79-121).

5 Towards a European Civil Code (Arthur Hartkamp et al. eds., 3d ed. 2004).

6 Ewoud Hondius, *Towards a European Civil Code, in* Towards a European Civil Code, *supra* note 5, at 11. *Cf. also* 16: "The time has now come to adopt such a Code."

7 Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Outline Edition (Christian von Bar et al. eds., 2009). The six-volume full edition of the Draft Common Frame of Reference including comments and notes has appeared in Autumn 2009. For the time being, an Interim Outline Edition, (2008), is available. That Interim Outline Edition has been used for the preparation of this paper. (Just before this paper went to the printer, the Outline Edition, 2009, has become available. Changes between the two documents have been indicated, throughout this paper, in brackets.)

8 Nils Jansen & Reinhard Zimmermann, *Was ist und wozu der DCFR?,* 62 Neue Juristische Wochenschrift 3401 (2009).

9 Rudolph von Jhering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Part One, 232 (6th ed. 1907) ("Ein Zwischenhändler war der erste Vorkämpfer der Kultur; er vermittelte mit dem Austausch der materiellen Güter auch den der geistigen und bahnte die Strassen des Friedens").

10 The etymology is not quite clear; see A. Walde, Lateinisches Etymologisches Wörterbuch (4th ed., vol. I, 1965) (referring to the terms *inter* and *pretium*); *cf. also* Jhering in a note to the sentence quoted in the previous footnote. *But see* Michiel de Vaan, Etymological Dictionary of Latin and the other Italic Languages, 307 (2008) (*enter-pore-t* = who goes between).

not limited by national borders. Obviously, therefore, commercial law, and particularly the law relating to commercial instruments and to commercial contracts, has been of central importance in every legal unification agenda. This is as true of nineteenth century Germany[11] as it is on the global level today.[12] Within the European Union, too, the internal market provides the most powerful motivation, and driving force, for legal harmonization and contract law is obviously particularly closely related to the internal market. Also, in spite of two hundred years of legal nationalization, contract law is still more international in substance and character than any of the other traditional core areas of private law.[13] Modern contract law rests on the same historical and philosophical foundations across Europe,[14] and the hypothetical will of reasonable parties has usually been the focal point in the evolution of its doctrines.[15] It is hardly surprising, therefore, that general contract law was the prime candidate not only for a textbook adopting a genuinely European vantage point, situated beyond (or above) the national legal systems,[16] but also a European reference text in the form of a "restatement," i.e., a set of model rules based on comparative research and international cooperation: the Principles of European Contract Law (PECL).[17] These Principles can guide the interpretation and development

11 For an overview, see Hans Schlosser, Grundzüge der Neueren Privatrechtsgeschichte, 170-77 (10th ed. 2005).

12 On the uniform laws concerning negotiable instruments, see Gerhard Kegel & Klaus Schurig, Internationales Privatrecht, 75-78 (9th ed. 2004); on the unification of international sales law, see Peter Huber, *Comparative Sales Law, in* The Oxford Handbook of Comparative Law, 937 (Mathias Reimann & Reinhard Zimmermann eds., 2008); on the Unidroit Principles of International Commercial Contracts, see Unidroit, *infra* note 26 and Michael Joachim Bonell, An International Restatement of Contract Law (3d ed. 2005).

13 For an authoritative comparative overview, see E. Allan Farnsworth, *Comparative Contract Law, in* The Oxford Handbook of Comparative Law, *supra* note 12, at 899.

14 James Gordley, The Philosophical Origins of Modern Contract Doctrine (1991); Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition, Parts I - VI (1996).

15 On the use of implied conditions for the development of European private law, see Reinhard Zimmermann, "*Heard melodies are sweet, but those unheard are sweeter ...*" *Conditio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts,* 193 Archiv für die civilistische Praxis 121 (1993).

16 Hein Kötz, Europäisches Vertragsrecht, vol. I, 1996; translation into English by Tony Weir under the title European Contract Law, vol. I, 1997.

17 Principles of European Contract Law Part I (Ole Lando & Hugh Beale eds., vol. I, 1995); Principles of European Contract Law, Parts I and II (Ole Lando & Hugh Beale eds., 2000); Principles of European Contract Law, Part III (Ole Lando et al. eds., 2003). There are translations of both books into a number of languages; *see, e.g.,* Georges Rouhette et al., Principes du droit Européen du contrat (2003).

of the national legal systems in Europe and thus pave the way towards a gradual assimilation of these systems.[18] There are, in fact, a number of encouraging examples of how the PECL have been used as a source of inspiration for legislators, legal writers, and courts of law.[19]

B. Principles of European Contract Law

At the same time it must be said that the PECL do not provide the blueprint for a codification of (general) contract law. For, first, their draftsmen originally set out to formulate a set of "general rules" (hence the choice of the term "Principles"), even if the rules contained particularly in the later chapters attain a level of specificity emulating that of the existing national codes of private law. Second, Part III has not been integrated with Parts I and II but stands on its own. Moreover, five of its eight chapters venture beyond contract law; they constitute core components of a general law of obligations.[20] However, the details of the relationship between general contract law and general rules on obligations have been left open. [21] Third, there are obvious deficiencies of coordination resulting from the fact that the PECL have been prepared in three stages. The three different sets of rules dealing with the restitution of benefits provide a prominent example.[22] Fourth, as a result of the national fragmentation, which continues to blight the academic discourse on private law in Europe, the critical assessment of the regime established by the PECL has thus far only been rudimentary.[23] Such critical assessment, however, is necessary for a number of

18 For details, see Reinhard Zimmermann, *Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea, in* European Contract Law, 1, at 33-41 (Hector MacQueen & Reinhard Zimmermann eds., 2006).

19 See, most recently, Carlos Vendrell Cervantes, *The Application of the Principles of European Contract Law by Spanish Courts,* 16 Zeitschrift für Europäisches Privatrecht, 534 (2008); Danny Busch, *The Principles of European Contract Law before the Supreme Court of the Netherlands – On the Influence of the PECL on Dutch Legal Practice* 16 Zeitschrift für Europäisches Privatrecht 549 (2008).

20 Principles of European Contract Law, Part III, *supra* note 17, at xvi.

21 Thus, for example, it appears odd to have rules on performance only for contractual obligations; see chapter 7 PECL: Principles of European Contract Law, Parts I and II, *supra* note 17, at 329-58.

22 For details, see Reinhard Zimmermann, *Restitutio in integrum: Die Rückabwicklung fehlgeschlagener Verträge nach den Principles of European Contract Law, den Unidroit Principles of International Commercial Contracts und dem Avant-projet eines Code Européen des Contrats, in* Festschrift für Ernst A. Kramer 735 (2004); *cf. also* Phillip Hellwege, Die Rückabwicklung gegenseitiger Vorträge als einheitliches Problem § 14 (2004).

23 *But see, e.g.,* Europäische Vertragsrechtsvereinheitlichung und deutsches Recht (Jürgen Basedow ed., 2000); Danny Busch et al., The Principles of European Contract Law and Dutch Law: A Commentary (2002); Danny Busch et al., The Principles of

reasons. One of them is the more creative nature of the task undertaken by the draftsmen of the PECL compared to that with which the authors of the American Restatement were faced.[24] Divergences between the national legal systems had to be resolved, decisions implying value judgments and policy choices had to be taken, and sometimes unconventional solutions were adopted which the draftsmen of the PECL themselves describe as "a progressive development from [the] common core."[25] Fifth, there is the competing project of the Unidroit Principles of International Commercial Contracts.[26] Of course, the Unidroit Principles focus on global rather than European harmonization, and their scope of application is confined to commercial (as opposed to general) contract law. At the same time, both projects are comparable in many respects, and they often reach very similar, sometimes even identical, results.[27] Where their solutions differ, and where these differences cannot be attributed to the different focus of both projects, this demonstrates that further debates are necessary.[28] Sixth, and

European Contract Law (Part III) and Dutch Law: A Commentary II (2006); Luisa Antoniolli & Anna Veneziano, Principles of European Contract Law and Italian Law: A Commentary (2005); La tercera parte de los Principios de Derecho Contractual Europeo (Antoni Vaquer ed., 2005); European Contract Law, *supra* note 18, as well as a number of contributions to Towards a European Civil Code, *supra* note 5.

24 The American Restatements, obviously, provided a source of inspiration for the draftsmen of the PECL; see Principles of European Contract Law, parts I and II, *supra* note 17, at xxvi. On the American Restatements, and particularly on the process of their preparation see, most recently, Joachim Zekoll, *Das American Law Institute – ein Vorbild für Europa?, in* Nichtstaatliches Privatrecht: Geltung und Genese, 101 (Reinhard Zimmermann ed., 2008).

25 Principles of European Contract Law, parts I and II, *supra* note 17, at xxiv. For examples, see Zimmermann, *supra* note 18, at 29-33.

26 Unidroit Principles of International Commercial Contracts (Unidroit ed., 2004). This constitutes a revised and extended version of a first edition published in 1994. At the moment, work is under way to prepare a third edition extended, once again, by a number of additional chapters.

27 Arthur Hartkamp, *Principles of Contract Law,* in Towards a European Civil Code et al., *supra* note 5, at 141, 142; and see, for the topics dealt with in Part I of the PECL, Reinhard Zimmermann, *Konturen eines Europäischen Vertragsrechts,* [1995] 50 Juristenzeitung 477; for the topics added to the Unidroit Principles of International Commercial Contracts in their second edition, see Reinhard Zimmermann, *Die Unidroit-Grundregeln der internationalen Handelsverträge 2004 in vergleichender Perspektive,* 13 Zeitschrift für Europäisches Privatrecht 264 (2005).

28 A good example in a central area of general contract law is the variation in approach to the circumstances in which an agent's acts bind his principal. While the PECL distinguish between direct and indirect representation (and thus adopt a taxonomy familiar from German law), the Unidroit Principles of International Commercial Contracts adopt the English distinction between disclosed and undisclosed agency. Nonetheless, effectively the approach adopted by the PECL is very close to English law and that of the Unidroit

most importantly, the *acquis communautaire* has largely been neglected in the PECL.[29] In particular, the Lando-Commission has never addressed the difficult question to what extent, and in which way, the mandatory rules of consumer contract law can be incorporated into a set of principles of general contract law.[30] This is due simply to the fact that the European directives in the field of private law had not yet been enacted when the Lando-Commission commenced its work. Yet, it means that the PECL, as they stand, present an incomplete and partly inadequate picture of European contract law.

C. Acquis Principles and the Activities of the DCFR-Network

The *acquis communautaire* in the field of contract law, particularly consumer contract law, consists of an "odd batch"[31] of Directives which are ill-adjusted to each other, prolix, needlessly complex, and questionable in many respects. It is very widely recognized, not least by the EU Commission itself, that the *acquis* has to be fundamentally revised and improved.[32] The "Principles of the Existing EC Contract Law" (Acquis Principles), drafted and published by the "European Research Group on the Existing EC Private Law" (Acquis Group)[33] constitutes

Principles of International Commercial Contracts to German law. For a comparative discussion, see Dominik Moser, Die Offenkundigkeit der Stellvertretung im deutschen und englischen Recht sowie in den internationalen Regelungsmodellen (forthcoming).

29 *But see* Art. 4:110 on unfair terms not individually negotiated.

30 That has repeatedly been criticized; *cf., e.g.,* Ralf Michaels, *Privatautonomie und Privatkodifikation,* 62 Rabels Zeitschrift für ausländisches und internationales Privatrecht 580, 589 (1998); Nils Jansen, Binnenmarkt, Privatrecht und europäische Identität 2-6 (2004); Hans-W. Micklitz, *Verbraucherschutz in den Grundregeln des Europäischen Vertragsrechts,* 103 Zeitschrift für vergleichende Rechtswissenschaft 88 (2004).

31 Stephen Weatherill, *Do we need a European contract law?, in* Proceedings of the 4th European Jurists' Forum, 7 (2008). *Cf. also* Peter Schlechtriem, *Wandlungen des Schuldrechts in Europa – wozu und wohin,* 10 Zeitschrift für Europäisches Privatrecht 213 (2002); Peter-Christian Müller-Graff, *EC Directives as a Means of Private Law Unification in* Towards a European Civil Code, *supra* note 5, at 77, 87; Thomas Wilhelmsson, *The Contract Law Acquis: Towards More Coherence Through Generalisation?, in* Proceedings of the 4th European Jurists' Forum, 111 (2008). On the concept of *acquis communautaire* see, most recently, Christiane Wendehorst, *The CFR and the Review of the Acquis Communautaire, in* Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung, 323 (Martin Schmidt-Kessel ed., 2009).

32 *Cf., e.g.,* the communication entitled "A More Coherent European Contract Law: An Action Plan," COM (2003) 68 final; and see the further communication "European Contract Law and the Revision of the Acquis: The Way Forward," COM (2004) 651 final, as well as the "Green Paper on the Review of the Consumer Acquis," COM (2006) 744 final.

33 Research Group on the Existing EC Private Law (Acquis Group), Principles of the

an attempt to tackle this task;[34] for they are supposed to formulate a system of community private law, with the primary and secondary acts of EC legislation, as well as their interpretation by the European Court of Justice, as authoritative basis. The main problem with these Acquis Principles, however, is that their draftsmen have not confronted the task of subjecting the *acquis* to critical scrutiny and revision. Their central concern appears to have been to establish a conceptually more coherent but otherwise complete and faithful reproduction of the "existing EC contract law." To the extent that they have moved beyond such faithful reproduction, one can identify a tendency towards abandoning the limitations concerning the scope of application fixed by the Directives and of generalizing the rules of the *acquis*. This is highly problematic, particularly in view of the political significance of the Acquis Principles within the EU Commission's Common Frame of Reference project.[35]

This is not the place to recount the tortuous history of that Common Frame of Reference (CFR) project and to analyze the string of Communications on which it is based.[36] An academic network was charged with its preparation.[37] The key

Existing EC Contract Law (Acquis Principles), Contract I, 2007.

34 *Cf. also* Karl Riesenhuber, Europäisches Vertragsrecht (2d ed. 2006).

35 For details, see Nils Jansen & Reinhard Zimmermann, *Restating the Acquis Communautaire? A Critical Examination of the "Principles of the Existing EC Contract Law,"* 71 Mod. L. Rev. 505 (2008); *cf. also* Wilhelmsson, *supra* note 31, at 144-150 pointing out that making generalizations from the *acquis* necessarily implies difficult policy decisions; Stefan Grundmann, *The Structure of the DCFR – Which Approach for Today's Contract Law?,* 4 European Review of Contract Law at 238 (2008). The approach adopted by the Acquis Group is defended by Fryderyk Zoll, *Die Grundregeln der Acquis-Gruppe im Spannungsverhältnis zwischen acquis commun und acquis communautaire,* 5 Zeitschrift für Gemeinschaftsprivatrecht 106 (2008).

36 *See* Reiner Schulze, *Gemeinsamer Referenzrahmen und acquis communautaire,* 15 Zeitschrift für Europäisches Privatrecht 130 (2007); Norbert Reich, *Der Common Frame of Reference und Sonderprivatrechte im "Europäischen Vertragsrecht,"* 15 Zeitschrift für Europäisches Privatrecht 161 (2007); Weatherill, *supra* note 31, at 12-27; Michael Joachim Bonell, *European Contract Law and the Development of Contract Law Worldwide, in* Proceedings of the 4th European Jurists' Forum 93-99 (2008); Reinhard Zimmermann, *European Contract Law: General Report, in* Proceedings of the 4th European Jurists' Forum 195-196 (2008); Thomas Pfeiffer, *Methodik der Privatrechtsangleichung in der EU*, 208 Archiv für die civilistische Praxis 227 (2008); Wolfgang Ernst, *Der "Common Frame of Reference" aus juristischer Sicht* 208 Archiv für die civilistische Praxis 248 (2008); and see the contributions under I. *in* Martin Schmidt-Kessel, Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung 9-51 (2009). On the so-called "stakeholder meetings," see Gerhard Wagner, *Die soziale Frage und der Gemeinsame Referenzrahmen,* 15 Zeitschrift für Europäisches Privatrecht at 189 (2007).

37 For critical comment, see Grundmann, *supra* note 35, at 225, 246, 247. – Part of that network, incidentally, is also a "Project Group Restatement of European Insurance Contract

members of that network are the Acquis Group and the Study Group on a European Civil Code. That Study Group, established by Christian von Bar in 1998,[38] sees itself as the successor to the Lando-Commission, although its structure, aims, and working methods are markedly different. Books II ("Contracts and other juridical acts") and III ("Obligations and corresponding rights") of the Draft Common Frame of Reference (DCFR),[39] therefore, constitute the attempt by a Compilation and Redaction Team, composed of members of the Acquis Group and the Study Group and established in 2006,[40] to amalgamate the Principles of European Contract Law and the Acquis Principles and thus to achieve an integration of *acquis commun* and *acquis communautaire*.[41] It has to be noted, however, that the Study Group had previously already taken upon itself the task of revising the PECL, sometimes only marginally, in other instances much more substantially.[42] The Acquis Principles have also been subject to some revision in the process of compiling the DCFR.[43]

In the meantime, a working group formed by two other members of the network established for the CFR project, the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Législation Comparée*, has also revised the PECL and has published its work under the title "Principes

Law"; that body is expected to publish a set of Principles of European Insurance Contract Law in the course of 2009 (the black letter rules have already appeared in 13 Contratto e Impresa Europa 477-505 (2008)). These Principles do not form part of the DCFR.

38 Christian von Bar, *Die Study Group on a European Civil Code, in* Festschrift für Dieter Henrich 1 (2000).

39 *Supra* note 7.

40 Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 48.

41 That this can, and should, be done under the auspices of a "materialized" notion of freedom of contract, emphasizing the right to self-determination of *both* parties to the contract, is explicated by Josef Drexl, Die wirtschaftliche Selbstbestimmung des Verbrauchers (1998); Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner Materialisierung,* 200 Archiv für die civilistische Praxis 273 (2000); Zimmermann, *supra* note 4, at 205-28.

42 Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 24-26 (Outline Edition 2009, 30-34); *cf. also* Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems,* 28 Oxford Journal of Legal Studies 659, 665-68 (2008); Brigitta Jud, *Die Principles of European Contract Law als Basis des Draft Common Frame of Reference, in* Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung 71 (Martin Schmidt-Kessel ed., 2009).

43 See, from the point of view of the Acquis-Group, the contributions by Christian Twigg-Flesner, Stefan Leible, Evelyne Terryn and Thomas Pfeiffer, *in* Common Frame of Reference and Existing EC Contract Law 97-185 (Reiner Schulze ed., 2008).

contractuels communs – Projet de cadre commun de référence"[44] virtually simultaneously with the DCFR. There does not appear to have been any coordination between the revision carried out by the Study Group and the French effort.

D. Proposal for a Directive on Consumer Rights

Finally, on October 8, 2008 another document with potentially great political significance for the shape of European contract law was published by the EU Commission: the Proposal for a Directive on Consumer Rights[45] which is supposed to "merge" the four most important existing directives in the field of consumer protection[46] "into a single horizontal instrument."[47] It had been announced in a Green Paper on the Review of the Consumer Acquis of February 2007[48] and foreshadowed by the First Annual Progress Report on European Contract Law and the Acquis Review of September 23, 2005.[49] This, in turn, had been perceived as a "coup de frein . . . brutal"[50] by a number of commentators who regarded it as the manifestation of an intention, on the part of the Commission, to shift its attention from general contract law to the consumer *acquis*.[51]

44 Principes contractuels communs – Projet de cadre commun de référence (Association Henri Capitant des Amis de la Culture Juridique Française & Société de Législation Comparé eds., 2008). This volume contains two parts, the second one of which (pp. 211 *et seq.*) concerns the revision of the PECL (including commentary and comparative observations). Part I provides "Principes directeurs du droit européen du contrat." Another volume, also published in 2008, deals with the problem of a common terminology; it is entitled Terminologie contractuelle commune, 2008. In the meantime an English version has appeared: European Contract Law – Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2008). It contains the study on terminology, the guiding principles of European contract law and the revised PECL (though of the latter document, unfortunately, only the black-letter rules).

45 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 final.

46 These are: the Doorstep Selling, Unfair Terms in Consumer Contracts, Distance Contracts, and Consumer Sales Directives. They are to be repealed (Art. 47 of the proposal). Originally, the proposal had been intended to replace eight of the existing Directives (including also the Package Travel, Timeshare, Price Indications, and Injunctions Directives).

47 *See* the Explanatory Memorandum concerning the proposed Consumer Rights Directive, 3.

48 *Supra* note 32.

49 COM (2006) 744 final.

50 Bénédicte Fauvarque-Cosson & Sara Patris-Godechot, Le Code civil face à son destin 141 (2006).

51 That was corroborated by a corresponding shift of attention in the "stakeholder meetings" in the course of 2006. Significantly, also, reference to European contract law in general was dropped from the title of the Green Paper on the Review of the Consumer Acquis;

In actual fact, it has never been clear how the DCFR-project and the *acquis* revision leading up to the proposed Consumer Rights Directive relate to each other, and the publication of the Proposal does not clarify the matter either.

What *is* clear, even from the first glance at the Proposal, is that there has been no, or very little, interaction between the two projects. The definitions provided in both documents for the same terms (e.g., consumer,[52] sales contract,[53] durable medium,[54] producer[55]) differ, and it is thus obvious that the DCFR has not been used as a "toolbox" in this respect.[56] Sometimes the proposal even employs a different terminology ("trade" instead of "business";[57] or "off-premises contract" instead of "contracts negotiated away from business premises"[58]). Also, the rules set out in both documents differ from each other even though, of course, they usually pursue the same policy and make use of the same arsenal of protective devices (in particular: duties of information, rights of withdrawal,

supra note 32.

52 Art. 2 (1) proposed Consumer Rights Directive as opposed to the definition provided in Annex I *in* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 329 (Outline Edition, 2009, 549). Both definitions, incidentally, presuppose that the person in question is engaged in a trade, business or profession (Art. 2 (1) Proposed Directive also adds "craft") even if, in the present instance, he is acting for purposes not related to that trade, business or profession (or craft). Of course, that cannot be intended, since, for example, students and pensioners are also consumers. The point has already been made by Werner Flume, *Vom Beruf unserer Zeit für Gesetzgebung*, Zeitschrift für Wirtschaftsrecht 1427, 1428 (2000) concerning earlier definitions of the term "consumer" in the EC consumer protection directives.

53 Art. 2 (3) proposed Consumer Rights Directive as opposed to the definition provided for "sale, contract for" in Annex I *in* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 341 (Outline Edition, 2009, 565, 566).

54 Art. 2 (10) proposed Consumer Rights Directive as opposed to the definition provided in Annex I *in* Principles, Definitions and Model Rules of European, Private Law: Draft Common Frame of Reference, *supra* note 7, at 332 (Outline Edition, 2009, 553).

55 Art. 2 (17) proposed Consumer Rights Directive as opposed to the definition provided in Annex I *in* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 339 (Outline Edition, 2009, 563).

56 The Commission has repeatedly stated that it intends to use the DCFR as a "toolbox" providing model rules to be used "to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law": COM (2004) 651 final ("The Way Forward"), *sub* 2.1.1. For comment, see Hugh Beale, *The Draft Common Frame of Reference: Mistake and Duties of Disclosure,* 4 European Review of Contract Law 317 (2008).

57 Art. 2 (2) proposed Consumer Rights Directive as opposed to the definition provided in Annex I *in* Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 328 (Outline Edition, 2009, 547).

58 Art. 2 (8) proposed Consumer Rights Directive as opposed to Art. II.-5:201 DCFR.

control of standard contract terms).[59] The "duty to provide information when concluding a contract with a consumer who is at a particular disadvantage" of Art. II.-3:103 DCFR has been turned into "information requirements for distance and off-premises contracts";[60] the consequences of any failure to comply with the general information requirements are specifically set out in Art. II.-3:107 (Outline Edition, 2009, II.-3:109) DCFR[61] while they are left very largely to the applicable law according to Art. 6 (2) of the proposal for a Consumer Rights Directive; the omission of information concerning a right of withdrawal results in the withdrawal period not commencing to run until the information has been supplied (except that the right of withdrawal lapses after one year from the time of conclusion of the contract) in the one document,[62] and in the withdrawal period expiring three months after the trader has fully performed his other contractual obligations in the other;[63] Art. II.-9:411 (Outline Edition, 2009, II.-9:410) DCFR contains a list of standard contract terms which are "presumed to be unfair" (plus one provision declaring exclusive jurisdiction clauses to be unfair), while the Proposal for a Consumer Rights Directive has two lists, one concerning terms which should in all circumstances be considered unfair, the other concerning terms which should be deemed unfair unless the trader proves otherwise.[64] These are but examples. They indicate that the consumer contract provisions in the DCFR will have to undergo a substantial revision should a Consumer Rights Directive be enacted along the lines of the Proposal. That Proposal, incidentally, is also remarkable in that it moves away from the minimum-harmonization approach followed in the existing directives and embraces the concept of full harmonization.[65] Member States may not maintain or

59 On the main devices for protecting consumers, see Zimmermann, *supra* note 4, at 210-24 with further references.

60 Art. 9 proposed Consumer Rights Directive.

61 For comment, see Eidenmüller et al., *supra* note 42, at 696, 697.

62 Art. II.-3:107 (1) (Outline Edition, 2009, II.-3:109(1)) DCFR.

63 Art. 13 proposed Consumer Rights Directive.

64 Arts. 34, 35 and Annex II and III proposed Consumer Rights Directive.

65 For comment, see Weatherill, *supra* note 31, at 27, 28 ("It is an aggressively homogenising agenda . . . [which] involves a sufficiently radical re-distribution of regulatory competence to call into question the very legitimacy of the EC's lawmaking pretensions" (27, 36); Norbert Reich, *supra* note 36; Reich, *Wie "vollständig" ist die geplante "Vollständige Harmonisierung" im Verbraucherrecht?,* 19 Europäische Zeitschrift für Wirtschaftsrecht V (2008); Thomas Wilhelmsson, *Full Harmonisation of Consumer Contract Law?,* 16 Zeitschrift für Europäisches Privatrecht 225 (2008); Michael Faure, *Towards a Maximum Harmonization of Consumer Contract Law?!?*, 15 Maastricht Journal of European and Comparative Law 433 (2008); Maria Berger, *Zu europäischen Entwicklungen im Internationalen Privatrecht und im Verbraucherschutz,* 17 Zeitschrift für Europäisches Privatrecht 451 (2009).

introduce, in their national laws, provisions diverging from those laid down in the proposed new Directive.[66] Its implementation is therefore likely to unsettle long-established institutions within the individual legal systems of the Member States.

In another equally important respect, however, the proposal is disappointingly conservative. In its Communication of 2004 ("The Way Forward"),[67] the Commission had called for a critical review of the existing body of European private law, especially in respect of its effects on consumers and businesses. The new Proposal does not reflect a really fundamental review. It attempts to consolidate, or tidy up, the existing regime by streamlining and updating, sometimes also generalizing, its rules, by removing inconsistencies and "closing unwanted gaps."[68] But it does not question that regime and the policy considerations supporting it.[69] Thus, for instance, it perpetuates the rights of withdrawal for off-premises and distance contracts[70] without examining whether they provide a meaningful protection for consumers and, if so, why and under which specific circumstances their availability may be justified as a remedy for an objectionable contractual imbalance.[71] Also, the effects of the various duties of information contained in the existing consumer *acquis* and perpetuated in the proposal have not, apparently, been critically examined in spite of the fact that they must be seriously questioned: a consumer faced with an avalanche of information that is descending upon him will often be in no better position to make a well-informed decision than one who has not been informed at all.[72]

66 Art. 4 proposed Consumer Rights Directive. The logic behind this move does indeed, as Weatherill, *supra* note 31, at 27 observes, press for EC action by way of regulation rather than directive.

67 *Supra* note 56.

68 *See* recital (2) of the proposed Consumer Rights Directive.

69 *Cf.* Eidenmüller et al., *supra* note 42, at 693-701; Wendehorst, *supra* note 31, at 351- 57.

70 Arts. 8, 12-20 proposed Consumer Rights Directive.

71 For distance contracts, recital (22) merely reiterates the unconvincing rationale that the consumer should have a right of withdrawal because he is not able to see the good before concluding the contract; see Zimmermann, *supra* note 4, at 217 with further references. For off-premises contracts no specific rationale is set out in the proposed Directive. Usually it is justified on the basis that the consumer has been caught "off-guard" (see *id.* at 213, 214 with further references). However, that does not apply in cases where the consumer has solicited the trader's visit. Yet, recital (14) of the proposed Directive specifically states that this situation is to be included in the definition of an off-premises contract.

72 *See* Eidenmüller et al., *supra* note 42, at 673, 694 with references; *cf. also* Florian Faust, *Informationspflichten, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven 115 (Reiner Schulze et al. eds., 2008).

E. Draft Common Frame of Reference

All in all, what we have is a plethora of documents concerning consumer contract law, general contract law, and the law of obligations in general: the PECL in their original and in two revised versions, and the *acquis* consolidated in three different forms (the Acquis Principles on their own, and as they have been integrated into the DCFR, as well as the proposal for a Consumer Rights Directive). The DCFR is supposed to mark the apogee of all European legal harmonization efforts.[73] But it is based on the unrevised *acquis* and also does not conform to the new Proposal for a Consumer Rights Directive; that Proposal, in fact, appears to some extent to disavow or even sabotage the DCFR. As far as the DCFR is based on the PECL, certain changes have been implemented and have led to welcome clarifications and improvements.[74] In other instances, however, they have produced ambiguities and inconsistencies, as has been demonstrated with regard to the provisions on assignment and representation.[75] But many other rules have been taken over unchanged even though they are vulnerable to criticism.[76] On the whole, the modifications made to the PECL appear to be somewhat haphazard. If it were a purely academic document, the DCFR would have to be welcomed as an important contribution to an ongoing debate. For it provides a first, and decidedly imperfect, attempt to devise a general law of contract that incorporates rules on consumer contract law. That is certainly preferable to the other two options for dealing with consumer contract law, i.e., to leave it to piece-meal legislation or to make it the object of a separate codification.[77] But

73 Completely unrelated to all the activities mentioned so far is the *Avant-projet* of a European Contract Code, drafted under the auspices of a private initiative known as *Accademia dei Giusprivatisti Europei*: Code Européen des Contrats: Avant-projet (Giuseppe Gandolfi ed., 2000). In contrast to other projects such as the PECL, it takes its cue from two models, i.e., the Italian Civil Code and a Contract Code drawn up on behalf of the Scottish and English Law Commissions at the end of the 1960s. A notable feature of the *Avant-projet* is that it has been published in French as opposed to English. The *Avant-projet* does not, at present, play a prominent role in the political debates surrounding European contract law; it appears to have been reduced to a back-stage existence by the DCFR project (which, in turn, does not appear to have taken any note of it). For an assessment, see Reinhard Zimmermann, *Der 'Codice Gandolfi' als Modell eines einheitlichen Vertragsrechts für Europa?, in* Festschrift für Erik Jayme 1401 (2004).

74 *See, e.g.,* Arts. II.-9:301-303 DCFR as compared to Art. 6:110 PECL (*stipulatio alteri*), or the change in system in Arts. III.-3:511-515 (Outline Edition, 2009, III.-3:510-514) DCFR as compared with Arts. 9:305-309 PECL (restitution following termination of contract).

75 Eidenmüller et al., *supra* note 42, at 687-93 (In the Outline Edition, 2009, the provisions on assignment and mandate [now mandate contracts] have been revised.)

76 For an example, see Eidenmüller et al. *supra* note 42, at, 699-701.

77 *See, e.g.,* Franz Bydlinski, System und Prinzipien des Privatrechts, 718-735 (1996); Thomas Pfeiffer, *Die Integration von "Nebengesetzen" in das BGB, in* Zivilrechtswissenschaft und Schuldrechtsreform, 481 (Wolfgang Ernst & Reinhard Zimmermann

since the DCFR is intended to be a reference text which, unlike the PECL, is to secure its authority not *imperio rationis* but *ratione imperii*, i.e., by virtue of the European Community endorsing or adopting it in one form or another, there is the danger that it might stultify the necessary further debate.

In this context, we should also note a number of highly problematic features characterizing the DCFR,[78] among them a noticeable erosion of private autono-

eds., 2001); Wulf-Henning Roth, *Europäischer Verbraucherschutz und das BGB,* 56 Juristenzeitung 475, at 484-90 (2001); Thomas Duve, *in* Historisch-kritischer Kommentar zum BGB, vol. I, §§ 1 - 14, nn. 84-89 (Mathias Schmoeckel et al. ed., 2003); Grundmann, *supra* note 35, at 225, 237, 238; and see *supra* note 41.

78 For details, see Eidenmüller et al., *supra* note 42, at 669-77. Our criticism, of course, relates to the Interim Outline Edition, 2008, but much of it remains valid for the Outline Edition, 2009. Hans Schulte-Nölke, one of the editors of the DCFR, attempts to deflect some of our criticism by the odd argument that the DCFR is neither a draft codification nor intended to be one, Hans-Schulte-Nölke, *Die Acquis-Principles (ACQP) und der Gemeinsame Referenzrahmen: Zu den Voraussetzungen einer ertragreichen Diskussion des DCFR, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven 67, 68 (Reiner Schulze et al. eds., 2008). But does he really want to make his readers believe that an enormous network of international working teams, designated "Study Group on a European Civil Code," produces a document, which looks like a codification of core areas of patrimonial law, merely for the sake of academic gratification? Christian von Bar, Schulte-Nölke's co-editor, is decidedly more candid when he states that there is "no reason against . . . calling the Common Frame of Reference a 'Code'" (even if not a legislative instrument such as the Code Napoléon or the BGB): Christian von Bar, *A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities,* 23 Tulane European and Civil Law Forum 37, 40 (2008). And he acknowledges that the choice of the nebulous term Common Frame of Reference serves as a camouflage. That had, of course, been realized by many commentators (*see, e.g.,* Martijn W. Hesselink, *The European Commission's Action Plan: Towards a More Coherent European Contract Law?,* 12 European Review of Private Law 397, 402 [". . . clever trick"] (2004); Wagner, *supra* note 36, at 180, 182, 183. Of course, the draftsmen of the DCFR see their work as a model for the (political) Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 6) whatever legal status such document will have. Martijn Hesselink, CFR and Social Justice, 2008, 9, regards an inter-institutional agreement between Commission, Parliament and Council as likely; and according to Christian von Bar, there is much to suggest that such an "official" CFR will in fact be adopted, Christian von Bar, *Die Struktur des Draft Common Frame of Reference, in* Der gemeinsame Referenzrahmen: Entstehung, Inhalte, Anwendung, 24 (Martin Schmidt-Kessel ed., 2008); *cf. also* Christian von Bar, *A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities,* 23 Tulane European and Civil Law Forum 37, 48 (2008), where he refers to the "involvement in a political process" on the part of the network that has produced the DCFR. Apart from that, of course, there is the idea of an optional code for which the DCFR might form the basis, particularly forcefully propagated by Hans Schulte-Nölke (*see, e.g.,* Hans Schulte-Nolke, *EC Law on the Formation of Contract – from the Common Frame of Reference to the "Blue Button"* 3 European Review

my going beyond the tendencies existing in many national legal systems to "materialize" contract law,[79] the abundance of general provisions and open-ended concepts entailing a considerable expansion of uncontrolled judicial power,[80] and an inclination to blur the lines between textbook and legislation.[81] Also, it must be kept in mind that in spite of the fact that general contract law has been at the center of attention in international comparative discourse, a variety of questions remain on which consensus has not yet been reached. And there are other issues which are still largely unexplored on the European level. Plurality of debtors and of creditors is one such issue, as is already apparent from the divergence of terminology in the PECL, DCFR and Unidroit Principles of International Commercial Contracts.[82] Other examples are the notion of a "juridical

of Contract Law 332 (2007); *cf. also* Dirk Staudenmayer, *European Contract Law – What Does It Mean and What Does It Not Mean?, in* The Harmonization of European Contract Law 235 (Stefan Vogenauer & Stephen Weatherill eds., 2006). All in all, I think, one can endorse the statement by Martijn Hesselink (member of the "Co-ordinating Group" of the Study Group on a European Civil Code and co-editor of the Study Group's volume on commercial agency, franchising and distribution contracts): "In practical terms this [i.e., taking the notion of the CFR in a very broad sense with a view to the wide range of possible applications] is very similar to regarding the DCFR as a draft European Civil Code" (Martin Hesselink, CFR and Social Justice, 11 (2008) (with a long footnote citing other authors who take the same view), 18; *cf. also* Jan Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward,* 4 European Review of Contract Law 270 (2008) ("the idea of comprehensive codification").

79 *Cf. also* Jürgen Basedow, *Kodifikationsrausch und kollidierende Konzepte*, 16 Zeitschrift für Europäisches Privatrecht 673 (2008) and, concerning Book IV A. of the DCFR, Ulrich Huber, *Modellregeln für ein Europäisches Kaufrecht,* 16 Zeitschrift für Europäisches Privatrecht 708, 711 (2008) (the DCFR is significantly more restrictive, in its approach to private autonomy, than German law); and see, concerning the regulation of pre-contractual duties in the DCFR, Bertrand Fages, *Pre-contractual Duties in the Draft Common Frame of Reference – What Relevance for the Negotiation of Commercial Contracts?,* 4 European Review of Contract Law 304 (2008) (pointing to the strong emphasis on duties, rather than freedom of negotiation, unsuitable for the relationship between businesses); Horst Eidenmüller, *Privatautonomie, Verteilungsgerechtigkeit und das Recht des Vertragsschlusses im DCFR, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven, 73 (Reiner Schulze et al. eds., 2008), (concerning the rules on formation of contract). *But see* Hesselink, *supra* note 78, at 13-22, 29-42, 43-47 (who, while agreeing that the DCFR is less autonomy-oriented than most classical Civil Codes, regards this as a welcome development that should have been taken further).

80 *Cf. also* Grundmann, *supra* note 35, at 225, 227 (". . . general clauses also constitute a failure to decide core issues and to find solutions for demanding questions of modern contract law"); *but see* Hesselink, *supra* note 78, at 49-58.

81 *Cf. also* U. Huber, *supra* note 79, at 708, 742.

82 The three types of plurality of debtors are labeled solidary, divided, and joint obligations in Art. III.-4:102 DCFR rather than solidary, separate, and communal obligations as

act,"[83] or the distinction between general rules of contract law, general rules on the law of obligations, and, as it were, general rules in general.[84] What is to be very much regretted is that what began as a genuinely academic enterprise (i.e., to draft a set of Principles of European Contract Law) has been transformed into a political project with all the concomitant features that this entails. The most damaging of them, in this case, has been an extreme pressure of time dictated by the expiry of the term of office of the present EU Commission in 2009. The civil code agenda, apparent already in the name of the Study Group, has raised anxiety and hostility to the process of Europeanization of private law in many quarters[85] and it is in danger of undermining what has been achieved

they are in Art. 10:101 PECL. In the Unidroit PICC, the first two categories are to be labeled joint and several, and separate obligations, whereas the third one is to be dropped. For a critical look at this third category, which originates in German law, see Sonja Meier, *in* Historisch-kritischer Kommentar zum BGB, vol. II, 72, §§ 420-432/I, nn. 93, 98 (Mathias Schmoeckel et al. eds., 2007).

83 See the title to Book II of the DCFR ("Contracts and other juridical acts"), and the definition provided in Annex I, Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 336 (Outline Edition, 2009, 557). According to Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law (trans. by Tony Weir, 3d ed., 1998), 146 "[t]he idea of 'legal act' is . . . far too abstract a notion."

84 Books I - III DCFR. The subdivision of material between Books II and III is premised upon the concepts of "contracts and other juridical acts" and "obligations and corresponding rights"; for criticism of this system, and of the fact that the DCFR has "in this respect, become something else than a European contract law," see Reiner Schulze, *The Academic Draft of the CFR and the EC Contract Law, in* Common Frame of Reference and Existing EC Contract Law, in *supra* note 43, at 14 (Reiner Schulze ed., 2008); Grundmann, *supra* note 35, at 225, 229-32; *and see* Ole Lando, *The Structure and the Legal Values of the Common Frame of Reference (CFR),* 3 European Review of Contract Law 245, 250 (2007) (". . . stringent and incomprehensible logic . . . borrowed from German law"). In the Introduction to the DCFR one finds, indeed, remarkably dogmatic statements such as: "Similarly, a contract is not terminated. It is the contractual relationship, or particular rights and obligations arising from it, which will be terminated": Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, *supra* note 7, at 24 (Outline Edition, 2009, 31).

85 Particularly among French academics; *see* Yves Lequette, *Quelques remarques à propos du projet de code civil européen de M von Bar,* [2002] Dalloz Chronique 2202; Philippe Malinvaud, *Réponse – hors délai – à la Commission européenne: à propos d'un code europèen de contrats*, [2002] Dalloz Chronique 2542; Bénédicte Fauvarque-Cosson, *Faut-il un code civil européen?,* [2002] Revue trimestrielle de droit civil 463; François Terré et al., Droit Civil: Les obligations 53, 54 (9th ed. 2005); as far as the mood of the fourth European Jurists' Forum in Vienna in 2007 was concerned, see Zimmermann, *supra* note 36, at 200, 204. The large-scale reform of the French law of obligations can be seen as an attempt to fortify the national castle against unwelcome European onslaughts; *cf.* Bénédicte

thus far. If I may borrow a metaphor current in the field of consumer contract law: a cooling-off period would be desirable, and the European contract law project should be taken off the political track.

III. NON-CONTRACTUAL OBLIGATIONS

A. Common Conceptual Structures?

What about special contracts and non-contractual obligations? These areas are also covered by the DCFR. They differ from general contract law in that (with one exception)[86] the ground for legal harmonization has been far less well prepared. It is true that we have books such as Christian von Bar, *The Common European Law of Torts*,[87] Cees van Dam, *European Tort Law*,[88] or Peter Schlechtriem, *Restitution und Bereicherungsausgleich in Europa*.[89] Unlike Hein Kötz's *European Contract Law*, however, these works cannot really claim to reveal a fundamental legal unity of which the existing legal systems can be regarded as national manifestations; instead, they are pioneering attempts of groping their way towards common structures. This is immediately obvious from Schlechtriem's book that is, significantly, entitled *Restitution and Recovery of Enrichment in Europe* (rather than European law of Restitution); but it applies also to the other two works. And it is a fair reflection of the state of development of the respective disciplines. For while it is true that the Continental law of delict rests on the same historical foundations (in the era of the *ius commune* it constituted an *usus modernus* of Aquilian liability which was reconceptualized under the influence of Natural law theory),[90] and that the ideas prevailing

Fauvarque-Cosson, *Towards a New French Law of Obligations and Prescription? About the "Avant-projet de réforme du droit des obligations et de la prescription,"* 15 Zeitschrift für Europäisches Privatrecht 428, 429 (2007) On the state of the French reform project see, most recently, François Terré, Pour une réforme du droit des contrats (2009); Reforming the French Law of Obligations (John Cartwright et al. eds., 2009).

86 That exception, of course, is the contract of sale. See *infra* IV.A.

87 Christian von Bar, The Common European Law of Torts, vol. I, 1998; vol. II, 2000. The German original appeared under the title Gemeineuropäisches Deliktsrecht in 1996 (vol. I) and 1999 (vol. II).

88 Cees van Dam, European Tort Law (2006).

89 Peter Schlechtriem, Restitution und Bereicherungsausgleich in Europa: Eine rechtsvergleichende Darstellung, vol. I, 2000; vol. II, 2001. *Cf. also*, Unjustified Enrichment: Key Issues in Comparative Perspective (David Johnston & Reinhard Zimmermann eds., 2002).

90 Zimmermann, *supra* note 14, 1017-1030; Nils Jansen, Die Struktur des Haftungsrechts 271-360 (2003).

in Continental Europe have also influenced the development of English law,[91] it is equally true that in the eighteenth and nineteenth centuries, the modernized version of Roman law was no longer really modern. In its basic structure it was still essentially geared towards the imposition of sanctions for private wrongs rather than the reasonable allocation of losses.[92] This was a problem that the European legal systems only started to grapple with in the course of the nineteenth century, by which time the first wave of codifications had contributed to a national isolation of the legal discourse. As a result, the European legal landscape became considerably more patchy in this field than in that of contract law, and it continues to be characterized by a lack of fundamental concepts which are both common to the various legal systems and teleologically satisfactory.[93] Particularly well-known is the contrast between the general provisions governing delictual liability in France and Austria, the system of the more limited but still comparatively general heads of liability in Germany, and the coexistence of a wide variety of individual torts in England.[94] The concept of unlawfulness plays a crucial role in the German law of delict but it is alien, as a distinctive requirement, to French and English law. English and German law operate with a relative concept of duty of care or *Fahrlässigkeit*, while French law relies on the notion of *faute absolue*. Even among systems from the same "legal family" such as Austria and Germany there is no unanimity as to whether personal blameworthiness is required for a finding of delictual liability.[95] Liability for pure economic loss is a notorious battle-ground in just about all European legal systems.[96] Strict liability is yet another key issue characterized by a wide variety of approaches.[97] And the doctrinal structures established within

91 David Ibbetson, *Harmonization of the Law of Tort and Delict: A Comparative and Historical Perspective, in* Grundstrukturen des Europäischen Deliktsrechts 83 (Reinhard Zimmermann ed., 2003).

92 The point is made, and substantiated, by Jansen, *supra* note 90, at 181-84.

93 Jansen et al., *supra* note 30, at 33-35.

94 For a comparative overview concerning this point and the following ones, see Gerhard Wagner, *Comparative Tort Law, in* The Oxford Handbook of Comparative Law, *supra* note 12, at 1003.

95 It is hardly surprising, therefore, that the European Court of Justice did not feel in a position to base its concept of member state liability for breach of Community law on a generally recognized concept of fault: ECJ 5 March 1996, Joined Cases C-46/93 and C-48/93, ECR 1996, I, 1029, nn.75-80 (*Brasserie du Pêcheur* and *Factortame*); Walter van Gerven et al., Cases, Materials and Text on National, Supranational and International Tort Law 911-924 (2000); Wolfgang Wurmnest, Grundzüge eines europäischen Haftungsrechts, 154 -57 (2003).

96 Pure Economic Loss in Europe (Mauro Bussani & Vernon Valentine Palmer eds., 2003); Willem H. van Boom et al., Pure Economic Loss (2004).

97 Comparative overview in The Unification of Tort Law: Strict Liability (Bernhard

the national legal systems also do not lend themselves to simply being transposed to the supranational level.[98]

B. Tort/Delict in the DCFR

The dramatic lack of clear concepts in Book VI of the DCFR ("Non-contractual liability arising out of damage to another") and the unwillingness of its draftsmen to choose between the various ways of how to regulate the law of delict are, therefore, hardly accidental. The DCFR opens the liability floodgates, particularly concerning the recoverability of pure economic loss and immaterial loss, to an extent that goes far beyond the standards accepted in most Member States of the EU. At the same time it relies on a number of devices which may be used to limit liability but which are subject to a wide-ranging judicial discretion.[99] The prime example of such devices is the general reduction clause in Art. VI.-6:202 DCFR which authorizes the courts to reduce, or even strike out entirely, claims for damages, well-founded otherwise, where this is deemed fair and reasonable. Significantly, the competing "Principles of European Tort Law," drafted by Helmut Koziol's Group on European Tort Law,[100] have also only managed to provide open-ended compromise solutions[101] though not so much by using general concepts than by resorting to the notion of a flexible system, espoused by Walter Wilburg.[102]

A. Koch & Helmut Koziol eds., 2002). For an attempt to reconceptualize the relationship between fault-based and strict liability (and thus to overcome the prevailing two-track model of liability law), see Jansen, *supra* note 90, at 545-640.

98 See, as far as German law is concerned, Reinhard Zimmermann, *Wege zu einem europäischen Haftungsrecht, in* Grundstrukturen des Europäischen Deliktsrechts 19, at 23-30 (Reinhard Zimmermann, ed., 2003).

99 For details, see Eidenmüller et al., *supra* note 42, at 682-87; Gerhard Wagner, *Deliktsrecht, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen 161 (Reiner Schulze et al. eds., 2008).

100 Principles of European Tort Law: Text and Commentary (Group on European Tort Law ed., 2005); and see Helmut Koziol, *Die "Principles of European Tort Law" der "European Group on Tort Law,"* 12 Zeitschrift für Europäisches Privatrecht 234 (2004); Reinhard Zimmermann, *Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact, in* European Tort Law 2003, 2 (Helmut Koziol & Barbara Steininger eds., 2004).

101 For a critical analysis, see Nils Jansen, *Principles of European Tort Law? Grundwertungen und Systembildung im europäischen Haftungsrecht,* 70 Rabels Zeitschrift für ausländisches und internationales Privatrecht 732 (2006).

102 Walter Wilburg, Entwicklung eines beweglichen Systems im bürgerlichen Recht, 1950; for an overview in English, see Bernhard A. Koch, *Wilburg's Flexible System in a Nutshell, in* European Tort Law 2001 545 (Helmut Koziol & Barbara C. Steininger eds., 2002); Helmut Koziol, *Außervertragliche Schuldverhältnisse im CFR, in* Der gemeinsame

C. Unjustified Enrichment

As far as the law of unjustified enrichment is concerned, the discussion about common European structures has only just started.[103] That discussion is rendered particularly difficult by the lack of consensus on a number of fundamental questions: Is the recipient liable for enrichment received or enrichment surviving? Does a claim based on unjustified enrichment not only require the recipient to have been enriched but also the claimant to have been impoverished? And, related to this, does this branch of the law ultimately serve to protect a person whose rights or interests have been impaired, or does it merely look at the position of the recipient and aim to skim off an enrichment that it regards as unjustified?[104] The abstract and decontextualized character of this branch of the law does not facilitate the discussion either. Nor does the common stock of concepts and ideas derived from Roman law, or the late scholastic restitution doctrine[105] provide very much assistance in view of the fact that the configuration of these elements in the modern legal systems varies considerably. The comparatively recent recognition in English law of a law of unjust enrichment[106] as a special branch of the law of obligations,[107] and the reappearance of the *condictio indebiti* in that legal system,[108] mark the end of a particularly obstructive structural difference (or perhaps rather: perception of

Referenzrahmen: Entstehung, Inhalte, Anwendung 94-96 (Martin Schmidt-Kessel ed., 2009), regards this as a fundamental difference between the Principles of European Tort Law and the respective book of the DCFR.

103 Grundstrukturen eines Europäischen Bereicherungsrechts (Reinhard Zimmermann ed., 2005).

104 *See* Jansen, *supra* note 30, at 40-47 with further references. For a legal system requiring both enrichment and impoverishment see, most recently, Daniel Visser, Unjustified Enrichment 156-220 (2008). For a discussion of similarities and differences *cf. also* Jan Smits, *A European Law of Unjustified Enrichment, in* European Private Law Beyond the Common Frame of Reference 153, at 155-57 (Antoni Vaquer ed., 2008).

105 Reinhard Zimmermann, *Bereicherungsrecht in Europa: Eine Einführung, in* Zimmermann, *supra* note 103, 17, at 22-25; Nils Jansen, *Die Korrektur grundloser Vermögensverschiebungen als Restitution? Zur Lehre von der ungerechtfertigten Bereicherung bei Savigny,* 120 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 106 (2003).

106 Peter Birks, Unjust Enrichment (2d ed. 2005). Of crucial importance was Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548; on which decision, see Sonja Meier, *Bereicherungsanspruch, Dreipersonenverhältnis und Wegfall der Bereicherung im englischen Recht* 1 Zeitschrift für Europäisches Privatrecht 365 (1993); Robert Goff & Gareth Jones, The Law of Restitution, 12-52 (7th ed. 2007).

107 See Peter Birks, *Definition and Division: A Meditation on Institutes 3.13, in* The Classifications of Obligations 1 (Peter Birks ed., 1997).

108 Sonja Meier, Irrtum und Zweckverfehlung (1999); Birks, *supra* note 106, at 101-28.

such difference) between the common law and the civilian systems.

None the less, it remains an extremely courageous enterprise, at the present stage of the discussion, to draft a set of Principles of European law on unjustified enrichment and to incorporate it immediately into the DCFR (Book VII).[109] Quite clearly, an attempt has been made to get away from traditional concepts such as "without legal ground," or "at the expense of," as well as from the existing national taxonomies. According to Art. VII.-1:101 DCFR an unjustified enrichment must have been attributable "to another's disadvantage", a phraseology which is very prone to misunderstanding. Surprisingly, Art. VII.-2:101 DCFR does not set out to define when an enrichment is unjustified but when it is justified,[110] but the DCFR then confuses the reader by not sticking to this approach (Art. VII.-2:101 (1) DCFR: "An enrichment is unjustified unless . . ."; Art. VII.-2:101 (4) DCFR: "An enrichment is also unjustified if . . ."; Art. VII.-2:102: "[An] enrichment is justified if . . . ."[111] One of the lessons that *can* be derived from comparative and historical experience, i.e., that it is hardly helpful for a practicable law of unjustified enrichment to provide one and the same "basic rule" for all different types of situations,[112] is ignored.[113] The DCFR does not provide satisfactory solutions for the restitutionary consequences of mistaken improvements of somebody else's property and for the discharge of another person's debt.[114] Third party enrichment situations are as difficult to figure out as they are in German law but lead, at least partly, to results that are less balanced.[115] And by devising different restitution regimes for situations where

109 For critical assessments, see Smits, *supra* note 104, at 157-62; Koziol, *supra* note 102, at 108-12; Christiane Wendehorst, *Ungerechtfertigte Bereicherung, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven, 215 (Reiner Schulze et al. eds., 2008).

110 *Cf.* Koziol, *supra* note 102, at 109, who also finds this "startling."

111 *Cf. also* Wendehorst, *supra* note 109, at 224.

112 *See, e.g.,* Stefan Lorenz, *in* Staudingers Kommentar zum Bürgerlichen Gesetzbuch, revised version 2007, § 812, n. 1; Christiane Wendehorst, *in* Kommentar zum Bürgerlichen Gesetzbuch, vol. II, § 812, nn. 17-31 (Heinz Georg Bamberger & Herbert Roth eds., 2d ed. 2008); Koziol, *supra* note 102, at 109, 110. Of course, at a very abstract level a uniform "enrichment principle" can be formulated; Pomponius D. 12, 6, 14 provides the classic example. But it is hardly accidental that it had never been regarded as a legal rule of immediate applicability. It has always been, and it remains, necessary to specify types of cases according to the event triggering the enrichment.

113 Consciously so: Stephen Swann, *The Structure of Liability for Unjustified Enrichment: First Proposals of the Study Group on a European Civil Code, in* Grundstrukturen eines Europäischen Bereicherungsrechts, 275, 276 (Reinhard Zimmermann ed., 2005).

114 Wendehorst, *supra* note 109, at 230-32 ("inadequate"), 233-35 ("simply intolerable").

115 *Id*. at 244-47.

a contract is terminated *ex nunc* and *ex tunc*,[116] the draftsmen of the DCFR draw a distinction, deeply entrenched in German law,[117] in utter disregard of a long line of criticism and of the difficulties faced by German law as a result of that distinction.[118] These are some of the more important points emerging from first critical analyses of the DCFR's provisions on unjustified enrichment. It must be obvious even to a superficial reader that these provisions, unlike the PECL, do not provide the foundations of a genuinely European building;[119] nor can they serve as a beacon to guide the interpretation and development of the national legal systems in a common direction.

D. Negotiorum Gestio

Both Books VI and VII of the DCFR have been drafted by the Study Group on a European Civil Code (or, more precisely, a subgroup of that Group located in Osnabrück). It is odd, of course, that they are published as part and parcel of the DCFR before the respective part projects of the Study Group have appeared in print and could thus have been subjected to scrutiny. And it is even more odd that the one part project in the field of extra-contractual obligations that has appeared prior to the publication of the DCFR was the volume on *negotiorum gestio* (or, in the Study Group's terminology: benevolent intervention in another's affairs).[120] Of all the legal institutions within the law of obligations it is probably the most amorphous. Its shape and significance are entirely dependent upon

116 Arts. III.-3:511-515 (Outline Edition, 2009, III.-3:510-514) DCFR (restitution following termination of contract) as opposed to Art. II.-7:212 (2) DCFR (referring to the rules on unjustified enrichment, as far as restitution following avoidance is concerned).

117 It remains entrenched even after the "modernization" of the German law of obligations. On the new §§ 346-359 BGB (i.e., the contractual restitution regime as opposed to the rules on unjustified enrichment), see Reinhard Zimmermann, *Restitution after Termination for Breach of Contract: German Law after the Reform of 2002, in* Mapping the Law: Essays in Memory of Peter Birks, 323 (Andrew Burrows, Lord Rodger of Earlsferry eds., 2006).

118 *See* Zimmermann, *supra* note 22, at 746-48; Hellwege, *supra* note 22, at §§ 2 and 7; Christiane Wendehorst, *Die Leistungskondiktion und ihre Binnenstruktur in rechtsvergleichender Perspektive, in* Grundstrukturen eines Europäischen Bereicherungsrechts 47, at 80-84 (Reinhard Zimmermann ed., 2005); Wendehorst, *supra* note 109, at 236-41; *cf. also* the criticism by Grundmann, *supra* note 35, at 234; Pietro Sirena, *The DCFR – Restitution, unjust enrichment and related issues* 4 European Review of Contract Law 445, 447 (2008). The new Unidroit working group on international commercial contracts (*supra* note 26) is, at present, busy devising a uniform regime.

119 Swann, *supra* note 113, at 268, a member of the relevant working team, acknowledges that the body of rules on unjustified enrichment "certainly conveys the impression of constructing a castle in the air"; *cf. also* Smits, *supra* note 104, at 157, 158.

120 Benevolent Intervention in Another's Affairs (Study Group on a European Civil Code/Christian von Bar ed., 2006).

that of the law of contract, delict, and unjustified enrichment within a given legal system. It is questionable whether the widely diverging claims traditionally arising from, and functions traditionally served by, *negotiorum gestio* in civilian legal systems should continue to be forced under one doctrinal umbrella.[121] Genuinely European foundations are even less visible here than in the law of delict or unjustified enrichment. Very little comparative groundwork has, so far, been carried out.[122] And the relationship between uniform rules on *negotiorum gestio* in Europe and the functioning of the internal market (which would, after all, be the point of view, from which the legitimacy of the EU's activity in this field would have to be assessed) is tenuous, to put it mildly.

By submitting bodies of text which cannot even remotely claim to represent a European "common core" not just for academic debate but for inclusion into the DCFR, i.e., a document which is designed to have some form of elevated status and to carry the imprimatur of the European Union,[123] the authors of the DCFR are attempting to latch onto the success story of the PECL. In reality, they may well put it in jeopardy.

IV. SPECIFIC CONTRACTS

A. Sale

For the specific types of contracts regulated in the DCFR we can refer partly to what has been said for general contract law and partly to our discussion of the non-contractual obligations. Concerning international sales law, the DCFR's draftsmen could draw on a long line of scholarship starting with Ernst Rabel's *Das Recht des Warenkaufs*[124] as an early culmination, as well as on models such as the United Nations Convention on Contracts for the International Sale of Goods and the Consumer Sales Directive.[125] The latter instrument has been regarded as a crucial step towards a European law of contract by many observ-

121 Nils Jansen, *Negotiorum Gestio and Benevolent Intervention in Another's Affairs: Principles of European Law?,* 15 Zeitschrift für Europäisches Privatrecht 958 (2007). For a critical evaluation of the DCFR's rules on benevolent intervention in another's affairs, *cf. also* Koziol, *supra* note 102, at 104-08.

122 For a comprehensive historical analysis, see Nils Jansen, *in* Historisch-kritischer Kommentar zum BGB, vol. III, §§ 677-687 I (Mathias Schmoeckel et al. eds., forthcoming).

123 *See supra* note 78.

124 Ernst Rabel, Das Recht des Warenkaufs, vol. I, 1936; vol. II, 1958.

125 P Huber, *supra* note 12, at 937-67 with further references.

ers of the international development.[126] The large degree of correspondence between the CISG and the Consumer Sales Directive[127] has led to a significant amount of common ground for the discussion of sales law in Europe (even if not all Member States of the EU have brought their sales law in general into line with the Consumer Sales Directive).[128] Discussions and rules on general contract law (particularly concerning remedies for non-performance) are also often conducted and drafted with the law of sale as the most common type of contract in mind.[129]

The Principles of European Law on Sales[130] and Book IV A. of the DCFR that is based on them are thus comparatively conservative documents.[131] None the

126 P. Huber, *supra* note 12, at 944; Stefan Grundmann, *in* Grundmann & Bianca, *supra* note 3, at Introduction, nn.19-25.

127 P. Huber, *supra* note 12, at 944; Grundmann & Bianca, *supra* note 3, at Introduction, n.6; Ulrich Magnus, *The CISG's Impact on European Legislation, in* The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences 129 (Franco Ferrari ed., 2003); Stefano Troiano, *The CISG's Impact on EU Legislation,* 8 Internationales Handelsrecht 221 (2008).

128 As has, however, happened in Germany; see Zimmermann, *supra* note 4, at 96-99. On the transformation of the Directive in other Member States, see the contributions to Verbraucherkauf in Europa (Martin Schermaier ed., 2003).

129 Significantly, no less than 52 of the 132 articles contained in the first two parts of the Principles of European Contract Law are modeled on a provision contained in the CISG: see the table in Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law, in* The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences, 169, at 181-87 (Franco Ferrari ed., 2003); for a detailed comparison between the CISG, PECL, and the Unidroit Principles of International Commercial Contracts, see now An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law (John Felemegas ed., 2007). It is hardly surprising, therefore, that according to Christiane Wendehorst, *Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht,* 206 Archiv für die civilistische Praxis 205, 284-90 (2006), the system of remedies does not fit service contracts very well. The dominance of the sales law thinking pattern has often been criticized; *cf., e.g.,* Hans Hermann Seiler & Frank Peters, *Das geplante Werkvertragsrecht, in* Zivilrechtswissenschaft und Schuldrechtsreform 263 (Wolfgang Ernst & Reinhard Zimmermann eds., 2001) (referring to the "Babylonian captivity of the contract for work").

130 Sales (Study Group on a European Civil Code/Ewoud Hondius et al. eds. 2008).

131 For background and overview, see Viola Heutger, Ein gemeineuropäisches Kaufrecht: Vision oder nahe Zukunft?, 171-75 (2007); Viola Heutger & Christoph Jeloschek, *Towards Principles of European Sales Law, in* Towards a European Civil Code 533 (Hartkamp et al. eds., 2004); Ewoud Hondius, *CISG and a European Civil Code,* 71 Rabels Zeitschrift für ausländisches und internationales Privatrecht 99 (2007); Anna Veneziano, *A Common European Law on Sales?, in* European Private Law Beyond

less, they also contain rules that deviate form the accepted status quo and that at least some Member States may find difficult to accept. Thus, for example, they exceed the consumer protection afforded by the Consumer Sales Directive in that they also remove the buyer's *damages* claim from the scope of party autonomy:[132] a damages claim which, incidentally, includes economic and non-economic loss.[133] The same tendency to restrict party autonomy is apparent from Art. III.-3:105 (2) DCFR: terms excluding or restricting a remedy for non-performance (including, of course, non-conformity) cannot be invoked if that would be "contrary to good faith and fair dealing." That applies not only in b2c but also in b2b relationships, and it applies even if those terms have passed the unfairness test for not individually negotiated terms under Arts. II.-9:401 ff. DCFR.[134] Also, as with the *acquis* in general,[135] the draftsmen of the DCFR's sales' provisions have not taken upon themselves the task of critically reviewing the *acquis*.[136] They have not, for example, addressed the question, much discussed in national legal literature, whether a consumer really benefits from a regime that does not allow the seller of a second hand article to contract out of his liability for non-conformity in exchange for offering the consumer a better purchase price.[137]

While the sales provisions of the DCFR, therefore, have faithfully adopted the consumer protection standards established by the Consumer Sales Directive, and sometimes even extended them, the rules provided by the CISG have not always been followed equally faithfully. They have been modified substantially on more than one occasion, and not always for the better. As far as the risk regime of Arts. IV A.-5:101 ff. DCFR is concerned, Ulrich Huber has come to the conclusion that "the text appears to be untidy, erratic, unnecessarily complex, occasionally contradictory, and it is difficult to understand, particularly for a reader who does not know the original [on which it is based, i.e., Art. 67 ff.

the Common Frame of Reference 43 (Antoni Vaquer ed., 2008); Troiano, *supra* note 127, at 238-240 (2008).

132 Art. IV.A.-4:102 (Outline Edition, 2009, IV.A.-4:101) DCFR; see U. Huber, *supra* note 79, at 710; Barbara Dauner-Lieb & Moritz Quecke, *Das Kaufrecht im Entwurf eines Gemeinsamen Referenzrahmens, in* Der akademische Entwurf für einen Gemeinsamen Referenzrahmen: Kontroversen und Perspektiven 137 (Reiner Schulze et al. eds., 2008).

133 Art. III.-3:701 (3) DCFR.

134 U. Huber, *supra* note 79, at 711.

135 *Supra* II.C and E.

136 *Cf. also* Dauner-Lieb & Quecke, *supra* note 132, at 141, 160.

137 Zimmermann, *supra* note 4, at 221 with references; and see U. Huber, *supra* note 79, at 712.

CISG]."[138] Another layer of complexity has now been added by the Proposal for a Consumer Rights Directive. None of the provisions in Chapter IV of the proposed Directive (Other consumer rights specific to sales contracts) has, as far as I can see, been taken over from either the Principles of European Law on Sales, or from Book IV A. of the DCFR, but they have clearly been modeled on, and modify, the provisions of the Consumer Sales Directive. If the Proposal is implemented, many of the DCFR's provisions will, therefore, have to be changed. Whoever seeks guidance on questions such as whether the buyer or the seller may choose between repair or replacement as the two forms of remedying a lack of conformity has thus to look at a variety of documents. According to Art. 26 (2) of the proposed Consumer Rights Directive, it is the seller while under the Consumer Sales Directive,[139] it presently is the buyer. The CISG probably gives the seller the choice but the matter is disputed.[140] Art. 4:204 Principles of European Law on Sales distinguishes between consumer sales and other sales: the buyer has the choice in the former, the seller in the latter situation.[141] The DCFR does not address the matter. This is, of course, a very simple and straightforward example. But it demonstrates that we still have some way to go before we have a set of rules on sales law that is sufficiently mature for an act of legislation on a European level.[142]

B. Services

The other parts of the DCFR's Book IV on specific contracts cover ground that is much less well-trodden internationally, sometimes even not trodden at all. Part C. on services (based on the Principles of European Law on Service Contracts of the Study Group)[143] provides a very good example, for it adopts both a taxonomy and a regulatory approach that are entirely novel.[144] Hannes Unberath has

138 U. Huber, *supra* note 79, at 718.

139 See recital 10 Consumer Sales Directive. German law has followed the Directive (§ 439 I BGB), even though this solution is widely regarded as unconvincing, and even though the matter is decided differently as far as contracts for work are concerned; see Zimmermann, *supra* note 4, at 100.

140 See the references in *id.* at 100, n.141.

141 For comment, see Study Group/Hondius et al., *supra* note 130, at 280, 281.

142 *Cf. also* Dauner-Lieb & Quecke, *supra* note 132, at 159, 160.

143 Service Contracts (Study Group on a European Civil Code/Maurits Barendrecht ed., 2007). For background information, see also Marco B. M. Loos, *Service Contracts, in* Towards a European Civil Code, *supra* note 5, at 571-582.

144 Part C has individual chapters relating to the following "basic types of services": construction, processing, storage, design, information and advice, and treatment. Apart from that, there is a lengthy chapter containing rules applying to service contracts in general which, in turn, is preceded by a chapter with "general provisions".

recently raised very serious and substantial criticism against the attempt to devise specific rules for a number of "basic types of services," in addition to rules applying to service contracts in general, and thus to arrive at a regime which is "clumsy, redundant and, just because it is concrete and specific, none the less full of gaps."[145] On the whole, Part C. reads like a well-intentioned medium of legal instruction rather than draft legislation, or a reference text providing tools for legislation. But whatever their merits or otherwise, since the rules on service contracts do not pretend to provide a *restatement* of the existing national or European laws,[146] it is inconceivable that they can be regarded as anything but a stimulating point of departure for the (very necessary) comparative discussion on the shape and content of the rules on service contracts.

V. THE LAW OF SUCCESSION

A. Part of a National Culture's Lifeblood?

Of course, a number of subjects within the field of traditional private law are not covered by the DCFR, among them the law of immovable property, family law, and the law of succession. Immovable property will be included in a casebook within the van Gerven-series,[147] and a Commission on European Family Law, based in Utrecht, has started to survey particular areas of family law.[148] Consid-

145 Hannes Unberath, *Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens,* 16 Zeitschrift für Europäisches Privatrecht 745 (quotation at 764) (2008). One is reminded here of the standard criticism leveled at the Prussian Code of 1794, which had close to 20,000 sections. For a much more positive evaluation, see Wendehorst, *supra* note 129, at 290-97 (celebrating the DCFR's basic-types-of-services model as a "brilliant coup").

146 That is also the impression of Unberath, *supra* note 145, at 759. For Lease of Goods (Study Group on a European Civil Code/Kåre Lilleholt et al. eds., 2008) (and consequently Book IV B. of the DCFR that is based on it), this is explicitly stated by Kåre Lilleholt, *A European Law of Lease?, in* European Private Law Beyond the Common Frame of Reference, 59 (Antoni Vaquer ed., 2008) (". . . the principles are not some sort of restatement of European lease law").

147 Cases, Materials and Text on National, Supranational and International Property Law (J.H.M. van Erp & B. Akkermans eds., forthcoming). *Cf. further* Christian von Bar, Sachenrecht in Europa (vol. I, 2000; vol. II, 2000; vol. III, 1999; vol. IV, 2001); Willem Zwalve, Hoofdstukken uit de geschiedenis van het Europese privaatrecht, vol. I: Inleiding en zakenrecht (2d ed. 2003).

148 Principles of European Family Law Regarding Divorce and Maintenance between Former Spouses (Commission on European Family Law et al. eds., 2004); Principles of European Family Law Regarding Parental Responsibilities (Commission on European Family Law/Katharina Boele-Woelki et al. eds., 2007). *Cf. also* European Family Law in

erable attention has been devoted to the comparative study of trust law,[149] and it has even been asserted that we are at the threshold of a truly European trust law.[150] Apart from that, however, the law of succession has remained very much a virgin territory. Only a few programmatic articles have, so far, been devoted to the question of its "Europeanization."[151] On the one hand, of course, this reflects the fact that by comparison with other areas of private law, the law of succession has generally been neglected by modern scholarship. On the other hand, there is a widespread view that here we are dealing with a subject that is both very stable and distinctively moulded by cultural peculiarities.[152] It belongs to the legal "lifeblood" of a nation's culture[153] and does not easily lend itself to comparative study, let alone to legal harmonization or unification. "L'action unificatrice attribué au droit comparé . . . se bornera à effacer progressivement les diversités accidentelles entre législations régissant des peuples de même civilisation . . .": this was Edouard Lambert's programmatic statement encapsulating the spirit in which the first international congress for comparative law

Action, vol. I: Grounds for Divorce (Katharina Boele-Woelki et al. eds., 2003); vol. II: Maintenance between Former Spouses (Katharina Boele-Woelki et al. eds., 2003); Masha Antokolskaia, Harmonisation of Family Law in Europe (2006).

149 See the overview by Marius J. de Waal, *A European Law of Trusts?, in* European Private Law Beyond the Common Frame of Reference, 167 (Antoni Vaquer ed., 2008).

150 *Id*., at 179 (". . . perhaps we have already crossed that boundary without realising it"). Of considerable importance, in that respect, have been the Principles of European Trust Law (D.J. Hayton et al. eds., 1999).

151 Dieter Leipold, *Europa und das Erbrecht, in* Festschrift für Alfred Söllner 647 (2000); Walter Pintens, *Die Europäisierung des Erbrechts*, 9 Zeitschrift für Europäisches Privatrecht 628 (2001); Walter Pintens, *Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts*, Zeitschrift für das gesamte Familienrecht 329 (part I), 417 (part II) (2003); Alain Verbeke & Yves-Henri Leleu, *Harmonisation of the Law of Succession, in* Towards a European Civil Code, *supra* note 5, at 335-350. An international harmonization in succession law reaching beyond the EU is regarded as having "never been more important than it is now" by Ronald J. Scalise, *Undue Influence and the Law of Wills: A Comparative Analysis,* 19 Duke J. Comp. & Int'l L. 41 (106) (2008).

152 See, for example, Erik Jayme, *Grundfragen des internationalen Erbrechts – dargestellt an deutsch-österreichischen Nachlassfällen,* 24 Zeitschrift für Rechtsvergleichung 162 (1983); Dieter Schwab, *Einführung, in* Familienerbrecht und Testierfreiheit im europäischen Vergleich, 2 (Dieter Henrich & Dieter Schwab eds., 2001); Sjef van Erp, *New Developments in Succession Law, in* General Reports of the XVIIth Congress of the International Academy of Comparative Law, 74 (Katharina Boele-Woelki & Sjef van Erp eds., 2007); Paul Terner, *Perspectives of a European Law on Succession,* 14 Maastricht Journal of European and Comparative Law 158 (2007).

153 Ernst A. Kramer, *Der Stil der schweizerischen Privatrechtskodifikation – ein Modell für Europa?,* 72 Rabels Zeitschrift für ausländisches und internationales Privatrecht 788 (2008).

in Paris was held in 1900.[154] If, therefore, the law of succession is characterized by cultural rather than "accidental" differences, their levelling out was bound to appear like an act of vandalism. Also, there could be no meaningful comparative discourse about the "better law."[155]

B. Indignitas Succedendi as an Example

Yet, whenever I have dipped into the law of succession I have not found these views (or possibly prejudices) confirmed. A recent study on the development of the law concerning *indignitas succedendi* (unworthiness to inherit) in the continental legal systems may serve as an example.[156] Apart from the fact that all legal systems regard a person who has intentionally killed the deceased as unworthy to inherit,[157] we have a very patchy picture. All legal systems apart from those where the Code civil prevails (France, Belgium, Luxemburg) exclude from the right of succession also those who have improperly interfered with the deceased's freedom of testation (but they all specify the details in very different ways).[158] In France, Spain, Portugal, Catalonia, and the Netherlands, unworthiness to inherit as a result of having killed the deceased depends on a judicial

154 Congrès International de Droit Comparé, tenu à Paris du 31 juillet au 4 août 1900: Procès-Verbaux des Séances et Documents, vol. I, 1905, 25-60 (reprinted in Rechtsvergleichung 30-51 (Konrad Zweigert & Hans-Jürgen Puttfarken eds., 1978)). That congress is usually taken to have been the birth of comparative law as a specific branch of legal scholarship.

155 On this concept in modern comparative studies, see Zweigert & Kötz, *supra* note 83, at 46, 47; Ralf Michaels, *The Functional Method of Comparative Law, in* The Oxford Handbook of Comparative Law, *supra* note 12, 339.

156 Reinhard Zimmermann, *Erbunwürdigkeit: Die Entwicklung eines Rechtsinstituts im Spiegel europäischer Kodifikationen, in* Festschrift Für Helmut Koziol 719-763 (2010); manuscript available from the author. The codifications covered are those of Prussia, France, Austria, the Netherlands, Italy, Portugal, Spain, Germany, Switzerland, Greece, and Catalonia.

157 On that topic, *cf*. Reinhard Zimmermann, *De bloedige hand en neemt geen erffenis: Erbunwürdigkeit aufgrund Tötung des Erblassers: Römisches und römisch-holländisches Recht, in* Festschrift für Rolf Knütel 1469-1491 (2009); for comparative references, see Zimmermann, *supra* note 156, under II. - IV.

158 *Cf., e.g.,* § 2339 nos. 2 and 3 BGB ("... if he has ... wilfully and unlawfully prevented the deceased from making or revoking a disposition mortis causa; [or] has, by fraud or unlawful threats, induced the deceased to make or revoke a disposition mortis causa"); and see § 542 ABGB; Art. 885 no. 3 Burgerlijk Wetboek (BW) of 1838; Art. 725 nos. 3 and 4 Codice civile of 1865; Art. 756 nos. 5 and 6 Spanish Código civil; Art. 1782 Portugese Código civil of 1867; Art. 540 no. 3 Swiss ZGB; Art. 1860 nos. 3 and 4 Astikos Kodikas; Art. 463 no. 4 Codice civile of 1942; Art. 2034 c) and d) Portugese Código civil of 1966; Art. 11 no. 4 Catalonian Código de sucesiones; Art. 4:3 (1) d) BW of 2003.

conviction to that effect;[159] in Austria, Germany, Switzerland, Greece, and Italy, it does not.[160] In France, Austria, Germany, the Netherlands, and Switzerland, *indignitas succedendi* is limited to those who have killed the deceased him- or herself,[161] in Spain, Greece, Italy, Portugal, and Catalonia, it extends also to those who have killed the deceased's spouse, child or parent.[162] Austria and the Netherlands also have a general provision covering serious crimes against the deceased, apart from killing him,[163] the other legal systems do not. In Germany and Switzerland, a person is unworthy to inherit who has put the deceased in a condition in which he is unable to make or revoke a will;[164] gross neglect of the parents' duties vis-à-vis their children entails unworthiness to inherit in Austria, Italy, and Catalonia,[165] lack of care for a deceased who suffered from disabilities in Spain,[166] adultery in Austria,[167] and failure to pay maintenance in Catalonia.[168] The unworthiness to inherit is wiped out if the deceased had forgiven the heir, though in all countries apart from Germany, Switzerland, and Austria,[169] the forgiveness must have been expressed in specific (albeit quite different) ways.[170] Unworthiness to inherit applies *ipso iure* in Austria, Switzerland, and the Netherlands;[171] in Spain, Germany, Greece, Portugal, and Catalonia

159 Art. 427 Code civil of 1803; Art. 726 Code civil of 2007; Art. 756 no. 2 Spanish Código civil; Art. 1782 Portugese Código civil of 1867; Art. 2034 Portugese Código civil of 1966; Art. 11 no. 1 Catalonian Código de sucesiones; Art. 4:3 (1) b) BW of 2003.

160 § 540 ABGB of 1811, of 1916, and of 1989; § 2339 no. 2 BGB; Art. 540 no. 1 Swiss ZGB; Art. 1860 no. 1 Astikos Kodikas; Art. 725 Codice civile of 1865; Art. 463 Codice civile of 1942.

161 Art. 427 Code civil of 1803; Art. 726 Code civil of 2007; § 540 ABGB (of 1916 and 1989); § 2339 no. 2 BGB; Art. 885 BW of 1838; Art. 4:3(1) a) BW of 2003; Art. 540 no. 1 Swiss ZGB.

162 Art. 756 no. 2 Spanish Código civil; Art. 1860 no. 1 Astikos Kodikas; Art. 725 Codice civile of 1865; Art. 463 Codice civile of 1942; Art. 1782 Portugese Código civil of 1867; Art. 2034 Portugese Código civil of 1966; Art. 11 no. 1 Catalonian Código de sucesiones.

163 § 540 ABGB of 1811, of 1916, and of 1989; Art. 4:3 (1) b) BW of 2003.

164 § 2339 no. 1 BGB; Art. 540 no. 2 Swiss ZGB.

165 The matter is specified in very different ways: *see* § 540 ABGB; Art. 463 no. 3-bis Codice civile of 1942 (as amended in 2005); Art. 11 no. 5 Catalonian Código de sucesiones.

166 Art. 756 no. 7 Spanish Código civil.

167 § 543 ABGB of 1811, of 1916, and of 1989.

168 Art. 11 no. 4 Catalonian Código de sucesiones.

169 § 540 ABGB of 1811, of 1916, and of 1989; § 2343 BGB; Art. 540 II Swiss ZGB.

170 *See* Art. 757 Spanish Código civil; Art. 1861 Astikos Kodikas; Art. 466 Codice civile of 1942; Art. 2038 Portugese Código civil of 1966; Art. 14 Catalonian Código de sucesiones; Art. 4:3 (3) BW of 2003; Art. 729-1 Code civil of 2007. Originally, French law did not attribute any effect to the declaration, on the part of the deceased, that he had forgiven the crime.

171 § 540 ABGB; Art. 540 Swiss ZGB; Art. 4:3 BW of 2003.

a judicial declaration is necessary;[172] in France, partly the one and partly the other system applies;[173] in Italy the question is disputed.[174] Other differences could be mentioned. They cannot, I think, be explained on either a rational, or cultural basis. Often they do not follow the lines suggested by the doctrine of legal families.[175]

Some light can be shed on the present state of affairs by a historical analysis. Such an analysis reveals that the draftsmen of the first two codifications still valid today (the French and Austrian ones), while both drawing on one and the same tradition, followed different concepts and thus selected different elements from that tradition.[176] The Roman institution of *indignitas succedendi*, in other words, had been placed on two different conceptual tracks; and as a result of codification, and the concomitant abrogation of the *ius commune*, the intellectual framework for an international discourse was now lacking. The other codifications in the tradition of French law (the Netherlands, Italy, Portugal, and Spain) differed from French law in one respect that was to have some bearing on the question of indignity to inherit: they did not subscribe to the rule "institution d'Héritier n'a lieu."[177] As a result, we find a number of deviations from the French model; they were, however, carried out somewhat half-heartedly. A fresh start was made by the draftsmen of the German BGB. In an admirably comprehensive manner (which one can only commend to law reformers today) they considered all relevant regulations available internationally[178] and ultimately decided to adopt a concept that differed from both the French and Austrian ones.[179] For unworthiness to inherit in the BGB is neither

172 Art. 758 Spanish Código civil; § 2342 BGB; Art. 1862 Astikos Kodikas; Art. 2036 Portugese Código civil of 1966; Art. 12 Catalonian Código de sucesiones.

173 "Sont indignes de succéder . . .": Art. 726; "Peuvent être déclarés indignes de succéder . . .": Art. 727 Code civil of 2007.

174 *See, e.g.,* the discussion in Riccardo Omodei Salè, *Indegnità a succedere, in* Digesto delle Discipline Privatistiche, Sezione Civile, Aggiornamento III, vol. II, nos. 4–7 (2007).

175 On which, see H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions, in* The Oxford Handbook of Comparative Law, *supra* note 12, at 421; Hein Kötz, *Rechtskreislehre, in* Handwörterbuch zum Europäischen Privatrecht 1253 (Jürgen Basedow et al. eds., 2009).

176 Zimmermann, *supra* note 156, under II.

177 On which, see Robert Joseph Pothier, *Traité des Successions, in* Oeuvres Posthumes de M. Pothier, vol. II, Paris, 1778, 2 (Article Préliminaire); Helmut Coing, Europäisches Privatrecht, vol. II, 600, 609 (1989).

178 *Cf., in particular,* Gottfried von Schmitt, *in* Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Erbrecht, Part 2, 10113 (Werner Schubert ed., 1984).

179 Zimmermann, *supra* note 156, under III.

regarded as punishment[180] nor based on the (presumed) intention of the deceased[181] but rather serves to protect the freedom of the testator to determine who is to be his heir: his private autonomy *mortis causa*.[182]

In the course of the twentieth century, five of the ten legal systems surveyed have reformed their rules on unworthiness to inherit, usually in the course of a more comprehensive reform of their law of succession or their codification in general (Austria, France, Italy, Portugal, and the Netherlands). These reforms have led to a convergence, though only to a very limited extent.[183] Austria and Portugal, in particular, have abandoned certain features setting their rules apart from what is widely recognized in Europe. French law, significantly, now recognizes a formal declaration, on the part of the deceased, that he has forgiven the crime committed against him.[184] Nonetheless, frequency distribution as well as an analysis of lines of development[185] reveals key elements of the law concerning unworthiness to inherit in Europe. On that basis it is possible to establish rational points of departure for discussing the details of this institution, to agree upon the most convincing conceptual and teleological foundations, and to pave the way towards leveling out differences which can be explained, but hardly justified, historically.[186]

C. Perspectives

This is but a small example. Still, it appears to me not to be untypical for the law of succession more generally.[187] Just about all the factors are relevant here

180 This is the French approach; *see* Henri et Léon Mazeaud, Jean Mazeaud, Francois Chabas, Leçons de Droit Civil, vol. IV, Successions – Liberalités, no. 717 (Laurent Leveneur & Sabine Mazeaud-Leveneur eds., 5th ed. 1999).

181 This is the Austrian approach; *see* Franz Xaver Nippel, Erläuterung des allgemeinen bürgerlichen Gesetzbuches, vol. IV, 41 (1832); for the situation today, see Helmut Koziol & Rudolf Welser, Grundriss des Bürgerlichen Rechts, vol. II, 422 (12th ed. 2001).

182 *Motive, in* Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, vol. V, 276 (B. Mugdan ed., 1899); *cf. also Protokolle*, in the same volume, 817, 818; Friedrich Mommsen, Entwurf eines deutschen Reichsgesetzes über das Erbrecht nebst Motiven, 140-43 (1876).

183 *See* Zimmermann, *supra* note 156, under V.

184 Art. 728 Code civil.

185 These criteria are mentioned as relevant also for the field of the law of succession by Leipold, *supra* note 151, at 656, 657.

186 *See* Zimmermann, *supra* note 156, under VI. and VII.

187 Along the same lines, see Marius J. de Waal, *Comparative Succession Law, in* The Oxford Handbook of Comparative Law, *supra* note 12, at 1071; Inge Kroppenberg, *Erbrecht*, *in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, 416, at 418; *cf. also* Leipold, *supra* note 151, at 650 (who maintains that the notion of the law of succession

which have made the law of contract such a fertile area of comparative study. Thus, there is the theme of a considerable diversity of modern legal regimes within an overarching intellectual unity based on common roots in medieval law.[188] Of course, there also is the wide-spread notion of a fundamental divide between the common law and the civilian world. But, as in contract law, we sometimes find that the differences are not as sharp as they are traditionally perceived to be;[189] that our perception is distorted by the fact that the same developments have occurred on both sides of the Channel, though not simultaneously but with a certain time-lag;[190] that there can be equally significant differences among the civilian systems;[191] that some civilian systems adopt a solution also recognized in the common law while others do not;[192] and that the map of European legal systems should not, therefore, be painted in black and white but in different shades of grey. We find the phenomenon of transnational migration of ideas[193] and can draw on the stimulating experiences of

being specifically embedded in a people's culture often sounds like an empty slogan) and, of course, the other authors mentioned *supra* note 151. For a first reconnaissance, see Exploring the Law of Succession: Studies National, Historical and Comparative (Kenneth G.C. Reid et al. eds., 2007).

188 The history of the executorship can be told in this light: Reinhard Zimmermann, *Heres Fiduciarius? Rise and Fall of the Testamentary Executor, in* Itinera Fiduciae: Trust and Treuhand in Comparative Perspective 267 (Richard Helmholz & Reinhard Zimmermann eds., 1998); *cf. also* De Waal, *supra* note 187, at 1095, 1096 and, more generally, Leipold, *supra* note 151, at 650.

189 *See* Tobias Helms, *Erbenhaftung, in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, at 404 concerning the liability of the heir; De Waal, *supra* note 187, at 1085, 1086, concerning the legitimate portion; *cf. also* Scalise, *supra* note 151 at 102, 105.

190 *See* Sebastian Herrler, *Testament, in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, 1472, at 1475 (relating to the question of how wills are interpreted).

191 *See* Inge Kroppenberg, *Universalsukzession, in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, 1560, at 1561 The difference in approach to the validity of *pacta successoria* between the "Romanistic" and the "Germanic" legal families is well-known; *see, e.g.,* Walter Pintens, *Die Europäisierung des Erbrechts*, 9 Zeitschrift für Europäisches Privatrecht 644 (2001) (but, again, the position is not quite so clear-cut, see Tobias Helms, *Erbvertrag und gemeinschaftliches Testament, in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, at sub 2). Also, for example, Dutch law (contrary to all other Western European legal systems) does not recognize the private will, while Austria stands out for having retained a system of comprehensive and obligatory official estate supervision.

192 Joint wills are recognized among spouses, or even more generally, in Austria, Germany, England, and the Nordic countries but are frowned upon in many other countries (e.g., Switzerland, France, Italy, and the Netherlands); *see* Helms, *supra* note 191, under 3.

193 For an example, see Reinhard Zimmermann, *Cy-près, in* Iuris Professio: Festgabe

the mixed legal systems.[194] Sometimes we see different legal systems grappling with the same or very similar individual problems[195] or policy concerns;[196] attempting to find a balance between conflicting legal principles recognized by all of them;[197] and coping with developments affecting all societies in Europe in the same or very similar way.[198] We can observe certain international trends if we look at the more recent reform legislation and discussion[199] (which, incidentally, also makes us aware of the fact that the law of succession is less static than it is widely thought to be). And we can start to ask ourselves which out of many different solutions to a legal problem available in Europe today appears to be preferable, from a functional or from a policy perspective. "For a long time," Marius de Waal writes, "the law of succession has led a precarious existence at the outposts of the comparative legal landscape. However, there is every indication that this is going to change."[200] At the same time, it should be possible to Europeanize study and research in the law of succession even, or perhaps

für Max Kaser, 395 (1986).

194 See, as far as trust law is concerned, Marius J. de Waal, *The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared,* 117 South African Law Journal 548 (2000); George L. Gretton, *Trusts without Equity,* 49 Int'l & Comp. L.Q. 599 (2000). Scots and South African law have been an important source of inspiration for the Principles of European Trust Law, *supra* note 150.

195 For instance, the question whether a testator may delegate his testamentary power; see Reinhard Zimmermann, "Quos Titius voluerit" – Höchstpersönliche Willensentscheidung des Erblassers oder "power of appointment"? (1991).

196 Kroppenberg, *supra* note 191, under 5 (concerning how best to effect an orderly transfer of a deceased's estate).

197 For example: freedom of testation and family solidarity; or: freedom of testation and freedom of contract. As to the former, see Inge Kroppenberg, *Pflichtteilsrecht, in* Handwörterbuch zum Europäischen Privatrecht, *supra* note 175, IISG; as to the latter, Helms, *supra* note 191.

198 On the strengthening of the position of spouses (and partners more generally) vis-à-vis descendants, culminating in the new Dutch law of succession, see Pintens, *supra* note 191, at 638-43; Inge Kroppenberg, *Erbfolge, in* Handwörterbuch zum europäischen Privatrecht, *supra* note 175, 409, at 409, 412; she refers to a "change of paradigm from a 'vertical' . . . to a 'horizontal' law of succession." Specifically for the new Dutch law, see Sjef van Erp, *The New Dutch Law of Succession, in* Reid et al., *supra* note 187, at 193. – Generally, on social and economic factors influencing the law of succession, see De Waal, *supra* note 187, at 1077; Kroppenberg, *supra* note 187, at sub 3.

199 *See, e.g.,* Pintens, *supra* note 191, at 628; Kroppenberg, *supra* note 197, concerning the legitimate portion and, particularly, the move away in the continental legal systems from the notion of (*materielles*) *Noterbrecht* (the relatives are granted a share in the estate itself) to the relatives merely being granted a monetary claim against the estate.

200 Marius J. de Waal, C*omparative Succession Law*, in The Oxford Handbook of Comparative Law supra note 12, at 1097.

particularly, if one adopts a culturalist approach to law. For a discussion limited by *national* boundaries and ignoring the deeper roots of our European cultural identity is as problematic here as in other areas of private law.

VI. SUMMARY

This essay has attempted to assess where we stand today in our efforts to state, restate, or create a European private law. Contract law has been, and will continue to be, at the center of attention. Even though there are areas that have remained largely unexplored, the ground has been relatively well prepared in comparative research. As a result, we are faced with an abundance of documents and initiatives. The Principles of European Contract Law have played a pioneering role. They were intended to provide a "restatement" of the *acquis commun*, i.e., the traditional contract law laid down in the national legal systems in Europe. Internationally, they compete with the Unidroit Principles of International Commercial Contracts. Both works are comparable in many respects and they have, to some extent, influenced each other. Both of them have been influenced considerably by the CISG.[201] The Principles of European Contract Law, in turn, have provided the starting point and basis for a draft codification of core areas of patrimonial law that has been commissioned by the European Union and has been given the enigmatic designation "Common Frame of Reference." In the process, however, the Principles of European Contract Law have been revised both by the draftsmen of the Common Frame of Reference and, independently, by a French academic network. In addition, the draftsmen of the Common Frame of Reference have attempted to incorporate the *acquis communautaire*, i.e., the law contained in the directives enacted by the EC, predominantly in the field of consumer contract law. In this respect they have been able to draw upon a "restatement" of the *acquis communautaire* that has appeared under the title "Principles of the Existing EC Contract Law (Acquis Principles)." At the same time, however, the European Commission has prepared a Proposal for a Consumer Rights Directive which is designed to "merge" the four most important directives in the field of consumer protection (i.e., the Doorstep Selling, Unfair Terms in Consumer Contracts, Distance Contracts, and Consumer Sales Directives) into a single horizontal instrument and which also, therefore, aims at "restating" central areas of the *acquis communautaire* in a more coherent

201 Ole Lando refers to a "troika" of contract rules on which a future world contract law should be based: Ole Lando, *CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law,* 53 Am. J. Comp.L. 379 (2005).

fashion. Surprisingly, there does not appear to have been any coordination between that Proposal and the Draft Common Frame of Reference. The future course of European contract law, therefore, is unclear. The change from the concept of minimum to that of full harmonization envisaged by the Proposal for the Consumer Rights Directives will lead to serious problems on the national level. There is one point, however, which the Proposal and the Draft Common Frame of Reference have in common: they essentially perpetuate the tools and policies of the present *acquis communautaire*. No fundamental and critical review of these tools and policies has taken place. Such a revision, and the consequent integration of *acquis commun* and *acquis communautaire*, remain one of the major challenges for the future.

The situation in sales law is similar in that we have a variety of documents (CISG; the Consumer Sales Directive; the Principles of European Sales Law; Book IV A. of the Common Frame of Reference; and Chapter IV of the Proposal for a Consumer Rights Directive) which are only partly coordinated with, or based upon, each other. Even though the harmonization of sales law has a long tradition, a number of issues remain unresolved. In other fields (tort/delict, unjustified enrichment, special contracts other than sale) the search for doctrinal structures which are recognizably European and teleologically satisfactory has only just begun. The respective parts of the Draft Common Frame of Reference cannot claim to be a "restatement", or to represent a "common core", of European law. They may be used to kick off the debate about an authoritative European reference text but they cannot be regarded as constituting such a reference text themselves. Finally, there are a number of branches of private law that have remained unaffected by the European legal harmonization debate. One of them is the law of succession which is widely held to be shaped by national legal culture and not to lend itself to comparative discourse. That perception, however, is highly questionable.

Is there a common denominator for what has been said in this essay? The extent to which the different areas of private law have acquired (or re-acquired) a European identity differs very widely. Some are well on their way while others have barely started. All of them require genuinely European, as opposed to

national, legal scholarship, based on historical and comparative study.[202] But none of them is ready to be cast into an official European legal instrument, whatever its name may be.

Reinhard Zimmermann is Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, and Professor of Private Law, Roman Law, and Comparative Legal History, University of Regensburg.

202 *Cf. also* Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science* 42 L. Q. Rev. 576 (1996); Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law, in* The Oxford Handbook of Comparative Law, *supra* note 12, at 539; Nils Jansen, *Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht* 13 Zeitschrift für Europäisches Privatrecht 750 (2005); Nils Jansen, *Traditionsbegründung im europäischen Privatrecht*, 61 Juristenzeitung 536 (2006); Jan Smits, *Contract Law in the European Union: Convergence or Not?, in* 4th European Jurists' Forum, 45 (2008); Smits, *supra* note 104, at 162.

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