

Institute of Advanced Legal Studies
School of Advanced Study
University of London

Omar Abdel Aziz

Europeanisation of Contract Law and its effect on Third
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Table of Abbreviations

1. Acquis Principles of European Contract Law.....	ACQP
2. Common Frame of Reference.....	CFR
3. Draft Common Frame of Reference.....	DCFR
4. Commission on the principles of European Contract Law.....	CoPECL
5. Court of Justice of the European Union	ECJ
6. Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union (Treaty of Lisbon).....	TEU
7. European Contract Law.....	ECL
8. European Review of Contract Law Journal.....	ERCL
9. European Union.....	EU
10. Member States.....	MS
11. Members of Compilation and Redaction Team.....	CRT
12. Principles of European Contract Law.....	PECL
13. Research Group on Existing EC Private Law.....	The Acquis Group
14. Joint network on European Private Law.....	CoPECL
15. Study Group on European Civil Code.....	SGECC
16. Unidroit Principles of International Commercial Contracts.....	Unidroit

Chapter One: Introduction and Historic Back Ground

Historic Background:

The Process of Europeanisation of contract law was founded on "Hard" contract law materials like EU directives and regulations. The Acquis regarding the directives focus primarily on consumer and commercial perspectives. The Regulatory side of the consumer directives deals with misleading advertising, unfair commercial practices and consumer credit, while the other side of private law deals with doorstep and distance selling, unfair terms and consumer sales. On the other hand the regulations add to harmonisation process through Rome I & II Regulations and Brussels I regulation.

Beside the hard contract law, the process depends as well on neutral rules for international transactions like international conventions "Vienna convention on the International Sale of Goods (CISG) and the international soft law of the UNIDROIT Principles for International Commercial Contracts. In additions, some European Restatements participated in this process like the Academy of European Private Lawyers (Gandolfi), EC Group on Tort and Insurance Law (PETL), and the Lando Commission on European Contract Law.

The early attempt of providing a European contract law starts with the Principles of European Contract Law (PECL), part I and II (2000) deals with formation, validity, contents and effects, performance and remedies. Part III deals with multiple parties, assignments, set-off, prescription, illegality and conditions. Then, the Acquis Group takes the role of preparing the already existing EC private law principles from the *Acquis Communautaire*. Finally, a study Group consisting of eminent academic professors across Europe gathered to formulate the European Civil Code.

The Commission, by its role, issued a communication to the European Parliament in 2001 on ECL, followed by an action plan on a more coherent ECL (2003). Then finally, in 2004 was the way forward a CFR to act to encompass the fundamental principles of contract law, provide definitions of key concepts and postulate model rules for the improvement and revision of the *acquis* drafting technique. It acts as an optional instrument for member states to adopt these rules in their cross-border transactions. In 2007, the European Commission issued a green paper requiring the revision of 8 consumer directives 2007 were the majority of the contract law rules are primarily stemmed from the consumer *acquis*.

However, some of terms were used in the DCFR without definitions, amongst which, "damages", when a "contract is concluded" and "recession" they leave its interpretation to ECJ and Member States (MS). The Model rules are envisaged to govern the relation between businesses and private persons and between business and consumers. The

PECL aimed at business persons with a simple "populist" language while the DCFR is technically more correct and it directed to draftsmen and legislators as will be shown later.

The core of the Europeanisation focused on the consumer acquis, it prioritize it in 2005 and the commission starts by issuing a green paper in February 2007 followed by a draft consumer right directives in October 2008.

DCFR and CFR distinguished:

The DCFR is the fruit of the work of the SGECC and the Acquis Group for formulating an academic draft of principles, Definitions and Model Rules of the existing European Private Law in an interim outline edition. In addition, this work fulfills an undertaking before the European Commission in 2005. Part of this draft is intended to be the seed for a political CFR as required by the European Commission's "Action Plan on a More Coherent European Contract Law".¹ It is an interim addition, because it was intended to be completed later after addition of some more model rules and receiving explanatory and illustrative comments on the existing model rules by the commission. The full edition was completed by the end of 2008.

It must be noted that this edition is a purely academic one drafted by contributions from academics with expertise in private law, comparative law and European Community law. The draft does not contain 'one single rule that has been approved or mandated by a political body either on a European or national level except where it coincides with existing EC or national legislation'.² That said, the DCFR can work as a possible model for a political CFR. Nevertheless, the DCFR on its own can work as a legal guidance for private law knowledge in different European jurisdiction; it attracts legal criticism to such an extensive research endeavour in a European project.

Furthermore, it will enhance comparative work to evaluate points of similarities and differences between different MS and to what extent these rules can be regarded as 'mutual stimulus for development and to what extent those laws can be regarded as a regional manifestations of an overall common European legacy'.³ It is submitted that DCFR can inspire MS to find solutions to common private law issues. For example, the PECL received considerable attention from European courts and official bodies for modernisation of relevant national laws and consequently to informal European

¹ COM (2003) final, OJ C63/1.

² Christian von Bar and others (eds), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the principles of European Contract Law (sellier. european law publisher 2008), 5.

³ Ibid, 6 [7].

harmonisation of private law. The DCFR is to a wide context a revised form of these principles.⁴

Definitions, Principles and Model Rules Distinguished:

Definitions are considered the preliminary tool of harmonisation by adopting uniform terminology. This is illustrated in Art. I -1:103 (1) ('the definitions in Annex 1 apply for all the purposes of these rules unless otherwise provided or the context otherwise requires'). The drafting technique used was to keep the first chapter short while expressly incorporating all the needed terminology in an "appendage" to keep the process of modifying and addition to this terminology easy without further editorial work. 'The substance is distilled from the *acquis*, but predominately derived from the model rules of the DCFR. If the definitions are essential for the for the model rules, it is also true that the model rules are essential for the definitions'.⁵

On the other hand, the word principles and model rules appear to overlap with each other. Thus a demarcation line needs to be provided. Principles can be used to refer to rules which don not have the force of law.⁶ In addition, they might be intended to refer to general rules of law. However, the term underlying principles is distinguished from mere principles in that sense that the former denote 'essentially abstract basic values, which the legislator should bear in mind when seeking to strike a balance between principles and the underlying ones'.⁷ Model Rules are based on these underlying principles.

Model Rules forms the major part of the DCFR. By their name they act as soft law rules like the PECL. They lack normative force. Legislators and Politician can resort to them to 'improve the internal coherence of the *acquis communautaire*'.⁸ They will be supplemented by comments and notes from scholars as requested by the European commission so that each rule in the final edition is modified, provided by practical examples, underlying policy considerations and exploring its application in individual MS.

⁴ Ibid, 7. See also Ole Lando and Hugh Beale (eds), *Principles of European Contract Law Part I and II. Prepared by the Commission on European Contract Law* (The Hague 1999); Ole Lando, Eric Clive, Andre Prum and Reinhard Zimmermann (eds), *Principles of European Contract Law Part III* (The Hague, London and Boston 2003).

⁵ Ibid, 9 [12].

⁶ See for example PECL which refer to themselves in Art. 1:101 as "Principles...intended to be applied as general rules of contract law in the European Union" and the Unidroit,

⁷ Ibid, 12 [11].

⁸ Ibid, 10 [13].

Coverage of DCFR:

Although the PECL has postulated rules on the formation, validity, interpretation, and contents of contracts, performance of obligations, remedies for non-performance of obligations either for contracts or other juridical acts. In addition, specific chapters deal with general private law rules, for instance, rules on a plurality of parties, on the assignments of rights to performance of such obligations, on set-off and on prescription, the DCFR add to all of these the idea of model rules, especially in specific contracts and the rights and obligations arising out from them. For applying these rules, the DCFR make them expand, specify the general provisions stated in Book (I-III), or 'even deviate from them where the context so requires or address matters not covered by them'.⁹

Furthermore, it encompasses non-contractual obligations to a wide extent including the rights and obligations arising out of unjust enrichment, of damages caused to benevolent intervention in another's affairs. It deals in its final edition with movable property, transfer of ownership and proprietary security and trust law. Finally, the DCFR is an organic entity for the law of obligations;¹⁰ it does not focus solely on rules of general contract law or consumer law. It regulates private law in its wider sense.¹¹

From a drafting point of view,¹² the DCFR gives more consideration to terms like contract and obligation. For example, a contract is concluded but an obligation is performed, similarly it is not terminated but the rights and obligations arising out of it. Terminologically, the DCFR used the terms "creditors" and "debtor" instead of "the aggrieved party" and "the other party" as used in PECL. Using the word of "Obligation" as a counterpart to the right of performance leads to some modifications in the PECL when incorporated in DCFR.

⁹ Ibid 19 [37].

¹⁰ Ibid 20 [42].

¹¹ For the difficulty of striking a dividing line between contract law in the wider sense and some other areas of private law precisely, see von Bar and Drobnig (eds), *The Interaction of Contract Law and Tort and Property Law in Europe* (Munich 2004). This study was concluded on behalf of the European Commission.

¹² Ajani Gianmaria, 'A Better of EU Private Law" and Multilingualism: Two Opposing Principles?' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008). Bar Christian von and others (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Interim Outline Edition*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the principles of European Contract Law (sellier. european law publisher 2008). Beale H.G and others, *Cases, Materials and Text on Contract Law* (Oxford: Hart 2010).

To illustrate this here are some examples:¹³

Art. III: -2:102 DCFR: **Time of Performance**

(1) If the time at which, or a period of time within which, an obligation is to be performed cannot otherwise be determined from *the terms regulating the obligation* it must be performed within a reasonable time *after it arises*.

(2) If a period of time within which the obligation is to be performed can be determined from the terms *regulating the obligation*, the obligation may be performed at any time within that period chosen by the *debtor* unless the circumstances of the case indicates that the *creditor* is to choose the time. [Italics added]

Compare it with Art. 7: 102 PECL: **Time of Performance**

A *party* has to effect its performance:

(1) If a time is *fixed by or determinable from* the contract, at that time.

(2) If a period of time is fixed by or determinable from the contract, at any time within that period unless the circumstances of the case indicates that *the other party* is to choose the time.

(3) In any other case, within a reasonable time after the conclusion of the contract. [Italics added]

Notice the difference in PECL and DCFR respectively [party –the other party] and [debtor and creditor], [fixed by or determinable from the contract] and [can be determined from the terms of the obligation], [a reasonable time after the conclusion of the contract] and [a reasonable time after the obligation arises]. It is obvious that the wording of the DCFR is slightly more abstract and this is helpful to determine in the rights and obligations arising out of a contractual relationship where not only the written contract [as in PECL] but also the applicable mandatory and default rules determine its scope. This approach was adopted earlier by the **Egyptian Civil Code**¹⁴ when it provides in Art 148 that:

(1) A contract shall be performed according to what has been stated in it and in manner compatible with good faith.

(2) A contract does not only abide the parties by what has been stipulated in it but also by all its accessories provided by law, custom and justice according to the nature of the obligation.

¹³ Schulte-Nolke Hans, 'Contract Law or Law of Obligations – The Draft Common Frame of Reference (DCFR) as a Multifunction tool' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008), 56 [V] -61.

¹⁴ Egyptian Civil Code No 131 for 1948 came into force in 15th October 1949.

In addition, the word ("a party has to effect performance") is a heavy noun – based construction and makes the reader wonder whether such this is different from the mere sentence ("to perform") creating consequently ambiguity in a legal notion of the obligation to perform an obligation. Instead the DCFR used the passive voice in a brilliant way ("an obligation is to be performed") giving an impression of a broader scope of application in order not to be restricted to the written document ("contract").

Otherwise, we would draft a separate rule for each non-contractual obligation arising out of tort or unjust enrichment and related to the contract. "This article applies to obligations other than non contractual obligations with the appropriate modifications".¹⁵ This is further evidence in another example:

Art. III. -3:101 DCFR: Remedies available

- (1) If *an obligation is not performed by the debtor* and the non-performance is not excused, the *creditor* may resort to any of the remedies set out in this chapter.
- (2) If the *debtor's* non-performance is excused, the *creditor* may resort to any those remedies except *enforcing specific performance* and damages.
- (3) The Creditor may not resort to any of those remedies to the extent that *creditor* caused *the debtor's* non-performance. [Italics added]

Compare it with its predecessor Art. 8:101 PECL: **Remedies Available**

- (1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Art. 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.
- (2) Where a party's non-performance is excused under Art. 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.
- (3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

It would not be a problem to re-contractualise the provisions of the DCFR in case the final version of CFR should be limited to contract law. It is confusing for the PECL's Article that the creditor of the obligation is called the ("the aggrieved party") in paragraphs (1) and (2) and then ("the other party") in paragraph (3). This may require 'more contemplation to understand that the same person is meant but in the last paragraph not aggrieved because it has caused the non –performance itself'. More

¹⁵ Different proposals were introduced by O. Lando, 'The Structure and the Legal Values of the Common Frame of Reference' [2007] ERCL 251, who suggest "contractualising" the Chapters on Performance and Remedies and to put them into Book II, but to provide a general rule in Book III that the provisions on performance and Remedies apply with appropriate modification.

cumbersome is the word "party" which needs to be distinguished every time the article used the word "the aggrieved party" and "the other party".

Moreover, the word "its own act" leads to more ambiguity in determining whether only acts or also omissions are included and whether beside "the party's own act" other acts which are other acts which are also the party's act but not its own (if another person has acted on behalf of the part). That said, the other phrase of DCFR ("to the extent that the creditor caused the debtor's non performance") is much clearer and better.

Currently, we are waiting for:¹⁶

1. a concomitant evaluation (economic impact assessment) for the DCFR carried out by the Research Group on the Economic Assessment of Contract Law Rules, organized by the Tilburg Law and Economics Centre;
2. An analysis of the philosophical underpinnings, undertaken by the Henri Capitant together with the Societe de legislation Comparee and the Conseil Superieur du Notariat.
3. Case assessment regarding the applicability of the principles made by the Common Core Group.
4. A case law database elaborated by a team of the University Paris-Sud.
5. The integration new EC legislation (new Services Directive¹⁷ and the forthcoming Consumer Credit Directive¹⁸).

¹⁶ Bar, n [2], 38 [77-79].

¹⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

¹⁸ Political agreement on the new Consumer Credit Directive reached in Council on 21 May 2007; Commission Position adopted on 20 September 2007; see further the Communication of the European Commission of 21 September 2007 COM (2007) 546 final.

Chapter Two: Europeanisation Methodology

Drafting Style:

Stemming from the fact that the Acquis principles serve a dual purpose where they formulate rules based on existing EC contract law as applied within MS and they represent the contribution of the Acquis to a Common Frame of Reference for European Contract Law where these rules should dovetail with the rules drafted by other members of the CoPECL. This entails using different methodology rather than merely formulating existing rules based on EC law sources.¹⁹

The Council of Europe endorsed the creation of a CFR on ECL on 18 April 2008.²⁰ The CFR is defined as "a set of definitions, general principles and model rules in the field of contract law" or "a tool for better law making".²¹ It could even form the basis of directly applicable rules in contract law as "an optional instrument".²²

Chapter 1, Art 1, Scope and Purpose of the Acquis Principles:

- (1) The following principles and rules are formulated on the basis of the existing law of the European Community in the field of Contract Law.
- (2) These Principles and Rules serve as a source for the drafting, the transposition and the interpretation European Community Law.
- (3) They are not formulated to apply in the areas of labour law, company law, family law or inheritance law.

The drafting process is conducted by individual drafting teams, the Redaction Committee, the Terminology Group and the Plenary Meeting. These teams are dealing with specific areas of contract law. Once the drafting team finished a draft, it passes to the Redaction committee whose task is to harmonize between the different draft proposals submitted from different teams. It also prepares drafts for discussion decision by the plenary meeting. The draft then found its way to the terminology group which aim primarily to harmonise the use of terminology, improving the language and consistency of the draft. Then it passes its comments to the drafting teams for taking

¹⁹ Dannemann Gerhard, 'Consolidating EC Contract Law: An Introduction to the work of the Acquis Group' in *Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Pre-Contractual Obligations. Conclusion of Contract: Unfair Terms*, prepared by the Research Group on Existing EC Private Law (Acquis Group) (2007).

²⁰ Press Release 8397/08, 8.

²¹ Dannemann Gerhard, 'Drafting Principles of Existing European Contract Law' in Stefanou Constantin and Xanthaki Helen (eds), *Drafting Legislation: A modern Approach* (Ashgate 2008), 167.

²² European Parliament Resolutions of 12 December 2007, PT_TA (2007)06 15, and of 7 September 2006, PT_TA (2006) 0352.

into considerations before final submission to the plenary meeting for adopting a decision on drafting.

Methodology:

After showing adopted drafting style to reach CFR, the question remains:

How can one formulate EC Contract Law rules from a compilation of directives, regulations and case law which is not best known for clarity and consistency? And how can one formulate such rules if most of EC law in the area of contracts is primarily concerned with consumer protection?²³

The Acquis group noticed two problems in dealing with these questions; the first is that EC contract law is not confined to some directives²⁴ and Brussels I and II regulations and the Rome Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the Recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility. These legislations are feasible to be formulated in a more general level through the digest of case studies. The second problem is overstretching rules of consumer protection to draft general rules of European contract law.

The Acquis has relied on general interpretation method of EC law to ‘transcend the piecemeal of the existing piecemeal legislation approach, but which at the same time can realistically claim to be based on the *acquis*’.²⁵ This can be achieved through purposive interpretation and *effet utile*. EC rules on contract law can be either a) a general rule; b) an exception to a general rule; or c) a rule that stand for itself and cannot be generalised one way or another. Deciding on the nature of a rules and its suitability for generalisation involves policy decisions. An effective tool to reach a decision on this issue is purposive interpretation.

²³ Dannemann, n [20], 170.

²⁴ Directive 85/577/EC to protect consumer in respect of contracts negotiated away from business premises; Directive 86/653/ EEC on the coordination of the laws of the member states related to self – employed commercial agents; Directive 90/314/ EC on package travel, package holidays and package tours; Directive 1997/7/EC on the protection of consumers in respect of distance contracts; Directive 1994/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the internal market; Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

²⁵ Dannemann, n [20], 171.

The Acquis Group has started with:²⁶

- a) Generalisation of rules through search for common denominators. For example, the group has generalised numerous EC provisions relating to duties on pre-contractual information.
- b) Generalisation of rules through interpretation of legislation as expression of a more general principle. For example, the group has thus generalised various situations which give rise to a right of withdrawal in consumer contracts.
- c) Generalisation of rules through interpretation of legislation as exception to a more general principle. For example, the group has interpreted the limited number of EC form provisions as exceptions to a general principle of freedom of form.
- d) Extension of rules under the doctrine of *effet utile*. For example, the group has arrived at a conclusion that violations of information duties or form requirement must have some consequences, and have attempted to formulate those.

It worth mentioning, that the terminology group avoided the use of pure English legal expressions when drafting the European rules as they mislead the readers when understanding them through the eyes of English law.²⁷ For example words like "consideration", "shall" and "deemed"²⁸ are pronounced to be completely banned for their tendencies to obscure more than to clarify.

Europeanisation through ECJ judgments²⁹

As long as international treaties govern only a very limited part of private law and limited numbers of member states accede to them, the ECJ takes a complementary role in unifying the application of private law. This has been achieved as follows:

a) Tort Law

Directives have to be interpreted by the national courts in a "European Friendly Manner". The role of the ECJ is to ensure the conformity of national law rules with these

²⁶ Ibid, 172.

²⁷ Sir William Dale(1977), Ch. 14; G. Dannemann, 'The Drafting of the Consumer Credit Legislations – A Structural Comprehension between EU Directives and the English, Irish and German Acts' in H. Schutle Nolke and R. Schulze (eds), *Europäische Rechtsangleichung und nationale Privatrechte*, (Baden –Baden; Nomos Verlagsgesellschaft, 1999), 191-204.

²⁸ D. Ibbeseston, *A Historical Introduction to the Law of Obligation* (OUP 1999), 43.

²⁹ For more detailed discussion on this topic, see W van Gerven, 'The ECJ case law as a means of unification of private law?', in A Hartkamp *et al*, *Towards a European Civil Code* (3rd edn, Nijmegen: Ars Aequi 2004).

directives. It plays this rules through the preliminary ruling procedure laid down in art 267 TEU. It maintains the uniform interpretation of the concepts used in these directives thus they confer the same effect whenever used and in every member states. However, practically the interpretation role practiced by the ECJ in construing Treaty provisions (textual nature) is different from that practiced in directives. Van Gerven illustrated that such interpretation is 'not very audacious, but rather of a textual nature'³⁰ by saying:

In Marleasing 13 November 1990, C-106/89. ECR 1990, I-4135, The ECJ ruled that national courts should, as much as possible, interpret their national rules in a way that this in line with the objective and wording of the directive. The duty to interpret national law in conformity with the directive is already incumbent on the courts after the issuing of the directive (thus even before interpretation).³¹

On a different note, the ECJ established in *Francovich*³² and *Brasserie*³³ cases the principle of state liability where a member state that fails to implement a directive or even implement it late is liable in tort for the harm caused to the aggrieved citizen (s) in the concerned member states provided that certain conditions are fulfilled (the directive is intended to confer rights on the individuals, the content of these rights is determinable and the breach of community law is sufficiently serious and that a causal link between the breach of community law and the harm can be proved).

That said, that the conflicting national rules can no longer be part of the national law, otherwise they would be set aside and replaced by new European rules which replaces the pre-existing ones. This contributes to the uniformity effect of national law with EU law. Moreover, the ECJ played a more specific rule in enhancing conformity of interpretation of private law concepts like "Causation" and "harm". Nevertheless, the real dramatic change would be of the ECJ recognise the availability of remedies for breaches of European Union law by individuals (the Horizontal Direct Effect of Directives). Yet, this has not been acknowledged.³⁴

³⁰ Jan Smits , *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (Translated by Nicole Kornet, Intersentia 2002), Schulte-Nolke Hans, 'Contract Law or Law of Obligations – The Draft Common Frame of Reference (DCFR) as a Multifunction tool' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008); Schulze Reiner, 'The Academic Draft of the CFR and the EC Contract Law' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008); Smits Jan, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (Translated by Nicole Kornet, Intersentia 2002); Smits Jan (ed), *The Need for a European Contract Law: Empirical and Legal Perspectives* (Europe Law Publishing, Groningen 2005).

³¹ Van Gerven, 'Textual Interpretation' (1997) 5 ERPL 295.

³² Case C-6/90 and C-9/90 ECR 1991, I- 5357 (*Francovich and Bonifaci*).

³³ Case C- 46/93 en C-48/93 ECR 1996, I – 1029 (*Brasserie du Pecheur and Factortame III*).

³⁴ Jacob Oberg, 'The Doctrine of Horizontal Direct Effect of Directives in EC law and the Case of Angonese' (Master Thesis, Faculty of Law - Stockholm University, 11 October 2007).

B) Contract Law

Whilst Article 288 of the TEU provides in its second paragraph that ‘In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties’, it states in the same article in Paragraph one that ‘The contractual liability of the Union shall be governed by the law applicable to the contract in question.’

Thus, the ECJ has to search for common principles in case of tortious liability, but not in the contractual one. Accordingly, the unifying effect of the ECJ in the area of contract law was limited as the article does not force it to search for the same common principles as in Tort law.

Nevertheless, we can say that the involvement of the ECJ in the field of contract law can be anticipated in two situations:

First: Issuance of a preliminary ruling under Art. 267 TFEU on the interpretation of an EU measure

At the request of national courts or tribunal,³⁵ the ECJ can give a preliminary rulings *inter alia* on the interpretation of a European legislation. The national courts have discretion to refer question to ECJ to settle pending cases before it. But if the judgment of the national court has no judicial remedy, a request for a preliminary ruling is a necessity. However, there is no requirement for such ruling if a previous decision has already dealt with the question of interpretation.³⁶ Or if the EU legislation is irrelevant or the applicable law on the case is so clear that there is no need to refer the question for the ECJ. That said the mere usage of preliminary ruling is when the national court is in the process of application or interpretation of EU law by domestic courts.

Within the field of contract law, directives deal only with a specific field of contract law and courts tend to broaden the scope of their national law beyond that required by directives. With regard to Europeanisation, the ECJ has taken a liberal view of its jurisdiction to pass beyond interpretation task to establishing case law clarifying the

³⁵ Controversially this does not include arbitration panel except where arbitration is compulsory. So in C-125/04 *Denuit v Transorient – Mosaique Voyages & Cultures SA* [2005] ECR I – 923, an arbitration panel set up to resolve disputes *inter alia* in respect of package holidays was not ‘a Court or Tribunal’ because the parties were not obliged to refer their disputes to arbitration (para 16).

³⁶ Case C- 28-30/62 *Da Costa en Schake NV v Nederlandse Belastingadministratie* [1963] ECR 31 and Case 283/81 *CILFIT Srl v Ministero della Sanita* [1982] ECR 3415.

scope of directives. In the Package Travel Directive (90/314 EEC), the organizer and/or retailer of a package holiday is required to provide sufficient evidence of the procedures made to secure refunding of payments made by the consumer as well as the cost of repatriation in case of their insolvency (Art 7). In *Dillenkofer*,³⁷ the wording of Art 7 was unclear whether it intends to grant individual consumers a specific right guaranteeing the refund of payments they had already made. The German national court raised this question to the ECJ, the latter ruled:

The purpose of Article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of insolvency of the organized from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of this security which organizers must offer under Article 7 of the Directive is to enable consumers to obtain a refund of money paid over or to be repatriated.³⁸

The Germany and UK governments argued that Art. 7 is merely an obligation to provide information and to secure refunding. The ECJ construed the obligation to provide evidence as necessarily implies that those having such ‘an obligation must actually take out such security’.³⁹ Otherwise, such an obligation is ‘pointless’.⁴⁰ Obviously, the ECJ engaged in law making process.

Once again, in *Leitner*⁴¹ decision, the ECJ's interpretation is getting perilously close to law – making. This case represents an expansive interpretation in the context of consumer contract law. Art. 5 of the package travel directive imposes liability upon the organizer and retailer of a package holiday where there has been an improper performance of the contract. The directive is not clear about the scope of liability, whether it includes non-material loss due to loss of enjoyment for example. The ECJ viewed that the divergence between member states could lead to distortion of completion which goes against the main objective of the directive. Therefore, the court ruled:

...the fact that the fourth subparagraph of Article 5(2) provides that Member States may, in matter of damage other than personal injury, allow compensation to be limited under the contract provided that such limitation is not unreasonable, means that the Directive implicitly recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.⁴²

³⁷ Case C- 178/94 *Dillenkofer and others v Federal Republic of Germany* [1996] ECR I -4845.

³⁸ *Ibid*, para 36.

³⁹ Para 36.

⁴⁰ Para 41.

⁴¹ C-168/00 *Simone Leitner v TUI Deutschland* [2002] ECR I – 2631.

⁴² *Ibid*, para 23.

However, this expansive interpretation was not adopted by the ECJ when it asked directly to apply directly the legislations to the facts of a given case. In C- 237/02 *Freiburger Kommunabauten GmbH Baugesellschaft & Co KG v Hofstetter*, a preliminary ruling was referred to ECJ to interpret whether a particular terms satisfies the fairness test in the unfair contract term directive 93/13/EEC. The court noted that:

In the context of its jurisdiction under Article [267] to interpret [European Union Law], the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of particular circumstances of the case in question.

Conferring a more prominent role to the ECJ to apply the law directly to individual cases will significantly alter the nature of EU law and elevate the court to a supreme court for all member states. Though this might entail more uniformity, it would affect the relationship between EU law and national jurisdictions.

Second: Enforcement Procedures taken by the European Commission against a Member State under Art. 226

The Commission is empowered by virtue of Art. 258 TFEU to take action against member state which has not complied with its obligations under EU law. The commission starts amicably to ask the Member State to adjust its laws in line with the EU instrument. If these attempts failed, the commission will ask the court to declare that this member state has failed to cope with its obligations under EU law.⁴³ If the commission found that the member states did not amend its legislations in a continuous failure way to match EU objectives and interpretation judgments by the ECJ of terminological terms therein; further procedures may be held before the court under Art. 260 TFEU. Eventually, the ECJ may impose financial penalty on the member state.⁴⁴

In this approach, the primary focus of the commission is to ensure that the directive has been transposed successfully into domestic law without considering to what extent the objective of this directive has been fully attained. It is more a process of textual correspondence. However, ‘a lack of congruence in form does not inevitably mean that

⁴³ If a member state relies on legislation before a directive was adopted, ECJ has to show what the EU means before comparing it with national law, see C- 144/99 *Commission v Netherlands* [2001] ECR I – 3541.

⁴⁴ Review these cases in private law spectrum though they are outside the scope of contract law; C-52/00 *Commission v France* [2002] ECR I- 3827 (Art 266 proceedings), followed by C- 177/04 *Commission V France* [2006] ECR I – 2461 (Art 288 proceedings) , dealing with France's failure to implement Directive 85/374/EEC on product liability.

the result in applying the domestic rules by the national courts will fail to achieve that prescribed by the directive'.⁴⁵

C) Company Law

The leading case in that context is *Marleasing* case⁴⁶ where the court abolished the requirement of "Causa" as a requirement for concluding a valid contract. This is because Directive 68/151 does not list the absence of "Causa" amongst the ground of invalidating the contract establishing a company. In addition, in *Kefalas* regarding the question of whether the interpretation of harmonised law lay solely within the scope of national courts. The application of 'the Greek national law concept of abuse of right would imply that a directive in the field of company law would have no effect. The ECJ held that applying the abuse of right doctrine would prejudice the uniform application and full effect of community law'.⁴⁷

Europeanisation through ECtHR judgments

The contribution of the ECtHR is manifested in family depending on the broad interpretation of Art. 8 of the European Convention of Human Rights, the court has faced many discriminating national provisions. Up till now the court has adopted restrictive positions regarding the purposive interpretation within the field of Contract Law.⁴⁸ Yet its contributions for the Procedural Law are relatively large where it invoked Art. 6 of the Convention "a fair and public hearing within a reasonable time by an independent

⁴⁵ Twigg-Flesner Christian, 'Pre-Contractual Duties – From the Acquis to the Common Frame of Reference' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, Sellier European Law Publisher GmbH, Munich 2008), 49.

⁴⁶ C-106/89 ECR 1990, I-4135 (*Marleasing SA/LA Comercial*).

⁴⁷ Smits, n [28], 34.

⁴⁸ Dale W (1977), Ch. 14; G. Dannemann, 'The Drafting of the Consumer Credit Legislations – A Structural Comprehension between EU Directives and the English, Irish and German Acts' in H. Schulte Nolke and R. Schulze (eds), *Europäische Rechtsangleichung und nationale Privatrechte*, (Baden –Baden; Nomos Verlagsgesellschaft, 1999). Dannemann Gerhard, 'Consolidating EC Contract Law: An Introduction to the work of the Acquis Group' in *Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Pre-Contractual Obligations. Conclusion of Contract: Unfair Terms*, prepared by the Research Group on Existing EC Private Law (Acquis Group) (2007). Dannemann G, Ferrari S, Graziadei M, 'Consolidating EC Contract Law Terminology: The Contribution of the Terminology Group' in *Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Pre-Contractual Obligations. Conclusion of Contract: Unfair Terms*, prepared by the Research Group on Existing EC Private Law (Acquis Group) (2007).

and impartial tribunal established by law"⁴⁹ to unify procedural law across member states.

Furthermore, numerous treaties has added to the harmonisation effect of procedural law like the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels 1: now Regulation 44/2001) and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters of 1988 (EEC – EFTA parallel convention).

Concerning family matters, the unification process was faced with opposition as this area of law is peculiar with its significant culture divergences. As the role of financial interest in this area decreases, the role of international recognition and protection of national solution increases. Eventually, this results in a number of international conventions in the field of private international law and human rights protection in the sphere of family law.⁵⁰

Critical Questions:⁵¹

1. Do we need a political and Practical CFR beside the academic DCFR, and what will be its importance?

If the CFR is to become an optional instrument, in the sense of a set of rules that parties can choose as the law applicable to a contract they wish to conclude between them, it will have to be incorporated into an act of the institutions of the EU. It would seem that the Commission's preference is for a regulation based on Article 114 TFEU. This is because Art 81 TFEU would seem to be ruled out because it does not cover the substantive law and could not be used in combination with Art. 114 because of the special position of Denmark, the UK and Ireland. The only other possibility would be the flexibility clause, but that would seem to be dubious legally.

Of course if Art. 114 is chosen as the legal basis, this would imply use of the ordinary legislative procedure, which could threaten the "purity" of the CFR, since it would be open to amendment by politicians.

⁴⁹ For an overview of case law based on this Art. See Konstantinos Kerameus, 'Procedural Implications of Civil Law Unification', in: Hartkamp et al (eds), *Towards 1998*, 130.

⁵⁰ Hague Convention concerning the powers of authorities and the law applicable in respect of protection of minors 1961 (which ceases to apply once the Hague Convention on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996 enters into force), the Hague Convention on the law applicable to Maintenance Obligations of 1973 and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry adoption 1993).

⁵¹ Interview with Robert Bray, Principal Administrator; Secretariat of the Committee on Legal Affairs of the European Parliament (IALS: London, 29 August 2011).

It would be important as it would be viewed as a first step towards a European law of contract and possibly a European civil code, although there is no legal basis for such a code at present. Whether it will succeed will depend on its take-up by companies, since its optionality can apply only to businesses, except in so far as companies offered it as an alternative to a national law.

There are huge numbers of unanswered questions about the optional instrument, including its relationship with pil (Rome I, for instance) and the question of the level of consumer protection.

2. What will be impact of the DCFR on the contract laws of the member states? should they amend their rules in light of these model rules?

This is unknown. There will be no compulsion for MS to amend their national law, but there could be subtle pressures if the CFR is used as a tool box and once the Court of Justice starts to answer references for preliminary rulings on the CFR (one of the objections to the CFR is how to maintain uniform interpretation; another is that the substantive law of contract and differences therein have never proved a barrier to trade).

3. What about the common law jurisdiction, is the Europeanisation of contract law considered a backdoor for a codification process of the judge made rules?

The English Bar and the Law Society regard the CFR as a threat to the common law and to London's place as a forum for the resolution of expensive legal disputes in which English law as chosen as the applicable law. It is feared that the Germans have picked up at long last on the idea that there is a market in justice and want to use the CFR to give pride of place to what is essentially German law under another name.

4. Did the Europeanisation deal only with the agreed upon principles amongst member states and tries to formulate them in a better drafting method? or could it aim at unifying the meaning and scope of application of disputed legal concepts like punitive damages as some states acknowledge the availability of punitive damages in their legal systems while others consider it contrary to public policy. Thus in the remedies for non-performance section in the DCFR should we aim to resolve this dispute or shall we only re-state what is agreed upon amongst the member states?

It is unlikely that this sort of dispute will be able to be resolved in the context of the CFR or elsewhere (see the Commission's proposals for the abolition of exequatur in the context of the Brussels I Regulation).

5. For the Civil Law Jurisdictions in Europe, did they really benefit from the DCFR in updating their own national rules? What could be the interaction between the national laws of member states and that of the contract law of Europe?

The answer to the first question is “no”.

6. The CFR is “a set of definitions, general principles and model rules in the field of contract law”. It is primarily “intended as a tool for better lawmaking which should guide legislator” and “form the basis of directly applicable rules on contract law, perhaps in the form of an optional instrument”. It can be used as a “toolbox” for a revision of EC directives, or for the formulation of Acquis principles, or as a basis for drafting a European Civil Code. So, to what extent is it obligatory for the European institutions in rafting proposals for directives or regulations to member states?

At the moment it is in no sense obligatory and the Commission itself ignores it. Members of the European Parliament, such as Diana Wallis, endeavour to ensure that it is respected by amending Commission proposals accordingly.

7. Do we need a procedural law for the European Contract law, otherwise how are we going to enforce it on a European Level?

This is the chief problem. Procedural law and not the substantive law is the main barrier to cross-border litigation.

8. What will be the policy behind Europeanisation, the scope of this instrument (contract law or private law), who will benefit from it and what are its risks?

For the present, it is contract law and, to some extent, private international law and, to a lesser extent, procedural law. The Treaties as they stand preclude going much further. The beneficiaries are supposed to be consumers. Small businesses could benefit. The risks are unknown, but an even greater backlash against the EU in the UK may well be expected.

9. In September 2008 the European Parliament adopted its most recent Resolution on the Common Frame of Reference, pointing out, among other things, that “when taking a decision about the content of the CFR, the Commission should bear in mind that the CFR could go well beyond a mere legislative tool and could result in an optional instrument.” The DCFR is currently undergoing an evaluation process by a network of several academic groups and the Commission is preparing a white paper on a Common Frame of Reference, on the basis of selected parts of the DCFR. Did the commission issue this paper?

Yes.

10. What is the essence of Europeanisation? Uniformity, Harmonization or integration?

I would say uniformity in the case of the CFR.

11. Can a Judge or arbitrator extend the scope of its domestic contract law – as chosen by the parties or designated by choice of law rules – claiming the complementary role of

EU contract law to its national contract law? (Superiority of EU law over national laws).

I would doubt it; but in a given context, I would not be surprised to see the CFR used as an aid to interpretation by national courts.

Chapter Three: Apparent Agency, Franchise and Distribution Agreements

As a matter of fact, the Egyptian Civil Code and the Egyptian Commercial Law do not contain one single provision regarding the any of the above mentioned specific contracts of this chapter. These contracts are governed generally by the general principles of law of obligations with only two main restrictions that nothing in these areas of the contracts dealing with them is contrary to public policy or the general principles of Islamic law as set out in the constitutional declaration governing the political, social and legal life currently in Egypt.⁵²

Accordingly, any proposed provisions in this section shall not be in conflict with either public policy or the general principles of Sharia. Having said that any by reviewing the articles of the final edition of the DCFR in chapter (5) dealing with specific contracts, nothing goes in contrary with either two restrictions. Specifically, for apparent agency, no specific rule was found in PECL or DCFR dealing with this issue, so our only reference in that regard is the Sharia principles, Egyptian Jurisprudence and general rules of the law of obligations.

Generally, nothing in the below mentioned provisions goes contrary to public policy in Egypt or even against Islamic law shariaa principles, thus the whole sections can be transposed safely in either the distributorship or the franchise sections as we lack totally any king of regulation to these areas of private law.

⁵² After the recent Egyptian Revolution dated 25 January 2011, the Egyptian Constitution for 1971 has been dropped by the Supreme Military Council governing the country now after a referendum dated 19 March 2011 to amend some articles related to political life the in old constitution. Though the referendum entails the maintaining of the old constitution, the council – unconstitutionally and contrary to the results of the referendum which agrees on the amendment of the constitution – dropped the constitution and replaces it with a constitutional declaration including the amended provisions from the old constitution in addition to the general constitutional principles governing any constitutional declaration. It is to be noted that Art. 2 in the old constitution which provides that "The General Principles of Sharia "Islamic Law" is the Principal Source of Legislation" is maintained in the constitutional declaration and it is highly predicted to exist in the new constitution after the parliamentary elections in late September 2011 which will elects 100 individuals to act as the constitutional committee to draft the new constitution then to be subjected to referendum.

First: Apparent Agency

In the outset, the appointment of an agent or representative may take different forms and need not, necessarily, be in the form of a formal document before a notary public; it could be agreed upon in a contract, letter, or even by conduct if the principal has the knowledge and provided his implicit or explicit acceptance.

The Egyptian Court of Cassation has confirmed such possibility when it stated:

"... such representation – envisaged in an agency agreement – entails mutual agreement between its parties – the principal and agent – on the limits and elements of such agency, which may be established explicitly **or implicitly**..."
[Emphasis added]

It is worth noting that "implied agency" is not exclusive to Egyptian Law, but is generally recognized in comparative law and practice.

Prior to embarking on an analysis to demonstrate that an apparent agent certainly possessed the capacity to act on behalf of the Claimants on the basis of implied agency and/or and apparent authority, it seems in order to provide an abstract and detailed overview of the doctrine of apparent authority under Egyptian Law.

Demystifying the Doctrine of Apparent Authority:

Agency is regulated under Articles (699) to (717) of the Egyptian Civil Code ("ECC"). However, apparent authority (agency) is not explicitly regulated under the ECC. That doctrine was developed and espoused by the courts and scholarly writings, and is considered a well-established doctrine under Egyptian Law. Moreover, it is submitted that apparent authority constitutes a general principal applicable to international commercial contracts. The UNIDROIT Principles have equally regulated the doctrine of apparent authority in a manner compatible and consistent with Egyptian law.

Generally, agency required an agent to act vis-à-vis third parties within the limits of his mandate and authorities as instructed by the principal. Thus, in principle, if a person acts in such capacity without actually being an agent to the principal, or if this person was in fact an agent of the principal but acted outside the scope of the agency, the principal shall not be bound by such actions.

However, in the case of "apparent authority", which constitutes an exception to such general principles of agency, the principal shall be bound by the actions undertaken by a person who is either acting without a mandate from the principal, exceeded that agreed authority, or whose agency had expired. To that effect, the Egyptian Court of Cassation has ruled:

"... in principle, contracts only bind their parties, and a person is not bound by actions undertaken by third *parties* in this regard. However, by scrutinizing the provisions of the Civil Code it becomes evident that there exist **some important applications where apparent situations are acknowledged for considerations of justice and protection of dealings within the society**. Such applications share a common ground as well as consistent rules, which entail that they **may not be stigmatized as an exception**. Accordingly, and provided all relevant conditions of application are met, the governing principle entails that if a person [the principal] has contributed – actively or passively – to the appearance of the party disposing of certain rights [the agent] as an authorized person in a manner that would instigate a bona fide third party to enter into a contract therewith in light of the surrounding circumstances ... then such act or contract concluded for a consideration between the apparent agent and the bona fide third part **shall be enforceable vis-à-vis the principal**." [Emphasis added]

Conditions for Apparent Agency:

In order to qualify as an "apparent agent", three conditions are required:

- 1. The alleged agent acted on behalf of the principal, but with no valid agency;**
- 2. The third party dealing with the agent acted in good faith; and**

3. An external appearance confirming the existence of an agency and attributed to the principal.

Acting on behalf of the Principal with no Valid Agency;

The first condition is satisfied in cases where the agent acts on behalf of the principal with no valid agency. Invalid agency includes: (a) cases where the agent exceeds his/her mandate or authority; (b) cases where the agent continues to act as such upon the termination of the agency; (c) cases where the agent acts on the basis of a null and void agency; or (d) **cases where the agent acts in the absence of any agency or mandate.**

It is worth noting that the **burden of proving the lack of a valid agency is vested with the principal.** There exists a legal presumption that an agent would generally be acting on the basis of a mandate from the principal. Thus, any claim to the contrary **should be proven and established by the principal.**

Good Faith (Bona Fide) of the Third Party:

This second condition is satisfied where the third party who contracted with the agent has acted in good faith. In other words, the third party must truly believe that an agency or valid representation does exist and that he/she was not aware of the agent's lack of capacity or absence of representation. Whilst such condition is required for the third party, it is certainly not requirement for the agent, who may be acting in bad faith. Thus, it would suffice for the principal to be bound by the acts of the agent to establish that the third party has acted in good faith regardless of the agent's good or bad faith.

In this regard, Egyptian courts have confirmed that the third party's good faith could be established by the occurrence of certain acts or omissions attributed to the principal. Accordingly, the Egyptian Court of Cassation has ruled that:

"... the third party dealing with the agent is considered an alien to the relationship between the agent and the principal, which entails that the third party should, in principle, verify the capacity of the agent dealing on behalf of the principal and enforceability of such dealings vis-à-vis the principal. Nonetheless, the third party **is exempted from such duty** if the principal behaves in a way that **demonstrates**, prima facie, that he/she has delegated an agent to deal in the Principal's name. **Such behavior is evidenced by the existence of an external appearance attributed to the principal, which deludes the third party and render him/her excused in his/her believe that an agency exists between the principal and the agent.** In such case, the third party's good faith is established – as consistently confirmed by the decision of Court of Cassation – and is accordingly **entitled to invoke the enforceability of the deal concluded with the person whom he/she truly believed was agent, vis-à-vis the principal.** This is not based on the existence of real and valid agency between the agent and principal, which is actually inexistent, but rather **based on the doctrine of apparent agency.** What could be attributed to the principal in this regard constitutes an event of default that deceived the third party and instigated the latter to deal with the agent in such capacity, which entails that the principal should be liable in compensation. On such account, and since in kind compensation should be pursued whenever possible, then the deal concluded between the agent and the *bona fide* third party should be enforced vis-à-vis the principal. Accordingly, **[apparent] agency shares the same consequences of a valid real agency.**" [Emphasis added]

Existence of External Appearance for the Agency and Attributed to the principal:

Finally, the third condition requires the existence of an external appearance of an agency attributed to the principal in a manner that would render the third party pardoned for his/her believe that a valid representation does exist. For example, if the agency expired and the principal takes the necessary measures to publicize such expiry, reliance on such expired agency would be based on the external appearance created by the principal, or if the agency was for a specific task and upon its conclusion, the principal did not recover the document evidencing the existence of the agency or exercise reasonable care to renounce and terminate such agency. In such cases, the

sham appearance attributed to the principal, whether the later acted or refrained from acting in a certain manner, caused the third party to reasonable presume the existence of a valid agency. On such basis, the principal should be stopped from claiming that the agent's act is not enforceable vis-à-vis the Principal.

Concerning the burden of proof, the *bona fide* third party is vested with such obligation. Thus, the third party is required to prove such external appearance attributed to the principal and which caused such third party to reasonably believe that an apparent authority or agency does exist.

Legal basis and Proof of Apparent Agency:

It is argued that apparent authority is based on the external appearance and trust generated, actively or passively, by the Principal and which deluded the *bona fide* third party. That said, the attribution of such external appearance to the principal requires the latter to be held liable and accountable there for. On such account, the protection of the *bona fide* third party prevails over the interests of the principal in order to promote certainly and stabilize deals and transactions.

In light of the prevailing Egyptian judicial precedents, it is worth noting that a court or tribunal is entitled to infer the existence of apparent agency from presumptions in so far as its conjecture was reasonable and logical.

Second: Distributorship⁵³

Article 5: 101: Scope and Definitions

(1) This chapter applies to contracts (distribution contracts) under which one party, the supplier agrees to supply the other party, the distributor, with products on a continuing basis and the distributor agrees to purchase them, or to take and pay for them, and to supply them to others in the distributor's name and on the distributor's behalf.

(2) An exclusive distribution contract is a distribution contract under which the supplier agrees to supply products to only one distributor within a certain territory or to a certain group of customers.

(3) A selective distribution contract is a distribution contract under which the supplier agrees to supply products, either directly or indirectly, only to distributors selected on the basis of specified criteria.

(4) An exclusive purchasing contract is a distribution contract under which the distributor agrees to purchase or to take and pay for, products only from the supplier or from a party designated by the supplier.

Article IV. E: -5:201: Obligations to supply

The supplier must supply the products ordered by the distributor in so far as it is practicable and provided that the order is reasonable.

Article IV.E- 5:202: Information by supplier during the performance

The obligation under IV.E-202 (information during performance) requires the supplier to provide the distributor with the information concerning:

⁵³ This is considered one of the ideal areas where foreign jurisdictions like Egypt can transpose provisions of cross-border nature contracts where the effect of Europeanisation can be of economic beneficial interest to mutual trading between two neighboring countries. Especially, if the investment environment, the improving political situation, geographical position and proximity with a neighboring continent like Europe, and big market of over 80 million customers are of utmost importance to put the impact of the Europeanisation policy options into reality terms. Furthermore, Egypt can learn from the different perspectives between civil and common law countries in drafting these articles, rather than limiting its vision to the traditional god father the French civil code. Interview with Robert Bray, Principal Administrator; Secretariat of the Committee on Legal Affairs of the European Parliament (IALS: London, 29 August 2011).

- (a) the characteristics of the products
- (b) the price and terms for the supply of the products
- (c) any recommended price and terms of re-supply of the products to the customers
- (d) any relevant communication between the supplier and customer; and
- (e) any advertising campaigns relevant to the operation of the business.

Article IV.E – 5:203: Warning by supplier of decreased supply capacity

- (1) The supplier must warn the distributor within a reasonable time when the supplier foresees that the supplier's supply capacity will be significantly less than the distributor had reason to expect.
- (2) For the purpose of paragraph (1) the supplier is presumed to foresee what the supplier could reasonably be expected to foresee.
- (3) In exclusive purchasing contracts, the parties may not exclude the application of this Article or derogate from or vary its effect.

Article IVE-5:204: Advertising Materials

The supplier must provide the distributor at a reasonable price with all advertising materials the supplier has which are needed for the proper distribution and promotion of products.

Article IVE – 5: 205: The Reputation of the Products

The supplier must make reasonable efforts not to damage the reputation of the products.

Article IVE – 5:301: Obligations to distribute

In exclusive distribution contracts and selective distribution contracts the distributor must, so far as practicable, make reasonable efforts to promote the products.

Article IVE- 5:302: Information by distributor during the performance

In exclusive distribution contracts and selective distribution contract, the obligation under IVE- 2:202(Information during the performance) requires the distributor to provide the supplier with the information concerning:

- (a) claims brought or threatened by third parties in relation to the supplier's intellectual property rights; and
- (b) Infringements by third parties of the supplier's intellectual property rights.

Article IV.E – 5:303: Warning by distributor of decreased requirements.

(1) In exclusive distribution contracts and selective distribution contracts, the distributor must warn the supplier within a reasonable time when the distributor foresees that the distributor's requirements will be significantly less than the supplier had reasons to expect.

(2) For the purpose of paragraph (1) the distributor is presumed to foresee what the distributor could reasonably be expected to foresee.

Article IV.E – 5:304 Instructions

In exclusive distribution contracts and selective distribution contracts, the distributor must follow reasonable instructions from the supplier which are designed to secure the proper distribution of the products or to maintain the reputation or the distinctiveness of the products.

Art IV.E – 5:305 Inspection

In exclusive distribution contracts and selective distribution contracts, the distributor must provide the supplier with reasonable access to the distributor's premises to enable the supplier to check that the distributor is complying with the standards agreed upon in the contract and with reasonable instructions given.

Art IV.E – 5: 306: Reputation of the products

In exclusive distribution contracts and selective distribution contracts, the distributor must make reasonable efforts not to damage the reputation of the products.

Third: Franchise

Article IV.E 4:101: Scope

This chapter applies to contracts under which one party, the franchisor, grants the other party, the franchisee, in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purpose of supplying certain products on the franchisee's behalf and in the franchisee's name, and under which the franchisee has the right and the obligation to use the franchisor's trade name or trade mark or other intellectual property rights, know-how and business methods.

Article IV.E 4:102: Pre-contractual information

(1) The duty under IV.E -2:101 (pre-contractual information duty) requires the franchisor in particular to provide the franchisee with adequate and timely information concerning:

- (a) the franchisor's company and experience;
- (b) the relevant intellectual property;
- (c) the characteristics of the relevant know-how;
- (d) the commercial sector and the market conditions;
- (e) the particular franchise method and its operation;
- (f) the structure and extent of the franchise network;
- (g) the fees, royalties or any other periodical payments; and
- (h) the terms of the contract

(2) Even if the franchisor's non-compliance with paragraph (1) does not give rise to a mistake for which the contract could be avoided under II – 7:201 (Mistake), the franchisee may recover damages in accordance with paragraph (2) and (3) of II. -7:214 (Damage for loss). Unless the franchisor had reason to believe that the information was adequate or had been given in reasonable time.

(3) The parties may not exclude the application of this Article or derogate from or vary its effect.

Article IV.E – 4:103: Co-operation

The parties to a contract within a scope of this chapter may not exclude the application of IV.E – 2:201 (co-operation) or derogate from or vary its effect.

Article IV.E – 4:201: Intellectual property rights

(1) The franchisor must grant the franchisee a right to use the intellectual property rights to the extent necessary to operate within the franchise business.

(2) The franchisor must make reasonable efforts to ensure the undisturbed and continuous use of the intellectual property rights.

(3) The parties may not exclude the application of this Article or derogate from or vary its effects

Article IV.E – 4:202: Know-how

- (1) Throughout the duration of contractual relationship the franchisor must provide the franchisee with the know-how which is necessary to operate the franchise business.
- (2) The parties may not exclude the application of this Article or derogate from or vary its effect.

Article IV.E – 4:203: Assistance

- (1) The franchisor must provide the franchisee with the assistance in the form of training course, guidance and advice, in so far as necessary for the operation of the franchise business, without additional charge for the franchisee.
- (2) The franchisor must provide further assistance, in so far as reasonably requested by the franchisee, at a reasonable cost.

Article IV.E – 4:204: Supply

- (1) When the franchisee is obliged to obtain the products from the franchisor, or from a supplier designated by the franchisor, the franchisor must ensure that the products ordered by the franchisee are supplied within a reasonable time, in so far as practicable and provided that the order is reasonable.
- (2) Paragraph (1) also applies to cases where the franchisee, although not legally obliged to obtain the products from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.
- (3) The parties may not exclude the application of this Article or derogate from or vary its effect.

Article IV.E- 4:205: Information by the franchisor during the performance

The obligation to inform requires the franchisor in particular to provide the franchisee with information concerning:

- (a) market conditions;
- (b) commercial results of the franchise network;
- (c) characteristics of the product;
- (d) prices and terms for supply for the product;
- (e) any recommended prices and terms for the re-supply of products to customers;
- (f) relevant communication between the franchisor and customers in the territory; and
- (g) advertising campaigns

Article IV.E – 4:206: Warning of decreased supply capacity

- (1) When the franchisee is obliged to obtain the products from the franchisor, or from the supplier designated by the franchisor, the franchisor must warn the franchisee within a reasonable time when the franchisor foresees that the franchisor's supply

capacity or the supply capacity of the designated supplier will be significantly less than the franchisee had reason to expect.

(2) For the purpose of paragraph (1) the franchisor is presumed to foresee what the franchisor could reasonably be expected to foresee.

(3) Paragraph (1) also applies to cases where the franchisee, although not legally obliged to obtain the products from the franchisor or from a supplier designated by the franchisor, is in fact required to do so.

(4) The parties may not, to the detriment of the franchisee, exclude the application of this Article or derogate from or vary its effect.

Article IV. E- 4:207: Reputation of network and advertising

(1) The franchisor must make reasonable efforts to promote and maintain reputation of the franchise network.

(2) In particular, the franchisor must design and co-ordinate the appropriate advertising campaigns aiming at the promotion of the franchise network.

(3) The activities of promotion and maintenance of the reputation of the franchise network are to be carried out without additional charge to the franchisee.

Article IV.E- 4:301: Fees, Royalties and other periodical payments

(1) The franchise must pay to the franchisor fees, royalties or other periodical payments agreed upon in the contract.

(2) If fees, royalties or any other periodical payments are to be determined unilaterally by the franchisor. II. – 9:105 (unilateral determination by a party applies).

Article IV.E – 4:302: Information by franchisee during performance

The Obligation under IV.E – 2:202 (information during performance) requires the franchisee in particular to provide the franchisor with information concerning:

(a) Claims brought or threatened by third parties in relation to the franchisor's intellectual property rights; and

(b) Infringements by third parties of the franchisor's intellectual property rights.

Article IV.E – 4:303: Business methods and instructions

(1) The franchisee must make reasonable efforts to operate the franchise business according to the business method and the maintenance of the reputation of the network.

(2) The franchisee must follow the franchisor's reasonable instructions in relation to the business method and the maintenance of the reputation of the network.

(3) The franchisee must take reasonable care not to harm the franchise network.

(4) The parties may not exclude the application of this Article or derogate from or vary its effect.

Article IV.E – 4:304: Inspection

(1) The franchisee must grant the franchisor reasonable access to the franchisee's premises to enable the franchisor to check that the franchisee is complying with the franchisor's business method and instructions.

(2) the franchisee must grant the franchisor reasonable access to the accounting books of the franchisee.

Chapter Four: Remedies (Damages)

Remedies are almost the only remedy in tort, but in contract they are one remedy amongst other remedies for an infringement of a contractual obligation. Yet, it is still the most frequent one. Owing to the nature of the law of damages which is relevant for both contracts and torts. The Acquis Principles and the DCFR principles should be drafted in a way that takes into consideration not only contractual and pre-contractual obligations but also EU – enactments in the field of tort law.

The Acquis in the context of private law is fragment and inconsistent. Most of the EU instruments which grant the remedy of damages refrain from imposing specific rules on the assessment of damages. The drafting used by regulations and directives did not specify the remedy available upon breaching of an obligation they create, they provide that the remedy prescribed should be "effective, proportionate and dissuasive".⁵⁴ These words appear to reflect the doctrine of *effet utile* utilised by the ECJ on interpretation and application of EU into national legislation. It does not, however, specify any guidance concerning the way in which such sanctions shall be implemented. Barely, it may decide when such a sanction is not effective.⁵⁵

On the other hand, there is a steadily growing number of EU instruments detailing the remedy of damages, from which general principles can so far be inferred.⁵⁶ For instance, Art. 340 TFEU concerning extra-contractual liabilities was the 'nucleus for judicial judgment development of a set of rules on damages as lost profit'⁵⁷ and immaterial

⁵⁴ Art. 7 of the Regulation 2560/2001/EC on cross-border payments in Euro; Art. 16(3) Regulation 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay flight; Art. 8 sent 2 Directive 98/6/EC on consumer protection in the indication of prices of products offered to consumers; Art. 20 sent. 2 Directive 2000/31/EC on certain legal aspects of information services, in particular electronic commerce, in the internal market; Art. 17 (2) Directive 2000/78/EC against discrimination; Art. 11 Directive 2002/65/EC concerning the distant marketing of consumer financial services.

⁵⁵ ECJ Case C- 14/83 *Von Colson v Kamann* [1984] ECR I – 1891; ECJ Case C- 79/83 *Harz v Deutsche Tradax GmbH* [1984] ECR I – 1921; Case C- 180/95 *Draempaehl v Urania Immobilienservice OHG* [1997] ECR I – 2195 concerning sanctions against discrimination in labour law.

⁵⁶ Art. 5(2) Directive 90/314 EEC on package travel, package holiday and package tours; Art. 3(3) Directive 2000/35/EC on combating late payment in commercial transactions; Art. 6 and 7 Regulations 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay flights; Regulation 2027/ 1997/ EC on air carrier liability in the event of accidents amended by Regulation 889/2002 of 13 May 2002; Art. 17 and 18 Directive 86/653/ EEC on the co-ordination of the laws of the member states relating to self-employed commercial agents; Art. 6 para 1, 2 and 3 Directive 97/5/EC on cross border credit transfers; Directive on payment services in the internal market amending directive 97/7/ EC, 2002/65/EC and 2006/48/EC and repealing Directive 97/5/EC; most recently is Art. 17 Regulation 1371/ 2007/ EC on rail passenger's rights and obligations; Art. 17 of Regulation 85/374/EC on the approximation of laws, regulations and administrative provisions of the member states concerning liability for defective products; Art. 9 of the product liability directive.

⁵⁷ See cases ECJ joined Cases C- 64/, 113/76, 176, 239/78, 27, 28, 45/79 *Dumortier Freres v Council* [1979] ECR I – 3091; Case C- 104/89 and Case C- 37/90 *Mulder v Council* [1992] ECR I – 3061.

loss⁵⁸ should be compensated'.⁵⁹ Surprisingly, the European courts have awarded nominal damages⁶⁰ and denied punitive damages⁶¹ with respect to anti-trust cases. In addition, while anyone could expect to find provisions on damages in the consumer sale directive,⁶² it totally left this issue to the applicable national law.

Moreover, the *acquis* has ignored types of damages with an aim different from compensation of loss. This is true regarding punitive damages.⁶³ Whilst US considers it as a civil fine, few proponent of this type of damages exist in Europe. Alternatively, English common law knows exemplary or aggravated damages which are granted under very restrictive conditions.⁶⁴ Thus, neither judicial nor legislative *acquis* adopted rules regarding punitive damages.

Article 8:401 of the ACQP is the basic norm which introduces the conditions under which damages are owed by the creditor. The entitlement requires: non-performance of an obligation, damages and its causation. This has been reflected in the numerous directives mentioned above. Questions arise does the *Acquis* require fault as additional condition of a claim for contractual obligations? Or does it follow the principle of strict liability with the possibility that the debtor may be excused under certain circumstances?

The *acquis* is less clear in that respect but nonetheless seems to militate in favour of a guarantee principle. Article 8:401 introduces grounds for exoneration which are enforceable and unavoidable circumstances which go beyond the control of the debtor or his/her assistants. The risks of these circumstances are not accepted by the debtor and could not be avoided despite the exercise of all due care like *force majeure*, unforeseeable and unavoidable act of third parties. This rule can be inferred from the Package Tour Directive, the Cross-Border Credit Transfer Directive and it matches Art. 79 of GISC. However, the principle of strict liability is subjected to some exceptions where the nature of the contract requires proven fault or where fault is only presumed or even when the contract requires from the debtor not to achieve a certain result but to use his best efforts.

What is meant by non-performance under the *acquis* article? It needless t say that mere non performance suffice, defective performance is included as well, or partial

⁵⁸ ECJ joined cases C- 169/83 and 136 /84 *Lussink – Brummelhuis v Commission* [1986] ECR I – 2801.

⁵⁹ Ulrich Magnua, 'The Damages Rules in the *Acquis Communautaire*, in the *Acquis Principles* and in the DCFR' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008), 213.

⁶⁰ Case C-34/87 *Culin v Commission* [1990] ECR I – 225.

⁶¹ Joined cases C- 295/04 to 298/04 *Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I – 6691.

⁶² Regulation 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

⁶³ Generally on this topic see Helmut Koziol and Vanessa Wilcox, *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009).

⁶⁴ *Rookes v Barnard* [1964] AC 1129; *Kuddus V Chief Constable of Leistershire* [2002] 2 AC 122; see also Markesinis and Deakin, *Tort Law* (6th edn, OUP 2008), 944 et seq.

performance to some extent is considered as a breach. In short, there is no specific requirement in the nature of the breach or its weight or even the aggrieved party has given prior notice. This does not deny that a specific requirement could be needed in certain situations like a requirement of notice in the case of delivery of non-conforming goods.

Regarding the requirement of damage as a pre-condition for damages, the main entitlement condition is a loss sustained by the creditor. Nevertheless, the ECJ acknowledged the possibility of nominal damages in form of a symbolic sum where the claimant suffer a wrong without loss or could not prove the exact amount of loss.⁶⁵ On a different note, accumulation of damages is acceptable to recover any remaining loss. For example, the Consumer Sale Directive and the Package Tour Directive do not exclude the aggrieved party's right to claim damages in conjunction with other remedies if this party terminates the contract justifiably. This approach has been adopted by the CISG as well.⁶⁶

Assessment of damages:

The ACQP contains only one principle regarding this issue. The aim of compensation is to reinstate the aggrieved person to the position he would have been in had the contract been performed correctly (principle of *restitutio in integrum*). It ensures that damages should recover the loss sustained but also lost profit as well as cost reasonably incurred to enforce the infringed obligation and non-pecuniary loss if possible (expectation interest shall be compensated),⁶⁷ with an overall reservation that damages shall not enrich the aggrieved party.

The costs necessary for enforcing the infringed obligation like legal advice, has to, first be reasonable in the sense that enforcement costs were necessary and, second no specific rules exist, if such rules exist in determining damages then they prevail. The provision does not provide a 'yardstick according to which infringed interest, in particular mere economic interests, are to be assessed in a monetary terms. The regular measure of damages is therefore the market value of the position infringed.'⁶⁸

Art. 8.402 (4) ACQP reads "Where the purpose of the obligation includes the protection or satisfaction of non-pecuniary interests", Magnus has expressed this saying:

In most cases the loss caused by a breach of contract or pre-contractual duty will, however, be of a pecuniary nature, namely a diminution of the aggrieved

⁶⁵ ECJ Case C- 34/87 *Culin v Commission* [1990] ECR I – 225 (Symbolic Franc).

⁶⁶ Art 45(2) and Art. 61(2) of CISG.

⁶⁷ ECJ Case C-308/87 *Grifoni v European Atomic Energy Community* [1994] ECR I -34 (Grifnoi II); ECJ Case C-168/00 *Leitner v TUI Deutschland* [2002] ECR I- 2631.

⁶⁸ Magnus, 222.

person's patrimony either because this person lost profits or because its tangible and intangible property rights were damaged or destroyed, or because this person had to spend money for recovery of the damage.⁶⁹

Contributory Negligence

A creditor cannot claim damage in so far and to the extent that he neglected to avoid the damage or reduce its scope. The claim of damages is reduced or even excluded to the amount equivalent to the harm that can be avoided or to the extent of the fault of the creditor in prevention that harm. However, the wording used by the acquis is not coherent to reflect this meaning; for instance, the Package Travel Directive used the expression that "non-performance must be attributable to the creditor", the Air Carrier Liability Regulation requires that the damage to be caused by, or contributed to by, negligence of the injured or deceased passenger", the product liability Directive partly or wholly relieves the producer from liability where "the damage is caused by defect of the product and by the fault of the injured person or any person for whom the injured person is responsible". This is considered an application of the principle that a creditor should not profit from own misdoing (Art. 8:403 ACQP).

Interest:

The Acquis has devoted four articles for this topic and deal with interest as liquidated damages and not as a separate category.⁷⁰ Unfortunately, the acquis communautaire does not postulate a general principle on interest, and this led the ACQP to use the idea of grey letter rule of Art. 8:404 which formulates the basic principle and is taken from Art. III – 3: 708 DCFR. The idea of interest in community law is taken from the late payment directive aiming to combat late payment especially in small and medium sized enterprises.

Judicially, the ECJ admitted that interest has to be paid on sums that are due and from at least the day of judgments onward.⁷¹ The debtor's excuse for the delay in payment can exclude interest is a controversial issue. It depends on whether the claim of interest is regarded as a claim for damages (can be excused) or as a claim of restitution (which has to retransfer the benefit from the debtor had thought through the excused as well as through the unexcused use of the money owned). Article 8:404 ACQP adopted the first approach.

⁶⁹ Ibid, 222.

⁷⁰ As Art. 78 which strictly separates interest from damages.

⁷¹ Joined Case C- 104/89 and C- 37/90 *Mulder a.o v Council and Commission* [1992] ECR I – 3061; CFI Case T- 231/97 *New Europe Consulting Ltd a.o v Commission* [1991] ECR II – 2403.

Art. 8:405 excluded the creditor's right to interest if he did not perform the reciprocal obligation to the payment one upon the debtor. In such case, the latter is entitled to withhold performance.

According to Art. 8:406 ACQP, the interest accrues only if the business is not excused for delayed by circumstances beyond its control. While Art. 8: 407 ACQP invalidates certain clauses concerning interest and late payment between businesses when these clauses are grossly unfair to the creditor. The term clause does not necessarily mean standard clauses they can encompass individually negotiated ones. It is worth noting that the objective of this article is restricted to the premise that the clause is proposed by and agreed upon an initiative from the debtor. But, in the case the creditor took the initiative it cannot be regarded as unfair to him.⁷²

Determining the grossly unfair nature depends on many objective criteria like the unusual date, rate of interest in this kind of dealings, good commercial practices any objective reasons to deviate from prescribed interest payment.

Furthermore, the DCFR is as well as the ACQP similarly in almost every section with different wording but the substance remains the same.⁷³ Except in the case of interest where the DCFR supplement the ACQP, moreover, it does not follow the Late payment Directive as the ACQP, instead it states a general basic rule on the entitlement of interest,⁷⁴ orders that interest are added every 12 months to the outstanding capital,⁷⁵ provided rules on foreseeability,⁷⁶ currency of damages,⁷⁷ abstract assessment of damages in certain cases,⁷⁸ entitle the creditor to compensation for costs of reasonably preventive nature⁷⁹ and acknowledged the possibility of accumulation of interest "compound of interests" which is totally forbidden in Egyptian law because it goes contrary to public policy and Islamic principles of Sharia which considered it "*Haram*" in addition, the general principles of the law of obligation which prohibits the creditor from taking compound interest.⁸⁰

⁷² Howells, G, 'European consumer law – the minimum and maximum harmonization debate and pro independent consumer law competence', in S Grundmann and J Stuyck (eds), *An Academic Green Paper on European Contract Law*. The Hague: Kluwer Law International, 2002. Kotz, H, 'A common private law for Europe perspectives for the reform European legal education', in B de Witte and C Forder (eds), *The Common Law of Europe and the Future of Legal Education*. Masstricht: Metro, 1992. Lando, O, 'Optional or mandatory Europeanization of contract law' (2000) 8 *European Review of Private Law* 59-69.

⁷³ However, the DCFR are primarily based on the CISG in its distinguishing provisions from the ACQP.

⁷⁴ Art. III -3: 708 DCFR = Art. 8:404 ACQP.

⁷⁵ Art. III – 3: 703 DCFR.

⁷⁶ Art III – 3:703 DCFR.

⁷⁷ Art. III - 3: 713 DCFR.

⁷⁸ Art. III – 3: 706 -7 DCFR.

⁷⁹ Art. III – 3: 705 (2) DCFR

⁸⁰ Art. 232 Egyptian Civil Code.

That said the compound interest would act as a double punishment, as interest for withholding interest.

Specifically, for the non-pecuniary damages, the ACQP provide that:

the amount of damages for non –pecuniary losses caused by discrimination may take account of the deterrent effect of the remedy but still must still be proportionate to the injury (thereby excluding punitive damages which are not related to the extent of the loss but to the character of the conduct of the debtor.⁸¹

We can transpose the same idea in Egypt rather than merely leaving the issue of punitive damages without explicit provision. According to Egyptian jurisprudence, such type of damages goes contrary to public policy where the primary aim of damages is to compensate only not to deter. The deterrence effect is left for the criminal law section. However, and in light of the modern approaches in civil and common law systems the recognition of punitive damages is increasing worldwide at least in the area of tort while it remains controversial in contracts. The primary argument in that regard is that both tort and contractual breach share the same roof of fault and practically speaking the claimant or creditor need to ensure the possibility of enforcing judgment and arbitral awards in other jurisdiction where the defendant or the debtor holds assets.

⁸¹ Magnus, 228, fn (87).

Chapter Five: Conclusions

I aimed in this thesis to prove that the process of Europeanisation of contract law is one of the most recent attempts at the EU level to reach harmonisation and uniformity in the field of private law. I moved from Europeanisation methodology to the proof of the feasibility of having a common frame of reference to the member states. The Process starts with valuable contributions amongst eminent scholars of private law across Europe with different backgrounds in the early 90th and ended up with PECL which was the source from which all the recent modifications and contributions are stemmed from.

The European parliament as an institution from the EU showed high willing to adopt the idea and spread it across Europe at least as an optional instrument as a start. On the contrary the European Commission showed reluctance to the idea and did not welcome it that much. The main concern for the Commission was the maintaining of culture differences and deep-rooted values in different jurisdictions which are the main distinguishing features of the European society.⁸²

Accordingly this view was transmitted to a number of scholars who began their fight against the codification process of the principles of contract law, these arguments mainly focus on the following:⁸³

1. An Imposed Codification of Rules does not Create Uniform Rules.

The idea of merely making uniform rules will not necessarily create uniform law due to the culture differences between citizens of member states. The meaning that a word bestows in a certain jurisdiction cannot be ascertained without studying its legal system as a whole. Legal mentalities differ and that leads to diverging interpretation between and different attitude towards the same rules across member states.

⁸² Lando Ole and Beale Hugh (eds), *Principles of European Contract Law Part I and II. Prepared by the Commission on European Contract Law* (The Hague 1999); Lando Ole, Clive Eric, Prum Andre and Zimmermann Reinhard (eds), *Principles of European Contract Law Part III* (The Hague, London and Boston 2003); Leible Stefan, 'Non-Discrimination' in Schulze Reiner (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008); Bernard-Maugiron Nathalie, Dupret Baudouin, Rady Wael (eds) with the support of the Commission of the European Union, 'Egypt and Its Laws' in S.W. Hoyle Mark (ed), *ARAB AND ISLAMIC LAW SERIES*, Vol. 22 (Kluwer Law International 2002).

⁸³ Bonell, MJ, 'The need and possibilities of a codified European contract law', (1997) 5 *European Review of Private Law* 505-18. Collins, H, 'European private law and the cultural identity of states' (1995) 3 *European Review of Private Law* 353-65. Davies, G, 'Can selling arrangements be harmonized?' (2005) 30 *European Law Review* 371-85.

Whilst we can assume that the mentalities approach each other between continental countries in Europe, it does not hold the same proximity between them and English law. These differences are "unbridgeable" in the view of Legrand. He claims that 'legal systems (...) have not been converging, are not converging and will not be converging.'⁸⁴

The English legal system focuses on details and facts of the case, while the continental system depends on abstraction and general rules. Studying judgments is even different between both systems. The exact facts are not of the same interesting to continental lawyer like the judgment itself; students should know the rule in the first place while facts of a case are in a back seat. On the contrary, in the English and US legal systems rules cannot be separated from the facts and 'woe betide the student who does not know the facts and who cannot compare them with those in judgments'.⁸⁵

2. An Imposed Civil Code Neglects the Culture Differences between Countries.

The conflict between the continental and common law approaches is manifested in every attempt of imposing a unified code for Europe where 'it imposes the continental lawyer's worldview on the common lawyer as being better'.⁸⁶ This leads to the fact that the common law representation of reality is in an inferior position to that of the continental one. That said, the economic interests in integration on the legal level to promote cooperation of the internal market are superior to the distinguishing deep – rooted cultures of European citizens.

3. Anticipating Specific National Problems will become More Difficult.

If a European Civil Code is to replace national law of member states, then we will face the problem of diversity and unity in private law. One possible solution is to let the European legislator postulate relatively specific rules which offer the courts an indication of how the case in hand is to be settled. Nevertheless, it would still be difficult to reach a consensus on the scope of this rule. An alternative option is a European Civil code of generally formulated principles. However, such principles would offer courts less discretion. In addition, courts would interpret these principles in conflicting ways serving the case on hand. Thus, business can no longer rely on merely the written text to predict its effect in a given jurisdiction. Consequently, this will lead to an illusion of unification as each court will give the principle its own meaning despite the formal requirement that these principles should be interpreted in light of their "international

⁸⁴ P. Legrande, 'European Legal Systems are not Converging' (1996) 60 ICLQ 60. See also P. Legrande, 'Against A European Civil Code' (1997) 60 MLR 44-63.

⁸⁵ Ibid, 60 MLR (1997) 49-50.

⁸⁶ Ibid, 60 MLR (1997), 60.

character". That is why the tendency is to give preference to "the principles of contract law" not a "unified European Civil Code".

4. The Making of a European Civil Code Creates More than is necessary considering the Objectives of the European Union.

The primary objective of private law unification is the promotion of trade in the common market, yet a uniform civil code is not necessarily the main mean to reach this objective. An evidence for this is US, 'where there is a widespread economic integration notwithstanding significant culture differences between legal systems of various states. A European Civil Code would therefore only need to regulate the inter-state trade while leaving the unrelated national rules intact'.⁸⁷

5. Assessment of Objections

It is worth mentioning that working on a unification of principles would academically serve the object of unifying European Private Law, but will not realise economic objectives. Legrand regards the idea of reaching a uniform European Civil Code by methods other than the centralist ones like legal science or legal education as illusory. He claimed 'difference (is) to act as the pertinent dialogical vehicle between European legal traditions'. Moreover, the objections raised in face of the unification process of private law can be claimed – *mutatis mutandis* - before other areas of law like Criminal law. For example in areas like extraditions, combating drugs and illegal workers which take place within the framework of the third pillar before its abolition by the Lisbon Treaty.⁸⁸ Eventually, it would have been better to think of non-centralistic methods of unifications which keep culture differences between member states.

However, and from the other side, the Green Paper issued from the European Commission towards a more coherent contract law for consumers and business has ended this debate and clearly reflect the true intention of the European legislator to adopt a new instrument for the enhancing the internal market across Europe with pursuing an objective of protecting consumers and small businesses. The DCFR is now an academic product; we are still lacking a political and professional attempt of drafting

⁸⁷ Smits, n [28], 38.

⁸⁸ Twigg-Flesner Christian, *The Europeanisation of Contract Law: Current Controversies* (Routledge – Cavendish Taylor and Francis Group, London and New York 2008). Van Gerven W, 'The ECJ case law as a means of unification of private law?', in A Hartkamp *et al*, *Towards a European Civil Code* (3rd edn, Nijmegen: Ars Aequi 2004). Von Bar and Drobnig (eds), *The Interaction of Contract Law and Tort and Property Law in Europe* (Munich 2004). This study was concluded on behalf of the European Commission.

to supplement the academic endeavour. This will certainly take a deeper contemplation of the political and professional impact of unification some principles of private law.

As a start the DCFR included agreed upon principles of contract law in a form quite similar to a code. Yet, other areas of private law are dealt with like unjust enrichment, tort law, restitution but not in a coherent style of drafting like the one used for contract law. It is highly noted that Germany is the leading European member state to influence the process of Europeanisation, many of its eminent professors are chairing and actively participating in the drafting committee like the Lando Commission, the Acquis Group and the Study Group on a European Civil Code. This has left a German stain on the style of drafting and the idea of codification which by its turn was a German one.

On the other side, English academic⁸⁹ who some of them work as lawyers and acquired highly drafting techniques were of a major support to the emergence of this DCFR. Truly, English law is considered the prominent jurisdiction in drafting style, yet as the attempt of codification goes against its principal distinguishing features, it faces strong waves of objections as they consider this a backdoor to end up common law systems gradually in Europe and moved gradually to the US style where some states have their own separate codes.

Then, I showed some differences and similarities between the ACQP and DCFR, showing the advantages of the DCFR over the former. However, it seems that no single member state has stated modifying up its contract law rules in light of the DCFR. I used primary and secondary resources to prove my hypothesis and even make use of the chance to have an interview with one of those who effectively participated in the discussions and drafting work of the DCFR by virtue of his position as the principal administrator of the committee of legal affairs for the European parliament.⁹⁰

I thought of taking the initiative to add to the work of the DCFR by referring to some areas which need to be dealt with in more details like apparent agency and punitive damages. Also, I do benefit from transposing the articles of Distributorship and Franchise contracts and that of damages to the Egyptian Civil Code. I do believe that the

⁸⁹ Whittaker Simon, 'A critical assessment of the content and possible role of the draft Common Frame of Reference for European contract law: commissioned by the Ministry of Justice, UK', published by the Academic Research Network in December 2007 <<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/publications/eu-contract-law-common-frame-reference.htm>> accessed on 26 August 2011.

⁹⁰ Lando, O, 'Culture and contract laws' (2000) 3 *European Review of Contract Law* 1-20. Lando Ole, 'The Structure and the Legal Values of the Common Frame of Reference' [2007] ERCL 245. McGregor, H, *Contract Code Drawn up on Behalf of the English Law Commission*, Milan: Giuffrè Editore, 1993. Mance, J, 'Is Europe aiming to civilize the common law?' [2007] *European Business Law*. Mckendrick, E, *The Creation of a European Law of Contracts – The Role of Standard Form Contracts and Principles of Interpretation*. The Hague: Kluwer, 2004.

DCFR has no direct link with Egypt. Yet, for the purposes of achieving and enhancing mutual cooperation in the field of commerce and industry and tourism, we can develop and transpose necessary provisions into our civil legal system. The DCFR is an optional instrument for Europe, but there is no restrictions on using it as an applicable law in arbitration disputes or even an agreed upon contractual provisions. This does not deny the fact the after the Lisbon treaty where the EU enjoys a separate personality can goes directly into special agreements and contracts with neighbor states like Egypt and it is highly likely that they will use their newly born European instruments to govern the mutual relationships between them and these states.⁹¹

Egyptian law is influenced by the shariaa principles and even any rule that goes against such principles will be rendered unconstitutional. Accordingly extreme caution should be exercised when transposing principles of DCFR, as none of member states involved in this process has an Islamic background. This will also influence a country like Turkey when thinking to join the EU to adapt may be its rules to this new EU instrument. Thus, studying the Egyptian example could be of both practical and theoretical importance.⁹²

Having said that, it is quite clear and due to the word limit that nothing in the Distributorship and Franchise Contract goes against public policy or general rule of the law of obligations or even Islamic law principles, so we can transpose these rules safely. However, in the field of damages, some rules regarding the compound interest, punitive damages and calculation of interests goes contrary to either Egyptian public policy or to the general principles of contracting or even to Islamic law principles, thus not every single rule can be transposed, we have to take what match with our culture and identity and this entail extreme caution while updating our Egyptian civil code.

⁹¹ Halton Herbert Welch, *An elementary treatise on the Egyptian civil codes*, Vol. 1: Ministry of Public Instruction (National Printing Department, Cairo 1904). Halton Herbert Welch, *An elementary treatise on the Egyptian civil codes*, Vol. 1: Ministry of Public Instruction (National Printing Department, Cairo 1904). Ibbeseston D, *A Historical Introduction to the Law of Obligation* (OUIP 1999), 43

⁹² Bechor Guy, *The Sanhoury Code and the emergence of modern Arab Civil Laws: 1932 to 1949* (Leiden: Brill; Biggleswade: Extenza Turpin [distributor] 2007). D. Kerameus Konstantinos, 'Comparative Law and Common Frame of Reference' in Schulze Reiner(ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, sellier. european law publisher GmbH, Munich 2008).

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