The DCFR, the ACQP and the reactions of Italian Legal Scholars

KLUWER LAW INTERNATIONAL

EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801

This journal should be cited as (2010) 18 *ERPL* 2

The *European review of Private Law* is published six times per year.
Subscription prices for 2010 [Volume 18, Numbers 2 through 6] including postage and handling:
EUR568/USD758/GBP418 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information at please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For advertisement rates please contact our marketing department at +31 (0) 172 641525 (Marina Dordic) or at marketing@kluwerlaw.com.

The *European review of Private Law* is indexed/abstracted in the *European Legal Journals Index.*

Printed on acid-free paper

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Contact
C.B.P. Mahé, *e-mail: erpl@kluwerlaw.com*

Founded in 1992 by Ewoud Hondius and Marcel Storme

ISSN 0928-9801

Typeface ITC Bodoni Twelve
Design Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed in Great Britain

European Review of Private Law 2-2010[227-258] © Kluwer Law International BV | Printed in the Great Britain

The DCFR, the ACQP and the Reactions of Italian Legal Scholars

BARBARA PASA*

Abstract: Italian commentators welcome the promotion of the Europeanization of Private Law through the process of increasing the coherence of EC legislation in the areas of consumer and contract law, although they appear to conclude that the *Draft Common Frame of Reference* (DCFR) and the *Acquis Principles* (ACQP) fall significantly short of achieving those goals. The stated purpose of the Italian comments is to stimulate critical yet constructive commentaries – at least insofar as the authors' intention is concerned – to be submitted to the project's architects, with a view to contribute to the harmonization of European contract and consumer law. General criticisms concern the scope of application of the two instruments, DCFR and ACQP (often extended without good reasons to *B2B* contracts) and the 'legislative technique' used in drafting them. Further causes for concern from the point of view of Italian scholars relate to general principles such as good faith, unfairness, reasonableness, or the principle of non-discrimination. As for the specific contents of the DCFR and ACQP, Italian scholars analyse formal requirements, contract formation, non-negotiated terms, withdrawal, performance of obligations, non-performance and damages.

Résumé: La doctrine italienne approuve le développement d'une européanisation du droit privé, à travers le processus de renforcement de la cohérence de la législation de l'UE dans les domaines du droit de la consommation et du droit des contrats. Elle conclue cependant que le Projet de Cadre Commun de Référence (PCCR) et l'Acquis Communautaire (ACQP) échouent en grande partie dans la poursuite de ces objectifs. Le but énoncé des commentaires italiens est de stimuler des avis critiques mais constructifs – du moins s'agissant de l'intention des auteurs – et de les soumettre aux architectes du projet, afin de contribuer à l'harmonisation du droit européen des contrats et de la consommation. Les critiques générales visent le champ d'application des deux instruments, le PCCR et l'ACQP (souvent étendus, sans bonnes raisons, aux contrats B2B) et la « technique législative » utilisée pour les concevoir. D'autres causes de préoccupation énoncées par les spécialistes italiens concernent des principes généraux tels que la bonne foi, la déloyauté, l'équité ou le principe de non-discrimination. Quant aux contenus spécifiques du PCCR et de l'ACQP, les spécialistes italiens font une analyse des conditions de forme, de la formation des contrats, des termes non-négociés, de la rétractation, de l'exécution des obligations, de l'inexécution et des dommages.

Zusammenfassung: Italienische Kommentatoren begrüßen die Förderung der Europäisierung des Privatrechts durch die Erhöhung der Kohärenz der EU Gesetzgebung auf dem Gebiet des Verbraucherrechts und Vertragsrechts, obwohl sie festgestellt haben, dass der *Draft Common Frame of Reference (DCFR*) und die *Acquis Principles (ACQP)* dieses Ziel nicht erreichen können. Das vorgegebene Ziel der italienischen Kommentare ist, die kritische, aber auch konstruktive Kommentierung (zumindest aus der Sicht des Autors), die den Architekten dieser Projekte vorgelegt werden sollte, zu fördern. Hierdurch soll gleichzeitig auch zur Harmonisierung des europäischen Vertragsrechts und Verbraucherrechts beigetragen werden. Die allgemeine Kritik betrifft den Anwendungsbereich

* Dr Barbara Pasa teaches Comparative Law at the Faculty of Law, University of Turin.

dieser beiden Instrumente, also den DCFR und den ACQP, die ohne nähere Begründung teilweise auch auf *Business to Business (B2B)*-Verträge anwendbar sind, sowie die Gesetzgebungstechnik, die zum Erlass der beiden Instrumente geführt hat. Die weiteren Bedenken des italienischen Wissenschaftlers betreffen die allgemeinen Grundsätze, wie Treu und Glauben, die Unbilligkeit, die Angemessenheit sowie auch den Grundsatz der Nichtdiskriminierung. In Bezug auf die spezifischen Inhalte der DCFR und der ACQP werden die Formvorschriften, der Vertragsschluss, die unabdingbaren Bestimmungen, der Rücktritt, die Erfüllung eines Schuldverhältnisses, die Nichterfüllung sowie auch die Schadensersatzregelungen durch die italienischen Wissenschaftler näher analysiert.

Keywords: DCFR, ACQP, Italian doctrine, Consumer protection, European contract law.

1. The European Context

The limited access for European jurists to studies and researches carried out by Italian legal scholars, evidently as a result of the language barrier, is the reason for producing this summary, in the context of the national debate taking place following the publication of the *Acquis Principles* (ACQP) and the *Draft Common Frame of Reference* (DCFR).

The Italian debate on this topic is of recent origin and seems to be less lively when compared, for example, to the ones taking place in other European legal systems. In Britain, for instance, the House of Lords itself has been debating EU measures and documents, in order to influence the Government's position in negotiations at EU level.[1] In Germany, for instance, legal scholars are at the forefront in drafting the DCFR and have encouraged the founding of a new *École de l'Exégèse* on the subject, which they largely illustrate in University lecture halls and major law reviews. Even French jurists, who regard the *Code civil* as the personification of their legal spirit, and notwithstanding the degree of suspicion which characterizes their approach to European and comparative legal scholarship, recognize the impact of the DCFR.[2] This comes as no surprise at all, given that both primary and secondary Community law, which is restated in the DCFR and better in the ACQP, often has

---

[1] House of Lords Report, European Union Committee, 12th Report of Session 2008–2009, *European Contract Law: The Draft Common Frame of Reference,* published 10 Jun. 2009, HL Paper 95.

[2] On the functionalist view of the market, summed up in the 'ordoliberal formula: highly competitive social market economy', inserted into the Lisbon Treaty 2007, as well as on the active involvement of French jurists, see recently A. Somma, 'Verso il diritto privato europeo? Il Quadro Comune di Riferimento nel conflitto tra diritto comunitario e diritti nazionali', *Rivista trimestrale di diritto e procedura civile*, fasc. 4 (2008), at 1097–1132. In France they propose alternative models to the 'ordoliberal Community model' Cf. Association H. Capitant et Société de Législation Comparée, *Projet de Cadre Commun de Référence. Terminologie contractuelle commune,* coll. Droit privé comparé et européen dirigée par B. Fauvarque-Cosson, vol. 6, SLC Paris (2008); Association H. Capitant et Société de législation comparée, *Projet de Cadre Commun de Référence. Principes contractuels communs*, coll. Droit privé comparé et européen dirigée par B. Fauvarque-Cosson, vol. 7, SLC Paris (2008); in English: B. Fauvarque-Cosson & D. Mazeaud (eds), *European Contract Law-Materials for a CFR: Terminology, Guiding Principles, Model Rules* (Munich: Sellier, 2008).

a strong impact on national civil laws and today embodies the prerequisites which inspire the reform of many Civil codes.[3] The reforms referred to here are the already enacted *Schuldrechtsmodernisierungsgesetz,* of November 2001,[4] the *Avant-projet de réforme du droit des obligations et de la prescription*, of September 2005,[5] still an ongoing project, and the new *Propuesta de Anteproyecto de Ley de Modernización del Derecho de Obligaciones y Contratos* of January 2009,[6] as well as other reforms in Central and Eastern European Countries, such as the re-codification of Czech private law and of Estonian Law of Obligations, and so forth.[7]

2. A Summary of the Italian Debate

To date, the Italian studies dedicated to an accurate analysis of the DCFR and the ACQP (whereby the former is coordinated and sometimes constitutes a mere transposition thereof, not always using a particularly convincing methodology),[8] are contained in two volumes of collected papers presented at the Pisa and Ferrara Conferences, one taking place in 2007[9] and the other in 2008.[10] These Conferences were preceded by a meeting at the University of Rome III in February 2007, organized by the association *Magistratura Democratica* (an important liberal Italian association of judges and prosecutors), who arranged a subsequent meeting in Florence, in March 2007, together with its European counterpart *MEDEL* (*Magistrats européens pour la démocratie et les libertés*). The meetings sought to exploit the rise of a new cultural ferment, involving the active participation of the whole legal community and the *magistrati* ('*magistrate*' is a generic term in Italian, comprising both prosecutors and judges) in particular.[11]

---

[3] Cf. A. Gambaro, 'La riforma del diritto italiano delle obbligazioni e dei contratti nella prospettiva del diritto europeo', *Rivista di diritto civile* (2006), I, at 27–32.

[4] *Gesetz zur Modernisierung des Schuldrechts,* 26 Nov. 2001 (*BGBl.* 2001 I,3138).

[5] Under the direction of prof. Pierre Catala, available on the website at the address <www.lexisnexis.fr/pdf/DO/RAPPORTCATALA.pdf>.

[6] Available on the website of the Spanish Ministry of Justice at <www.mjusticia.es>.

[7] See respectively L. Tichý, 'Processes of Modernisation of Private Law Compared, and the CFR's Influence', *Juridica International* II (2008) (online): 35–42; A. Värv, 'The Draft Common Frame of Reference's Regulation of Unjustified Enrichment: Some Observations from Estonia's Viewpoint', *Juridica International* II (2008) (online): 63–75.

[8] On the autonomy of the ACQP with respect to the other components of the DCFR, in particular with respect to the contribution made by the Study Group for a European Civil Code, cf. G. Ajani, S. Ferreri & M. Graziadei, 'Introduzione ai principi di diritto comunitario in materia di contratto', *Rivista trimestrale di diritto e procedura civile*, fasc. 1 (2009), at 271–278; previously, see passim B. Pasa, *La forma informativa nel diritto contrattuale europeo. Verso una nozione procedurale di contratto* (Napoli: Jovene, 2008), at 333 et seq.

[9] Cf. E. Navarretta (ed.), *Il diritto europeo dei contratti fra parte generale e norme di settore. Atti del Convegno (Pisa, 25–26 May 2007*) (Milano: Giuffrè, 2008).

[10] Cf. G. De Cristofaro (ed.), *I 'principi' del diritto comunitario dei contratti. Acquis communautaire e diritto privato europeo* (Torino: Giappichelli, 2009).

[11] Cf. G. Bisogmi, 'Un diritto civile per l'Europa', *Questione giustizia*, n. 3 (2007), at 600–615, at 608. See also <http://magistraturademocratica.it/node/419>, with the reply by MEDEL (16 May 2007) to the

The stated purpose of the Italian writings is to stimulate critical yet constructive commentary – at least insofar as the authors' intention is concerned – to be submitted to the projects' architects, with a view to contribute to the harmonization of European contract and consumer law.

In point of fact, the commentaries criticizing the DCFR and, before, the ACQP outnumber the favourable ones. There is no evidence of the development of a general law of contracts common to the legal systems of Europe.[12]

In general terms, these commentaries outline that while the *acquis communautaire* is the product of the harmonization process of European private law in the consumer protection sector and imposes a protection model which serves to construct the internal market by means of mandatory rules (i.e., Community law), the DCFR and the ACQP are an academic exercise of consolidation of what is already in force in European Community law, whether good or bad, taking no or little account of a perspective of the law *as it ought to be* (i.e., a sort of Restatement).

As favourable commentaries, we can recall the revision of the existing *acquis* and the systematic organization of notions, principles and model rules, which conform to European contract law, both in the ACQP and in the DCFR, which has been granted the approval of many authors.[13] They outline, in general terms, the 'unifying rationalization' and the 're-ordering of the Babel of legal languages' achieved by the DCFR, which constitutes a prelude to a Europe founded on a common legal culture. This community of shared culture will create the basis for the development of future national and community legislative measures. However, there are authors who advocate a different course of action, namely promoting the development of Standard Terms and Conditions (STC) for EU-wide use by private parties,[14] a

---

Green Paper of 8 Feb. 2007 on the revision of the Acquis related to consumers (GUUE 15 Mar. 2007, C 61/5).

12 Cf. C. Castronovo, 'Quadro Comune di Riferimento e acquis comunitario: conciliazione o incompatibilità?', *Europa e diritto privato* (2007), at 275–290: the author poses the question of what instrumental function the CFR was meant to perform in relation to the *acquis communautaire*; the latter, in fact, according to the Commission's well-known Action Plan 2003 [COM (2003) 68 final], had to be improved as regards its consistency and quality by means of a '*tool-box*'; the question then is if it should only reorganize what already existed rather than proceed to the construction of a new body of European law (at 288). For a less traumatic, rather more favourable view, cf. M. Meli, 'Armonizzazione del diritto europeo e Quadro Comune di Riferimento', *Europa e diritto privato*, fasc. 1 (2008), at 59–81.

13 G. Alpa & G. Conte, 'Riflessioni sul progetto di Common Frame of Reference e sulla revisione dell'Acquis communautaire', *Rivista di diritto civile*, fasc. 2, I (2008), 141–178, at 165. Cf. also V. Scalisi, 'Alberto Trabucchi e la costruzione in Europa di un diritto privato comune', *Europa e diritto privato,* fasc. 4 (2008), 907–928, at 916.

14 Cf. F. Cafaggi, 'La regolazione privata nel diritto europeo dei contratti', *Contratto e impresa. Europa*, fasc. 1 (2008), at 104–169: he speculates as to how far business can be pushed regarding standardization, without infringing the competition laws.

trajectory already signalled by the Commission as one of the possible options,[15] as opposed to rule-based legislation. This would entail the encouragement of private self-regulation based on common standards and the harmonization of contract law using 'soft' measures, obviously without exceeding the limits imposed by competition law (Articles 81 and 82 EC Treaty). The debating stance of Italian legal scholars may therefore be summarized as taking a dialogical, multilevel perspective: they advocate a simultaneous recourse to common standard terms and general principles, maintaining typically national specific rules. Such discourse strategies are aimed at mitigating the fears of scholars and, above all, practitioners who see in the DCFR the preliminary step towards a full-scale codification of European civil law.

Italian legal scholars assume that what we are witnessing with respect to the DCFR is a 'cultural exercise', which responds to the need of finding a shared language within the common European arena while addressing concrete demands for the protection of citizens' civil rights. In this manner, the so-called 'political CFR', which is expected to follow this preliminary 'academic CFR' (or DCFR), could constitute an essential instrument for the achievement of a 'constitutional Europe', as it represents a means for securing one of the cornerstones of citizens' rights and an affirmation of one of the founding reasons underpinning the EU, namely the creation of a real and efficient common space for civil justice in Europe.

The DCFR has only recently been encompassed by the Directorate General for Justice, Freedom and Security, which has taken over responsibility for the DCFR from the Directorate General for Health and Consumers. The transfer of responsibility appears to reflect a new policy view that the CFR will be addressed in the broader context of EU action in the area of civil justice. A new start, which culminated in the so-called 'Stockholm Programme', a multi-annual programme (period 2010–2014) adopted by the Heads of State and Government of Member States at the European Council in Stockholm, at the end of December 2009.[16]

As long as the 'final' CFR remains tied to a systematic framework of laws, it will never become the common point of reference for contract law and even less so for European civil law. It could possibly constitute the more general part of a European Civil Code, but it will still lack any prior political debate explaining the reasons

---

15 This was 'Measure II' in the Action Plan. Cf. *European Contract Law and the Revision of the Acquis: The Way Forward,* COM (2004) 651 final, at 6 et seq.

16 Cf. Brussels, 2 Dec. 2009, Document CO EUR-PREP 3, JAI 896, POLGEN 229, from the Presidency to the European Council, for its approval in accordance with Art. 68 TFUE and publication in the Official Journal of the European Union. At its meeting of 30 Nov. 2009 and 1 Dec. 2009, the Council (Justice and Home Affairs), held a wide-ranging exchange of views on the Programme, which was met with a broad consensus. Cf. Brussels, 11 Dec. 2009 EUCO 6109, Conclusion.

for its adoption.[17] In this regard, the issue regarding the legitimacy of a body of civil or contract law and its political basis still has to be clarified.[18]

3. Some Critical Commentaries to the DCFR and the ACQP

Of the two volumes of collected papers presented at the Pisa and Ferrara Conferences, the second one comprehensively analyses the chapters of the ACQP,[19] comparing them to the Interim Outline Edition of the DCFR.[20]

From the numerous commentaries made by the Italian authors, with no pretensions to present an exhaustive coverage, the following may be noted.

3.1 B2C Contracts versus B2B Contracts

The first criticism concerns the general framework of the DCFR and ACQP, which should have operated a clearer distinction between *B2C* and *B2B* contracts, in a manner consistent with the different interests and values underlying the two types of legal relations. Further, the DCFR and ACQP should have integrated the current competition rules (e.g., Articles 81 and 82 EC Treaty), taking into account the role of private enforcement of competition law.[21]

B2B contracts are a sector that does not benefit from any assimilation to other disciplinary regimes, such as *B2C* contracts, nor a sector that feels the need of a European legislative action specifically addressing peculiar issues. Taking into

---

17 Cf. Bisogni, at 614.

18 Scalisi, *supra* n. 13, at 923, Alpa & Conte, *supra* n. 13, at 175.

19 In the version published by the Research Group on the Existing EC Private Law (Acquis Group), *Principles of Existing EC Contract Law (Acquis Principles). Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms* (Munich: Sellier, 2007). The numerous commentaries made by the Italian authors refer to this first volume, which from now on will be cited as *Acquis Principles 2007, supra.*

At the end of 2009, the Research Group on the Existing EC Private Law (Acquis Group) published the second volume, a full version of ACQPs, together with comments: *Principles of the Existing EC Contract Law (Acquis Principles). Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services* (Munich: Sellier, 2009). This second volume includes a revision of 'Contract I' rules within an innovative structure and presents numerous new rules, on remedies for non-performance and on certain specific contracts, such as delivery of goods, package travel and payment services, which were previously available on the website of the Acquis group. Cf. H. Schulte-Nölke & F. Zoll, *Introductory Part*, xxiii–xxxv, in *Principles of the Existing EC Contract Law (Acquis Principles). Contract II 2009, supra*.

20 In the version prepared by the Study Group on European Civil Code and the Research Group on EC Private Law (Acquis Group), ed. Christian von Bar, Eric Clive, Hans Schulte-Nölke, Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano & Fryderyk Zoll, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR),* Interim Outline Edition (Munich: Sellier, 2008) (2nd edn, 2009).

21 L. Di Nella, 'Il Consumatore, il professionista e l'inderogabilità in pejus', in ed. De Cristofaro, *supra* n. 10, 23–94, at 38.

account the pre-existing Unidroit Principles,[22] this is – indeed – superfluous. Those Unidroit principles have already formed the basis for the development of international common standards and rules regarding commercial transactions and for new codes as well, for example, those of the Russian Federation, Estonia and Lithuania, as well as the reform of the Spanish Commercial Code and the BGB, and the 1999 Chinese law on contracts.

Moreover, the judgments of the courts of the Member States prefer to invoke the Unidroit Principles as soft law[23] whether with a view to integrating international instruments of uniform law (such as the CISG) or to applying the national law of the State, or to demonstrate conformity to the most widely-regarded standards at international level.

3.2 Good Faith and Reasonableness

A second question of general importance relates to the 'legislative' technique used in drafting the DCFR and the ACQP, which, albeit constituting an 'academic exercise',[24] are in fact structured as if they were a legal text based on general clauses and undefined legal concepts. In particular, the ACQP, while devoid of legal force, have been distilled from laws and rules in force in Community law (and consequently in the Member States of the Community), which is enough to classify the drafting technique adopted by the Acquis Group as legislative. Having drawn attention to the similarities to the work of the American Law Institute and the US Restatement of the Law, the Italian author of this comment[25] summarizes the frequent recourse to general clauses, in particular those of 'good faith' and 'reasonableness'.

Given the policy choice made, of law favouring vague and undefined concepts, which reserve a margin of discretion for Member States in approximating to Community measures, this is a quite widespread trend in Community law. The Italian scholar speculates as to whether the use of general clauses is better able to achieve harmonization of European contract law or whether it is not instead the outcome of 'damaging compromises',[26] opting for the second hypothesis.

---

[22] Cf. M.J. Bonell, 'Il diritto europeo dei contratti e gli sviluppi del diritto contrattuale a livello internazionale', *Europa e diritto privato* (2007), 599–638, at 624 et seq., and 635 et seq. This author, on the other hand, is attracted by Schulte-Nölke's idea of an optional European consumer contracts law, which consumers could select by pressing the 'blue button' with the gold stars which represents the Member States, therefore excluding enterprises, from the small to medium and big ones: the *lex mercatoria* is single, nothing is gained by breaking it up into 'European' and 'International' (at 620).

[23] See database UNILEX <www.unilex.info>.

[24] G. Ajani & H. Schulte-Nölke, *The Principles of the Existing EC Contract Law: A Preliminary Output of the Acquis Group*, in *Acquis Principles 2007, supra* n. 19, at IX.

[25] S. Troiano, 'Clausole generali e nozioni giuridiche indeterminate nei principi Acquis del diritto comunitario dei contratti', in ed. De Cristofaro, *supra* n. 10, at 190–240: the author lists all the ACQP in which these general clauses appear, at 194.

[26] Troiano, *supra* n. 25, at 224.

The first general clause analysed concerns 'unfairness', which underpins the monitoring of the contents of *B2B* contracts.

Under Article 6:301 (2) ACQP,[27] 'A term in a contract between businesses which has not been individually negotiated is considered unfair only if using that term amounts to a gross deviation from good commercial practice.' Under Article II-9:406 DCFR, 'A term in a contract between businesses is unfair (...) only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.'

According to the Italian author's commentary, on the one hand, it is arbitrary to extend this principle's scope of application to all *B2B* contracts, and in any case to all contracts made by enterprises. It would have been better to limit its application to certain categories of *B2B* (essentially in the financial services sector); on the other hand, it is arbitrary to have limited its applicability to just those clauses which are 'not individually negotiated'. In addition, the commentator underlines the lack of definition of the principle, due to the use of two (or more, in the case of the DCFR) vague concepts such as 'gross deviation', 'good commercial practices', 'good faith' and 'fair dealing'.

Other issues concern the criterion of 'reasonableness', which appears from Article II-1:104 DCFR, in relation to 'usages and practices'; it is actually in the DCFR which appears as many as 500 times.[28] Here, criticism is directed at the idea that such a criterion is capable of bridging the gap between the legal traditions of Common Law and Civil law, as a functional step aimed at reorganizing the conceptual framework of European law, in terms of less dogmatism and more concreteness and pragmatism. Nonetheless, according to this commentator, the concept of 'reasonableness' is unknown in many legal traditions and hence, in the countries of the community, it does not have a sufficiently consolidated body of precedents upon which to draw in order to identify recurrent behaviour, so that the term can acquire concrete significance. Furthermore, in reorganizing the conceptual framework, the risk arises that the specific meanings of various concepts (such as diligence, good faith and equity: in Italian, *diligenza, buona fede, equità*) are lost within an ill-defined, catch-all notion, which – in reality – operates within the bounds of the general principle of 'good faith'.[29] The final criticism is that in this way, the predictable application of the rules and certainty in the law are prejudiced.[30]

---

[27] Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: T. Pfeiffer & M. Ebers, at 234 et seq. Wording slightly changed in the second volume, but not the substance of the provision.

[28] Troiano, *supra* n. 25, at 201.

[29] See *Acquis Principles 2007, supra* n. 19, Comment No. 7 of Art. 2:102 ACQP by Pfeiffer & Ebers, *supra* n. 27, at 70.

[30] Troiano, *supra* n. 25, at 202.

From another perspective, the Italian commentator observes ruefully, in perhaps a rather contradictory way, the over-prudent use of the canon of good faith, which could be elevated to become a guiding principle placed at the top of the ACQP, as the lowest common denominator for all the European legal systems, including the Common law,[31] concerning the negotiation stage until performance.[32] Conversely, the choice was made to invoke the principle of good faith in a range of rules scattered over a number of different contexts: pre-contractual dealings[33] (Articles 2:101–2:103 ACQP), performance of obligations[34] (Articles 7:101–7:102 ACQP), unfair (non-negotiated) terms (Article 6:301 ACQP). The fragmentation of the canon of good faith also emerges from the importance accorded to legitimate expectations (Articles 2:102 and 7:101(2) ACQP). However, in this case the literal tenor of the provisions makes it unclear whether this canon can effectively give rise to duties that are accessory to the main obligation, but, if this was the case, it would constitute a more restrictive rule than the principle of good faith *in executivis* would otherwise suggest.[35]

The Italian commentator above all criticizes Article 7:103 ACQP on the duty of 'loyalty' imposed on the debtor,[36] which has been extended to include cases going beyond those for which it was originally designed. In fact, according to Directive MiFID No. 2004/39, it was intended to apply to certain long-term contractual relationships. The criticism does not so much concern the fragile toe-hold supporting the duty of loyalty, which substantially derives from good faith, but mainly the misunderstanding about what is provided for under Article 19(1) MiFID: 'Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients (...).' The investment

---

[31] Although legal scholars do not concur on the point. Cf. Troiano, *supra* n. 25, at 218. *Contra*: F. Zoll, 'Die Grundregeln der Acquis-Gruppe im Spannungsverhältnis zwischen acquis commun und acquis communautaire', *GPR (Gemeinschaftsprivatrecht*), 2008, at 114.

[32] The option was also debated within the Acquis Group: see Comment No. 8 of Art. 2:101 ACQP, by Pfeiffer & Ebers, *supra* n. 27, at 65: 'Given the fact that the requirement of good faith in Community law is not limited to pre-contractual dealings, an alternative option could have been to include a general rule on good faith equivalent to Art. I-1:102 DCFR(...).'

[33] According to Troiano, *supra* n. 25, at 221, too broad a role was given to pre-contractual negotiations; thus he makes precisely the same criticisms as those already made by N. Jansen & R. Zimmermann, 'Grundregeln des bestehenden Gemeinschaftsprivatrechts?' *JZ* (*Juristenzeitung),* 2007, 1113–1126, at 1123, of which there is a subsequent version in English: 'Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law', 71 *Modern Law Review* (2008): 505–534.

[34] To which, on the other hand, according to Troiano, a narrow role has been given: cf. Troiano, *supra* n. 25, at 222.

[35] Troiano, *supra* n. 25, at 216.

[36] Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: C. Aubert de Vincelles, P. Machnikowski, J. Pisulinski, J. Rochfeld, M. Szpunar & F. Zoll, at 266 et seq.

firm must conform to standards of professional diligence, in order to protect the best interests of its clients *already* covered by the contractual scheme and not protect *further* interests through an extensive interpretation of the contract.

To conclude, the Italian legal scholar cited does not believe that it is possible to abandon general clauses which provide fundamental elements of flexibility. However, their use must be calibrated by means of the redefinition and reinforcement of the ECJ's interpretative role, so that it can give the general clauses concrete meaning. As things stand at present, there is no unanimity of agreement as to the possibility for the ECJ to give concrete interpretation of undefined concepts in conformity with national legal traditions. On the basis of the subsidiarity principle (Article 5(2) EC Treaty), there is a presumption that where the ECJ can only draw up hermeneutic guidelines, framing the methodology of interpretation, Member States give concrete form to the general clauses, since the Community legal system does not have a sufficiently consolidated set of values, principles and rules available to draw on in order to give concrete meaning to the undefined concepts. The ECJ itself[37] refuses to pronounce upon the application of general criteria in a particular clause, in that the evaluation of 'unfairness' is the task of the national courts, after having ascertained the factual circumstances and following the rules of the national legal system within which the clause is to produce its effects.

It may be possible to overcome this latter aspect, in that the actual and concrete evaluation of a clause does not necessarily have to be based on pre-existing legal material (namely: Member States' national laws in force) but may be deduced from 'law in action', as interpreted by the case law of the ECJ and as applied in the Member States.

3.3 Notions of Consumers and Business

Further causes for concern from Italian scholars' standpoint relate to the notions of consumer and business. In particular, the fundamental notions of consumer and business which appear in the ACQP (Articles 1:201–1:202 ACQP)[38] are not very convincing.[39]

So far as the notion of consumer is concerned, according to the Italian commentator express account should have also been taken of those who are negotiating with the aim of setting up a business, a situation which is not yet provided for, however. This preparatory activity is nonetheless considered as 'business activity',

---

[37] ECJ 1 Apr. 2004, C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter* (also confirmed in ECJ 26 Oct. 2006, C-168/05, *Elisa Maria Mostaza Claro v. Centro Móvil Milenium SL*).

[38] Cf. *Acquis Principles 2007, supra* n. 19, author of the Comments: M. Ebers, at 23 et seq.

[39] Di Nella, *supra* n. 21, at 64.

and those engaging in it are included under the general definition of business.[40] Then, the notion of consumer should have taken legal persons into account as well (with or without legal personality), who do not carry on any business activity in an organized or stable way, but for non-profit purposes. However, it is true that the ECJ has already ruled on the point, limiting the notion to natural persons only.[41]

So far as concerns business, the commentary criticizes the fact that the notion seems to concentrate on 'self-employed persons or entrepreneurs'. With this remark, the Italian commentator assumes that agents are excluded (to which, however, reference is made in the ACQP[42]), as well as autonomous workers and craftsmen (whereas, once again, these categories are present in the ACQP[43]); beside these, the Italian commentator assumes that producers of goods and services are excluded, but also in this case the comment does not seem well-founded, since business is defined regardless of its 'legal form' or 'ownership'.

3.4 Formal Requirements

Careful analyses have also been made of the provisions regarding form, contained in Articles 1:301–1:302 ACQP[44] and Articles 1:303–1:307 ACQP,[45] as well as those which have respectively been subsumed, with some amendments, into the DCFR, Articles I-1:105–1:106 and Article II-1:107.

Italian commentary[46] is overall quite favourable and accept the principle of 'legislative indifference' between in writing and textual form in a durable medium, provided this is reasonably accessible to the recipient (e.g., Article 2:206(3)

---

40 See Ebers, *supra* n. 38, Comment No. 15, at 27: 'Transactions in the course of setting up a professional activity are clearly directed at business activity.'

41 ECJ 22 Nov. 2001, Joined Cases *Idealservice*, C-541/99 and C-542/99.

42 See Ebers, *supra* n. 38, Comment No. 3 to Art. 1:202 ACQP: 'Conduct by a third party who is acting in the name or on behalf of a business is attributed to the business. A business therefore does not lose this quality by using a consumer as its agent or other representative' (at 33).

43 At 34, Example 1, where the question as to whether a person qualifies as business does not depend on business experience, but rather on the purpose of the transaction. Transactions in the course of setting up a professional activity are clearly directed at business activity. Furthermore it is not necessary that the business intends to make profit in the course of its activity. See Ebers, *supra* n. 38, Comment No. 15 to Art. 1:201 ACQP (at 27).

44 Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: S. Leible, J. Pisulinski & F. Zoll, at 38 et seq. In the second volume, *Contract II, supra* n. 19, a new provision has been inserted, Art. 1:302 (Effectiveness of notice), thus the entire s. 3 of Ch. 1(Notice and Form) has been renumbered. Here we follow the previous numeration.

45 Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: E. Arroyo i Amayuelas, B. Pasa & A. Vaquer Aloy, at 41 et seq.

46 S. Pagliantini, 'La forma nei principi del diritto comunitario', in ed. De Cristofaro, *supra* n. 10, at 95–160.

ACQP[47]). These formal requirements contemplated as valuable legal items for 'monitoring through documentation' all the potentially useful information for the end-user, are a form of protection (so-called warning function of the form). They aim at long-term conservation of the information (so-called informative form). It is not a new solemn formalism, a new dogmatic category, and it does not exclude the traditional functions of the written form (which have to do with the validity of contract).

The Italian commentator then highlights the fact that the key notion *Textual form* was taken from the German *Textform* (§ 126b BGB).[48] The notion is referred to in Article 1:304 ACQP, and it is reproduced for information, documentation and monitoring purposes in the DCFR (see, for example, a notice in textual form on a durable medium for the formal confirmation of a contract between businesses, Article II-4:210 DCFR, or the '*Del credere clause*', which is valid only if and to the extent that the agreement is in a textual form on a durable medium, Article IV-E-3:313 DCFR). As in the German legal system *Textform* represents an exception to the general principle of *Formfreiheit*[49] and is at a subordinate level with respect to legal written form (§ 126 *Schriftform*), electronic form (§ 126a, *Elektronische Form*) and notarial form (*notarielle Beurkundung*) but is at a higher level than oral form (*mündlichen Erklärung*), in the structure outlined by the ACQP (and transposed in the DCFR) it performs the same 'exceptional' function and is set at the same level.[50]

As far as the signature issue, the system outlined by the ACQP and the DCFR seems to be tending more and more towards the use of surrogate signatures; and in fact Article 1:307 ACQP and Article I-1:106(2) DCFR confine themselves to approving the definition of 'signature' but does not call for the signature to be written by hand, an essential requirement of a contractual declaration, according to traditional legal literature.

What seems to be increasingly the case, in the national legal systems[51] too, is that whenever instruments which are alternatives to written signatures are declared

---

[47] Renumbered as Art. 2:204 ACQP in the second volume of the Acquis principles of 2009, *supra* n. 19.

[48] In the ACQP and the DCFR the third requisite, which is present in the German notion of *Textform* (the 'sign' or 'mark' aimed at ascribing a declaration to a certain party) is lacking, but it is clear – also from the literal tenor of the BGB – that this requisite does not mean any 'written signature'. Therefore the issue does not – in the least – concern the written signature as a 'precondition for the validity of the declaration'. Cf. Pagliantini, *supra* n. 46, at 97.

[49] In any case it seems to be a principle in name rather than in practice: on this point see Pasa, *supra* n. 8, at 47 et seq., at 129 et seq., and the legal doctrine cited in her volume.

[50] On a different presentation of the 'levels of formal requirements' see Pasa, *supra* n. 8, at 347 et seq.

[51] See, for example, the Italian system, at least so far as concerns *B2C* contracts, where hand-made signatures are downgraded to an incidental element, as national legal scholars have noted: R. Sacco, 'La forma', in *Il contratto*, eds R. Sacco & G. De Nova, vol. I, of the *Trattato di diritto civile*, by

to be acceptable, in the negotiation contexts referred to, they conform to socially recognized and trusted practice.

The Italian commentator is also in favour of the requirement of 'unilateral non-alterability' included in the definition of durable medium (Article 1:305 ACQP; Article I-1:105 DCFR) on the basis of which – as in German case law – the definition as a durable medium for the website managed by the business professional is refused. It will only be treated as a durable medium if the 'save page' function is active, in a way that the data can be saved, downloaded and printed, namely it is easily accessible by the recipient, whether a consumer or business. However, there is a complicating factor in the definition framework of the ACQP and the DCFR: the fact that there is no relationship of 'one-to-one correspondence' between 'textual form' and 'durable medium', given that not every form of information reproduced with that durable support can be said to be issued in textual form. Audio recordings and films on DVD are not within the definition (unlike an e-mail, for example) and therefore come under 'non-written means', which in any case seem to remain suitable for modifying a pre-existing item expressed in textual form.

Article 2:203(1) ACQP and Article II-3:103(1) DCFR on information duties towards disadvantaged consumers prescribe that the information must be 'clear', but not written: orality[52] is, therefore, relevant for the purposes of fulfilling the informational duty, and the necessity for a written 'confirmation' (or in a textual form), whenever general contractual conditions are involved, is the unifying criterion (Article 2:205(1) ACQP[53] and Article II-3:105(2) DCFR).

Even though no contract has been concluded, the breach of the information duties entitles the other party to reliance damages: 'failure to observe a particular form will have the same consequences as breach of information duties' (Article 2:206(4) ACQP and Article 2:207(2) ACQP;[54] Article II-3:106(4) DCFR).

The crucial importance of the formal requirements concerns this fact, that neither the ACQP nor the DCFR explicitly set out the remedies, apart from noting that the failure to observe a particular form will have the same consequences as breach of information duties. This is a direct consequence of the *acquis communautaire*, which

---

R. Sacco, 3rd edn (Torino: Giappichelli, 2004), 703–776, at 730; thus Pagliantini, *supra* n. 46, at 145; Pasa, *supra* n. 8, at 373 et seq.

[52] Under Art. 1:301 ACQP and Art. II-1:106 DCFR 'notice may be given by any means appropriate to the circumstances' which applies to all possible notices, including offer and acceptance, pre-contractual information, notice of withdrawal and termination, etc.

The form, therefore, is merely instrumental to the knowledge and a communication, which has in any case achieved the purpose of making the intention known (of offer, acceptance, release from contractual obligation, etc.), will be effective. This rests on the principle that communication must always conform to the canons of good faith and transparency.

[53] Renumbered as Art. 4:105 ACQP in the second volume of the *Acquis Principles 2009, supra* n. 19.

[54] Renumbered respectively as Arts 2:204 and 2:208 ACQP (the latter with major reformulation) in the second volume of the *Acquis Principles 2009*, *supra* n. 19.

does not set down a general rule with regard to the remedies applicable in case of breach of formal requirements; given the variety of contexts in which the principle of form and its exceptions appear within the *acquis*, the question is to be resolved taking into consideration the specific function and purpose of each particular formal requirement.[55] As far as the consequences for breach of information duties is concerned, they can be different for damages because of the causation requirement (incorrect or missing information; information not provided in the correct form). Furthermore, other consequences should be noted, because a failure to observe the correct form may trigger additional rights, such as withdrawal from the contract or termination.[56]

Clearly, I guess everything depends on the 'procedural form' in which standardized information is presented, on the 'structural form' with reference to the contents of the contract, on the other formalities for withdrawal: in other words, it depends on the function for which the formal requirement comes into play in the contract. Hence, given that currently no directive provides for a set of remedies for the infringement of formal requirements and Member State do not provide common principles and rules for it, the infringement is always subordinate to the function of form, which – in the end – is related to its traditional meaning in the Member States and, to a lesser extent, to the new one in the European Private Law so-called (form of the information, or informative form).

In order to preserve the EU Law *effet utile*, and appropriate, effective, proportionate and dissuasive sanctions (as the directives say), there are different options: (a) the contract is not binding, or only some terms are not binding; (b) the interpretation *contra proferentem*; (c) the nullity of contract; (d) the claim for damages if damages can be proved (pre-contractual liability based on the *culpa in contrahendo* principle, with the cause of action either in tort or in contract, depending on the national legal system); (e) the unenforceability of the contract; (f) reversion of the burden of proof; (g) the prolongation of the withdrawal period as, for example, in Article 2:207(1) ACQP.[57]

Despite appreciation for the effort made by the Acquis group to fill the gaps left by the Community law in terms of consequential remedies for violation of the form of the information (informative form),[58] attention is drawn to the need to

---

[55] See *Acquis Principles 2007*, *supra* n. 19, Comment No. 5 by Arroyo, Pasa & Vaquer, *supra* n. 45, at 43.

[56] See *Acquis Principles 2007*, *supra* n. 19, authors of the Comments: C. Twigg-Flesner & T. Wilhelmsson, No. 3, at 97.

[57] Cf. Pagliantini, *supra* n. 46, at 99, and Pasa, *supra* n. 8, at 404 et seq.

[58] Omissions which are likewise highlighted in G. Alpa, 'Gli obblighi informativi precontrattuali nei contratti di investimento finanziario per l'armonizzazione dei modelli regolatori e per l'uniformazione delle regole di diritto comune', *Contratto e impresa,* fasc. 4–5 (2008), at 889–916.

investigate in greater depth the logic underpinning the different protection mechanisms.[59] If it seems consistent that the extension of the time limit for withdrawal should be linked either to the lack of information as a function of the exercise of withdrawal or to the lack of 'written confirmation' as a formalization subsequent to the conclusion of the contract, on the other hand the congruity is doubtful of compensation for loss as a remedy that is concurrent with the remedy provided for the performance of obligations which the other party could reasonably expect, as a consequence of the absence or incorrectness of the information (Article 2:207(3) ACQP).[60]

3.5 Principle of Non-discrimination

Further areas of 'resistance'[61] concern Chapter 3, Articles 3:101 ACQP ff., regarding the principle of non-discrimination.[62] Criticism is mainly targeted at the remedial framework, since the ACQP did not introduce any innovations with respect to Community measures, and neither did the DCFR, Articles II-2:101 ff. (no class actions to protect collective interests). The criticism is precisely that – namely, the lack of a set of provisions, such as actions for injunctions to protect collective interests, as a disincentive to discriminatory conduct. In fact, a class action would be a decisive move in protecting the interests of discriminated persons. However, the literal tenor of Articles 3:201–3:202 ACQP would lead the interpreter to believe that only the person discriminated against is entitled to other remedies which are apt to undo the consequences of the discriminating act or to prevent further discrimination.

This is a consequence of the fact that the ACQP are formulated on the basis of the *acquis communautaire*. Although the Acquis Group has sought to fill some gaps left by the existing EC measures (less then twenty directives, a few Regulations and the Rome Convention, plus the ECJ interpretations), the ACQP remain mainly based on the *existing acquis communautaire.*

On the differentiation between remedies at national level, with respect to the Community framework cf. likewise Pasa, *supra* n. 8, at 399–451.

59 U. Salanitro, 'Gli obblighi precontrattuali di informazione: le regole e i rimedi nei principi Acquis', in ed. De Cristofaro, *supra* n. 10, at 241–263; A. Gianola, *L'integrità del consenso dai diritti nazionali al diritto europeo. Immaginando i vizi del XXI secolo* (Milano: Giuffrè, 2008), 582 et seq.

60 Remedies that can be supported with reference to the principle of *effet util*, especially in light of the cases ECJ 20 Sep. 2001, C-453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, and ECJ 17 Sep. 2002, C-253/00, *Antonio Muñoz y Cia SA, Superior Fruiticola SA v. Frumar Ltd, Redbridge Produce Marketing Ltd.*, as Twigg-Flesner & Wilhelmsson, *supra* n. 56, pointed out, 99 et seq.

61 D. Maffeis, 'Il divieto di discriminazione', in ed. De Cristofaro, *supra* n. 10, at 265–304.

62 Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: S. Leible, S. Navas Navarro, J. Pisulinski & F. Zoll, at 105 et seq.

3.6 Formation

On the topic of contract formation, the Italian doctrinal opinion is decidedly negative, above all with respect to the ACQP.[63] The criticism is twofold. First of all it focuses on the structure and topics covered by Chapter 4 ACQP.

It can be noted that Articles 4:105–4.106 ACQP[64]do not deal with the 'if, where and when' contractual aspects, but with the establishment of the contents of the agreement, which is assumed to already have been validly achieved. Regarding Article 4:108 ACQP, on the acknowledgment of receipt,[65] another systematic mistake has led the ACQP's compilers to choose to place this provision in Chapter 4, on formation. The error is due to the '*mere linguistic assonance*' between *acknowledgment,* which identifies only the performance of a duty of communication and information, deriving from the principle of good faith, and *Bestätigung*, which in the German legal system defines all the spontaneous procedural acts reproducing the contractual intention, which has already been given, aimed at specifying its full workability and capable of giving rise, in certain circumstances (i.e., silence of the recipient) to a particular procedure for the execution of the contract.[66]

Secondly, the Italian commentator criticizes the contents of this Chapter 4 ACQP, emphasizing that the only references relevant to the subject of contract formation are so obvious – such a truism – that they generate a completely negative opinion: 'the final product satisfies no one and it is to be hoped that the authors change job'.[67] In other words, these rules on contract formation are so self-evident to be considered useless. Specifically, the comments refer to the contents of Article 4:107 ACQP on the binding force of unilateral promises,[68] the content and wording

---

[63] F. Addis, 'La formazione dell'accordo', in ed. De Cristofaro, *supra* n. 10, at 305–349; the same essay is also published in *Obbligazioni e contratti*, fasc. 1 (2009), at 8–17.

[64] Cf. *Acquis Principles 2007*, *supra* n. 19, author of the Comments: R. Schulze, at 140 et seq.

Articles renumbered respectively as Arts 4:107–4:108 ACQP (with wording slightly changed) in the second volume of the *Acquis Principles 2009, supra* n. 19.

[65] Cf. *Acquis Principles 2007*, *supra* n. 19, authors of the Comments: S. Leible, J. Pisulinski & F. Zoll; see Comment No. 5, at 153, who, not by chance, say that the remedies provided by *(previous)* Art. 4:108 ACQP mirror the system of remedies for the violation of pre-contractual information duties, Art. 2:207 ACQP; indeed, the duty to acknowledge the receipt of an offer or acceptance may be considered as a specific kind of information duty applicable in the phase of contract formation. Therefore it is here, among the pre-contractual duties, that this provision could have been collocated, according to Addis.

Art. 4:108 ACQP has been renumbered, with major reformulation, as Art. 4:110, in the second volume of the *Acquis Principles 2009, supra* n. 19.

[66] Addis, *supra* n. 63, at 324.

[67] Addis, *supra* n. 63, at 313 and at 349. Also, to the same purpose, M. V. De Giorgi, 'Principi, Acquis e altro', *Europa e diritto privato*, fasc. 3 (2008), at 649–653.

[68] See *Acquis Principles 2007*, *supra* n. 19, Comment No. 8 by Schulze, *supra* n. 64, at 150.

Art. 4:107 ACQP has been renumbered, without changes, as Art. 4:109 in the second volume of the *Acquis Principles 2009, supra* n. 19.

of which differ from Article II-4:301 DCFR on the requirements for a unilateral juridical act.

Lastly, the criticism focuses on Articles 4:101–4:102 ACQP, where a unilateral promise opens a '*particular*' procedure for the formation of the contract, because the theoretical prospect is '*restricted*', reducing the modalities of formation of the contract to the offer/acceptance exchange. The prescriptive effect of this article is '*non-existent*', it is '*useless or innocuous*'[69] because, unlike the effects of Article 2:103 PECL and Article II-4:101 DCFR, the defining features of a 'sufficient agreement' are not stated.[70] The unilateral promise is only defined in the negative, with regard to the contract, whereas it would have been preferable to opt for a notion of the contract which reflects the outcome of a formative procedure based on a range of different mechanisms, not only characterized by the 'magical meeting of wills'.[71] According to Addis, this 'return to the past' does not seem to have been tempered by Article 4:102(2) ACQP, which only refers to the *possibility* that the contract *may be concluded* in a way that *differs from the offer/acceptance scheme* but provides no regulation for contractual schemes, which differ from those centred on the exchange of declarations, such as, for example, 'acceptance by conduct' (see Article II-4:205(2)(3) DCFR), or 'formal confirmation between businesses' (see Article II-4:210 DCFR). The concrete result is that the provision has no prescriptive weight and that the relevance given to the hypothesis that a contract can be concluded through the traditional mechanism of offer and acceptance amounts to ignoring the fact that the conclusion of contract may take place by other means.

3.7 Right of Withdrawal

There are no less than three Italian studies on the right of withdrawal.[72]

The first commentary[73] starts on a linguistic note, with the comment that the Italian translation of the ACQP uses the term '*recesso*' (withdrawal), whereas the German one uses the term '*Widerruf*' or '*revoca*' (revocation), instead of '*Rücktritt*'; however, it should be noted that the term '*Widerruf*' itself, in § 130 BGB, has the meaning of *'revoca'*, whereas in §§ 355–359 BGB governing contracts with

---

69 Thus, literally, Addis, *supra* n. 63, at 330.

70 Although to be fair, the authors of the ACQP are aware of the omission, since in the *Acquis Principles 2007*, *supra* n. 19*, sub* 'Explanation' No. 9 by Schulze, reference is made to just this issue (*supra* n. 64, at 132).

71 Thus Addis, *supra* n. 63, at 327. Critical of the notion of contract which emerges from the DCFR (Arts II-1:103(2) and II-1:105) likewise G. Alpa, 'Autonomia delle parti e libertà contrattuale oggi', *Rivista critica del diritto privato*, fasc. 4 (2008), at 571–603.

72 G. De Cristofaro, 'La disciplina unitaria del 'diritto di recesso': ambito di applicazione struttura e contenuti essenziali', at 351–390; E. Bargelli, 'Gli effetti del recesso nei principi Acquis del diritto comunitario dei contratti', at 391–417; R. Volante, 'Recesso del consumatore e contratti collegati', at 419–442: all in ed. De Cristofaro, *supra* n. 10.

73 De Cristofaro, 'La disciplina unitaria del diritto di recesso (...)', *supra* n. 72, at 351.

consumers, it means '*recesso*'.[74] Therefore, I do not think we are dealing here with a 'radically different option' at the conceptual level.

Having underlined that Chapter 5 ACQP ought to be reformulated in the light of Directive No. 2008/48 and Directive No. 2008/122 and the indications emerging from the Proposal of the Commission on a Consumer Rights Directive,[75] the commentary goes on to criticize[76] the overarching nature of the *jus poentiendi.* According to De Cristofaro, this should constitute a *lex specialis*, rather than be generalized, as envisaged in the DCFR. The latter has in fact included the general framework on withdrawal (Articles II-5:101–106 DCFR and Articles II-5:201–202 DCFR) in Book II (dealing with 'contracts and other juridical acts'), extending it to all contracts (not only *B2C*), so that the right of withdrawal is available to all parties (and not just to consumers, as it is in the ACQP). This last comment on the ACQP is not precise, however, given that Articles 5:101–5:106 ACQP are not restricted to the field of consumer protection, as the authors of Article 5:101 ACQP have highlighted;[77] on the other hand, Articles 5:201–5:202 ACQP deal with 'particular rights of withdrawal' in contracts negotiated away from business premises and timeshare contracts.[78]

The most severe criticism is, however, lodged against the lack of identification of the 'nature' of the right of withdrawal.

It is only defined negatively: it is not a revocation, nor termination, it is not an ordinary withdrawal (*Kündigung*, different from *Rücktritt*) understood as a remedy for non-performance or as a remedy for the frustration of a contract. The party is also entitled to exercise its right of withdrawal where the contract is void or where the obligations to perform have lapsed for other reasons (e.g., annulment, rescission by one of the parties[79]); however, the Italian commentator believes this solution is not correct.[80]

Furthermore, the ACQP are not clear on the reason justifying a right of withdrawal of this type, which interferes with the mechanisms of contract formation, as

---

[74] Cf. B. Pasa, 'Diritto contrattuale europeo e inconsistenza terminologica', in *Diritto contrattuale europeo tra direttive comunitarie e trasposizioni nazionali*, eds B. Pasa, P. Rossi & M. Weitenberg (Torino: Giappichelli, 2007), 3–31, at 15.

[75] COM (2008) 614/3, of 8 Oct. 2008.

[76] As previously Jansen & Zimmermann, *supra* n. 33, at 116.

[77] See *Acquis Principles 2007*, *supra* n. 19, Comments by P. Møgelvang-Hansen, E. Terryn & R. Schulze, No. 9, at 159.

[78] Renumbered, with wording slightly changed, as Art. 5:A-01 and Arts 5:C-01–5:C-02 in the second volume of the *Acquis Principles 2009*, *supra* n. 19.

[79] See *Acquis Principles 2007*, *supra* n. 19, Comment No. 10 by Møgelvang-Hansen, Terryn & Schulze, *supra* n. 77, at 160.

[80] De Cristofaro, 'La disciplina unitaria del diritto di recesso (...)', *supra* n. 72, at 377.

it is available even *before* the agreement has been reached;[81] in such a case, it is a right to deprive a contractual declaration of its legal effects (i.e., it coincides with the revocation of the offer).

It is said, by the authors of Article 5:101 ACQP,[82] that 'the application of common rules with regard to the exercise and effects of the various rights of withdrawal is based on the common features of these rights'. However, there are at least three types of rules on withdrawal (set out in the comments on the ACQP themselves): one with regard to the intrinsic complexity of the contents of *B2C* contracts, another concerning the special features of various means of communication, and finally the third, arising out of particular conditions and circumstances such as the nature and characteristics of the place in which the party declares her/his contractual intention. Therefore, the Italian commentator thinks that it is not correct to establish a common basis for those three sets of rules.[83]

The consumer-oriented basis of Articles 5:102–5:106 ACQP is approved, although here the most serious omission, according to Italian authors, is the absence of rules regulating the distribution of the burden of proof and evidence; however, such rules are not absent since, as noted above, the principle of freedom of form applies to the ways of communicating (and thus proving) withdrawal.

The rationalization of the chaotic set of rules on the *dies a quo* of time limits for the activation of the *jus poenitendi* laid down in the five directives which traditionally provide for them is applauded. A main period of fourteen days and a maximum time limit of one year, which runs from the signing of the contract,[84] are considered to be acceptable, by contrast with the existing rules. However, by virtue of the 'Rome I' Regulation (No. 593/2008), the conclusion of the contract is determined by the national rules of conflict, thus – once again – there are diverging (not common!) rules.

---

[81] According to an authoritative source (Castronovo, *supra* n. 12, at 285): 'The right of withdrawal from the contract risks undermining the single legitimation represented by the autonomy of the party which, once exercised, results in a tie from which it is impossible to disengage. This right should only be allowed in situations capable of justifying what would otherwise be a "destructive deviation from the freedom to contract"; for these purposes it would be preferable to frame withdrawal in terms of contract formation rather than in terms of performance. This is feasible, emphasising the reasons justifying withdrawal which are not those of destroying the efficacy of the contractual relationship, but rather for avoiding the performance of contract notwithstanding the reciprocal exchange of consent between the parties.'

[82] See *Acquis Principles 2007, supra* n. 19, Comment Nos. 4–5 of Art. 5:101 ACQP by Møgelvang-Hansen, Terryn & Schulze, *supra* n. 77, at 157–158.

[83] De Cristofaro agrees with the opinions of Jansen & Zimmermann, *supra* n. 33, at 1125.

[84] See *Acquis Principles 2007, supra* n. 19, Comment No. 7 by Møgelvang-Hansen, Terryn & Schulze, *supra* n. 77, at 171.

The formulation '*does also not apply to*' contained in Article 5:201(4)(5)[85] ACQP seems equally mistaken: according to the Italian commentator, the right of withdrawal is also '*applicable*' to those contracts (letters: a, b, c, d, e, f, e, and financial services contracts fully performed by both parties), but in point of fact it brings about an '*early extinction*' of the right of withdrawal, at a time prior to the one established by the two provisions contained in Articles 5:103 and 2:207 ACQP. This is a provision which would moreover conflict with the mandatory nature of the *jus poenitendi* (Article 5:101 ACQP), since circumstances could occur in which a consumer waives the right to withdraw, as a result of unilateral (external) insistence.

As to the effects of the right of withdrawal,[86] it is underlined that the rule contained in Article 5:105 ACQP lowers the level of protection in some legal systems (in Sweden and Cyprus, it is allowed for the consumer to retain the goods as an 'unconditional gift' even after the right of withdrawal has been exercised) and it raises it in others (in the Italian and Hungarian legal systems, which add a further condition to the right of withdrawal, namely that the goods to be returned should not have undergone any modification or alteration and that the service has not been performed) and that consequently it is seeking an unhappy compromise between protection of the consumer and safeguarding the market. Furthermore, this provision leaves two issues unresolved: one on the efficacy of withdrawal, which can have merely obligatory or real effects ('*efficacia obbligatoria o reale*'); the other as to whether the rule of full restitution of the performance can be extended to include long-term contracts (each party has to return at its own expense to the other what it received under the contract) set out in Article 5:105 ACQP. Moreover, the provision places the risk on the seller and liability for damages on the buyer when the damage arises from his/her negligence ('is not liable for damage to the received goods, provided that it exercised reasonable care' Article 5:105(2) ACQP), or for the diminished value that results from the normal use of the goods as well, with the relevant burden of proof being on the buyer once again. The same party is not liable for the diminished valued of the received goods caused by inspecting and testing and when it had not received reasonable notice of the right of withdrawal (this regime exists under German law).

Finally the Italian author[87] shows that Article II-5:105 DCFR incorporates the contents of Article 5:105 ACQP but by adding a reference to the restitutionary effects of termination. It entails that in the DCFR the effects of the right of withdrawal are regulated in the section dedicated to the consequences of termination of the contractual relationship (Article III-3:501 DCFR). The 'restitution' of any benefit received by performance of obligations under the terminated contract remains among provisions on unjust enrichment. The DCFR thus makes use of the German

---

[85] Renumbered as Art. 5:A-02 ACQP in the second volume of the *Acquis Principles 2009*, *supra* n. 19.
[86] Cf. Bargelli, *supra* n. 72, at 401.
[87] Bargelli, *supra* n. 72, at 406.

'twin track model', creating a deep divergence in the restitutionary regimes, and producing a graft of consumer rights and a new common private law (so-called '*acquis commun*').[88] However, the inadequacy of this solution,[89] especially with regard to the issue of risk distribution in the event of the destruction of specific goods that have been delivered in performance of a bilateral contract, ought to have discouraged an imitation of the German model.

Still in relation to the DCFR, it is emphasized that it proposes a different solution, which is more comprehensive with respect to the ACQP framework, although it is less favourable to the consumer.

In fact, according to Articles II-5:105(2) and III-3:513(1)

(1) DCFR the recipient is:[90] (a) obliged to pay the value (at the time of performance) of a benefit which is not transferable or which ceases to be transferable before the time when it is to be returned *and* (b) obliged to pay compensation for any reduction in the value of a returnable benefit as a result of a change in the condition of the benefit between the time of receipt and the time when it is to be returned.

Furthermore, Article III-3:513(2) DCFR sets out the criterion for calculating the value of the benefit when restitution cannot take place, which is fixed at the price agreed between the parties, adding that, where no price was agreed, the value of the benefit is the sum of money that a willing and capable provider and willing and capable recipient, aware of any lack of conformity, would lawfully have agreed.

Article III-3:514 DCFR adds another burden of liability on the recipient (who could be a consumer!), analogous to that provided for under § 346 Abs. 1, BGB: the recipient is obliged to pay a reasonable amount for any use which the recipient makes of the benefit, except in so far as the recipient is liable under Article III-3:513(1) DCFR in respect of that use.

Finally, liabilities arising after the time when return was due (Article III-3:515 DCFR) still fall on the recipient/consumer, but in a different way with respect to the German model, which places the despatch and costs and risks solely on the business party to the contract (§ 357 Abs. 2, BGB).

To conclude, this section dealing with the effects of withdrawal is an auspicious occasion for more general reflection, from a comparative law perspective, above all on its effects on the termination of the contract, starting with the German model, which to date has been considered the most convincing.[91]

---

[88] See, for example, in the DCFR Arts II-7:212(2), II-7:303(1); Arts III-1:106(5), III-1:107(3), III-3:104(4); Art. IV-G-4:103(5), Art. VII-2:201(2) and Art. VII-7:101.

[89] As has been demonstrated by German legal scholars largely cited in the essay by Bargelli, *supra* n. 72, at 410.

[90] Of course this is the general rule, but there are some exceptions to the rule: see Art. III-3:513 (2)(3)(4) DCFR.

[91] Bargelli, *supra* n. 72, at 417.

Another issue must be highlighted. Another Italian writer[92] has criticized the consumer exercise of the right of withdrawal in linked contracts (Article 5:106 ACQP).[93] In his opinion, the concept of '*economic unit*' accepted in the ACQP (which stems from German Law) is a vague notion. It would be preferable to replace it with the notion of '*commercial unit*' introduced by Directive No. 2008/48 (after the first volume of the ACQPs was published[94]). Moreover, the ACQP rule does not consider the exceptional nature of the case of credit contracts used for acquiring real property, which is, indeed, outside the scope of Article 5:106 ACQP. It is not possible to withdraw from a mortgage arrangement in respect of real property, nor is the buyer permitted to bring a legal action against the bank or the lending institution for non-performance or incomplete performance on the seller's part.

3.8 Non-negotiated Terms

Concerning non-negotiated terms, the Italian commentary[95] emphasizes, first of all, a structural difference between the DCFR and Chapter 6 ACQP. Articles II-9: 404–9:406 DCFR, in point of fact, do not include the regimen governing non-negotiated terms within a *single* chapter or section, but differentiate *three* contractual types: (1) the meaning of unfair in contracts between a business and a consumer (*B2C*); (2) the meaning of unfair in contracts between businesses (*B2B*); and (3) the meaning of unfair in contracts between non-business parties (*P2P*).

Passing on to the analysis of the rules contained in the ACQP,[96] the Italian commentary regards the contents of Article 6:201 ACQP with disfavour.[97] The rule concerning the inclusion of non-negotiated terms into a contract, which is applicable also to *B2B* contracts,[98] goes beyond the *acquis communautaire*, and may raise political issues. The drafters of the ACQP justified this by stating that it seemed preferable, in order not to fall back from PECL and CISG,[99] but the PECL are not, in the

---

92 Volante, *supra* n. 72, at 420 et seq.

93 See *Acquis Principles 2007*, *supra* n. 19, Comments by Møgelvang-Hansen, Terryn & Schulze, *supra* n. 77, at 186 et seq.

94 However in the second volume of the *Acquis Principles 2009*, *supra* n. 19, it appears the same concept of 'economic unit': see the new volume, at 269.

95 M. Maugeri, 'Clausole non oggetto di trattativa individuale: l'ambito di applicazione del sesto capitolo dei Principi Acquis', in ed. De Cristofaro, *supra* n. 10, at 443–457.

96 Cf. *Acquis Principles 2007*, *supra* n. 19, authors of the Comments: Pfeiffer & Ebers, *supra* n. 27, at 213 et seq.

97 Pfeiffer & Ebers, *supra* n. 27, at 221 et seq.

98 And to all contracts, such as para. (3); stricter rules have to apply for *B2C* contracts, such as para. (4).

99 See Comment Nos 7–8 by Pfeiffer & Ebers, *supra* n. 27, at 223.

opinion of the commentator, an integral part of the *acquis* and the reference to CISG is not conclusive.[100]

According to other commentators, however, a positive innovation is brought in by Article 2:206 ACQP[101] to read as a combined measure with Article 6:201 ACQP, cited above: any information (included in non-negotiated terms) has to be clear and precise and expressed in plain and intelligible language, so as not to hide the significance of a combination of interests which are unfavourable to the consumer (principle of transparency). This allows for monitoring of the contents of the contract[102] (e.g., subject matter and price), in cases where the wording of the contract is ambiguous or obscure.[103] In the ACQP the lack of transparency and unfairness are combined so as to form a whole, but this is not true for the DCFR; consequently the remedies available in relation to these two items are disappointingly different: under Article 6:306 ACQP the terms are not binding, whereas under Article II-9:407 DCFR the terms are unfair only if they are not drafted in plain and intelligible language.

The rule under Article 6:301 ACQP, which is also applicable to *B2B* contracts, is also not given approval by the Italian commentator,[104] on the basis that it is quite arbitrary to cite only the legislation of some countries,[105] where there are general clauses which provide for a content review of standard terms (unfairness test) which do not merely apply to *B2C* contracts, but also to *B2B* contracts. Such that the ACQP are 'constrained' to concede a weaker protection to business (based on the parameter of 'gross deviation from good commercial practice') in order to respect the traditions of other legal systems too. There might instead have been a careful consideration of the idea of 'relevant market power', where the contract terms constitute the means by which the powerful contracting party abuses its dominant position and hence the issue of unfairness of the terms should have been analysed also with respect to Article 82 EC Treaty.

Article 6:301 ACQP, on the other hand, is regarded with particular favour[106] for the innovative definition of unfairness that it introduces: a term is considered unfair if it disadvantages the other party ('disadvantage' to be taken as indicating a combination of interests which are disadvantageous to the consumer). This is the

---

100 Maugeri, *supra* n. 95, at 450.

101 Cf. *Acquis Principles 2007*, *supra* n. 19, Twigg-Flesner & Wilhelmsson, *supra* n. 56, at 95. As we said, the article has been renumbered and it is now Art. 2:204 ACQP.

102 Cf. Pasa, *supra* n. 8, at 257 et seq.

103 M. Meli, 'Trasparenza e vessatorietà delle clausole nei contratti per adesione', in ed. De Cristofaro, *supra* n. 10, 459–486, at 481.

104 Maugeri, *supra* n. 95, at 453. See also the perplexities expressed in the *Acquis Principles 2007*, *supra* n. 19, Comment No. 5 by Pfeiffer & Ebers, *supra* n. 27, at 215.

105 Estonia, Lithuania, Austria, Germany, Portugal, Slovenia, the Netherlands. See Pfeiffer & Ebers, *supra* n. 27, Comment No. 7, at 236.

106 Meli, *supra* n. 103, at 470.

key element of the definition, whether it comes about contrary to the requirement of good faith, or whether it produces a significant imbalance in the rights and obligations of the parties under the contract.

There is a further innovation in Articles 6:304 and 6:305 ACQP: the two lists, which are not exhaustive, are a point of reference for all the legal systems which have not transposed the annex of Directive No. 93/13. However, the inadequacy of the new reorganization of subject matter is demonstrated by the failure to identify a body which is competent to adjudicate the question of unfairness, integrating those lists of unfair terms, given that the ECJ has declared itself to be the least suitable organ to carry out this evaluation on the merits of the unfairness of the terms.[107]

3.9 Performance of Obligations

Chapter 7 ACQP,[108] concerning the performance of obligations, according to Italian commentary assembles scanty statements dealt with in the comments written by the compilers of the ACQP, where the use of the English language has not been particularly productive.[109]

Article 7:101 ACQP (the debtor's duty of performance) and Article 7:102 ACQP (the creditor's good faith in the exercise of rights) demonstrate, according to the Italian commentator, a conception of the duty to perform the obligation which reflects values (such as good faith), as a function of protecting the legal position of individuals. However, it would have been better to formulate a single rule for both debtor and creditor, as Article 1.201 PECL does.[110]

Furthermore, still in the view of the Italian commentator, to consider Article 7:102 ACQP as a general rule preventing the *abus de droit* which determines the limits of rights arising form different sources,[111] it would be without foundation

---

[107] Meli, *supra* n. 103, at 468, who recalls ECJ 1 Apr. 2004, C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*.

[108] Cf. *Acquis Principles 2007, supra* n. 19, authors of the Comments: Aubert de Vincelles, Machnikowski, Pisulinski, Rochfeld, Szpunar & Zoll, *supra* n. 36, at 255 et seq.

[109] A. Ciatti, 'La disciplina dell'adempimento dell'obbligazione', in ed. De Cristofaro, *supra* n. 10, at 487–507, at 489. Here the author criticizes the Terminology Group (within the Acquis Group), in which no jurists who were native speakers of English took part.

[110] However, see *Acquis Principle 2007*, *supra* n. 19, Comment No. 4 by Aubert de Vincelles, Machnikowski, Pisulinski, Rochfeld, Szpunar & Zoll, *supra* n. 36, at 263: 'One can argue whether this rule should be combined with Art. 7:101 ACPQ, to form one provision. This is a question of presentation rather than a political issue. Art. 7:101 ACQP governs duties of the debtor, Art. 7:102 ACQP of the creditor. The nature of the creditor's duties is not the same as the duties of the debtor. They only have a supportive function in order to efficiently reach the aims of the obligation. Therefore the separation of the duties and their distribution over two articles is justified.'

[111] See Comment No. 6 by Aubert de Vincelles, Machnikowski, Pisulinski, Rochfeld, Szpunar & Zoll, *supra* n. 36, at 264.

in the *acquis communautaire*. The notion of *abus de droit* has been invoked in the ACQP probably without full awareness of the implications which could derive from it.[112]

Article 7:103 ACQP codifies the duty of loyalty, whereas Article 7:104 ACQP codifies the duty to cooperate. Criticism centres not on these principles as such, but rather on the comments by the compliers of the ACQP,[113] which, stretching the interpretation, find in them a European Law of Contracts based on a 'cooperative legal ethic' and 'contractual altruism'. This reveals, in the commentator's view, the 'decidedly slanted' political stance of the Acquis group. In addition, he continues, *honeste agere* (the honest commercial practices) in business relationships have little to do with the so-called 'battle for the socialization of contract law' evoked by some European scholars.[114]

All this would give rise to an uncontrolled multiplicity of concepts. It would have been better to clarify the relationship between the duty to cooperate and good faith, but what is said about this is merely that the extent of the cooperation is limited by the objective criterion of 'reasonable expectations'. A debtor performs his/her obligations in order to meet the reasonable expectations of the creditor, where reasonableness depends on the nature and purpose of the contract, on the facts and circumstances of the case, on usages, customs and practices. As regards loyalty, the idea of 'altruism in specific kinds of contractual relationships' does not seem to find support in the *acquis communautaire*, where loyalty is nearer to consistent conduct, according to the ancient legal maxim, prohibiting *venire contra factum proprium* – no one may set himself in contradiction to his/her own previous conduct if another person has already relied on that previous conduct.

Finally, the ACQP compilers concede that the *acquis* have omissions regarding time and place of performance: the guidance given to the interpreter is that if the contract does not fix the time of performance, the debtor must perform 'without undue delay' (Article7:201 ACQP) or, according to a second formulation adopted in the DCFR, 'within a reasonable time after it arises' (Article III-2:102 DCFR). However, regarding the place of performance, the *acquis communautaire* do not provide a sufficient basis for formulating rules, and the gap is to be filled taking a 'grey rule' from the DCFR. Article III-2:101 DCFR says that in the case of monetary obligation, the place will be the creditor's place of business; in the case of any other obligation, the debtor's place of business.

---

112 Ciatti, *supra* n. 109, at 501.

113 Edited, as mentioned *supra*, by Aubert de Vincelles, Machnikowski, Pisulinski, Rochfeld, Szpunar & Zoll, *supra* n. 36, at 257 et seq.

114 The implicit reference is to M.W. Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law' (27 Feb. 2002), available at SSRN <http://ssrn.com/abstract=1098923>, and then to the Study Group on Social Justice in European Private Law: see the '*Manifesto*' in *European Law Journal*, 2004, at 653–674.

3.10 Non-performance

Chapter 8 ACQP[115] supplies general provisions on remedies and opens with a wide definition of non-performance, which includes any failure to perform an obligation, including delayed performance, defective performance and failure to cooperate in order to give full effect to the obligation (Article 8:101 ACQP). The ACQP therefore impose a strict contractual liability rule (in conformity with CISG, PECL and Unidroit, but differing from the BGB, which even after the reform of § 267 makes compensation dependent on establishing the debtor's liability on the basis of malicious or negligent behaviour of the wrongdoer).

Every failure to perform an obligation, including delay in performance, figures as non-performance under Article 8:101 ACQP, which provides for compensation for contractual damages. One deduces from this article, therefore, a strict liability principle governing non-performance, where the fault of the debtor is relevant only to the duty to compensate as Article 8:401 ACQP provides, on the right to damages:

> (1) The creditor is entitled to damages for loss caused by non-performance of an obligation, unless such non-performance is excused. (2) Non-performance is excused if it is due to circumstances beyond the control of the debtor and of any persons engaged by the debtor for performing this obligation, provided that the consequences of those circumstances could not have been avoided even if all due care had been exercised.[116]

Thus a consistent body of rules has been achieved, which include the so-called 'twin track' rules, connoting, for example, the Italian system, in which, on the one hand, the debtor has the chance to free himself/herself from the consequences of non-performance, by offering exculpatory evidence (*prova liberatoria* in Italian) (Articles 1218 and 1453 Italian CC) and, on the other, the impossibility to render the performance due to the discharge from liability, if it falls outside the debtor's sphere of risk (Article 1256 Italian CC).[117]

---

115 This Ch. 8 was not included in the first publication of the ACQP, *supra* n. 19, to which reference has been made up to now; it was available online at <www.acquis-group.org/>, without comments. The full version of ACQP is now available (as we already said) in the second volume, *supra* n. 19, *Principles of the Existing EC Contract Law (Acquis Principles). Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services*, edited by the Research Group on the Existing EC Private Law (Acquis Group) (Munich: Sellier, 2009). See in this second volume Comments to Ch. 8 by P. Machnikowski & M. Szpunar, at 408–426.

116 The section on 'Damages', in the second volume of the ACQP, *supra*, was written by U. Magnus: see his comments and explanations at 427–447.

117 R. Calvo, 'Le conseguenze dell'inadempimento: esatto adempimento, riduzione del prezzo e risoluzione del contratto', in ed. De Cristofaro, *supra* n. 10, 509–532, at 525.

Article 8:401(2) ACQP, however, represents an exception: non-performance is excused if it is due to circumstances beyond the control of the debtor and of any persons engaged by the debtor for performing this obligation, provided that the consequences of those circumstances could not have been avoided even if all due care had been exercised.

This raises the question whether only cases of physical impossibility are included or other impediments too;[118] in other words, to what extent the contract liability rule is actually one of *strict* liability. The ACQP, according to the Italian commentator, support strict liability, but it is not an absolute rule:[119] although performance is physically possible, it may in fact be practically impossible (because of exorbitant cost, for example) due to circumstances outside the debtor's control and in relation to the contractual commitments undertaken by the debtor.

Another Italian comment[120] concerns the extra-textual integration of the contract, which is triggered in the case of lack of cooperation. The spirit of solidarity, says the author, can be evidenced in Article 8:201(2) ACQP, a particularly original provision. It concerns a 'grey rule' copied from Article III-3:301 DCFR:

> Where the creditor has not yet performed the reciprocal obligation for which payment will be due and it is clear that the debtor in the monetary obligation will be unwilling to receive performance, the creditor may nonetheless proceed with performance and may recover payment unless: (a) the creditor could have made a reasonable substitute transaction without significant effort or expense; or (b) performance would be unreasonable in the circumstances.

The creditor cannot proceed with performance and recover payment when s/he could have made a reasonable substitute transaction, without significant effort or expense, or when performance would be unreasonable in the circumstances, in all the cases it is clear that the debtor in the monetary obligation will be unwilling to receive performance.

The substitute transaction must not incur significant costs at the expense of the creditor: it serves to create new business opportunities by reintroducing the goods or services into the distribution cycle, when the debtor is unwilling to receive them. But the point which needs clarifying remains: when is s/he not in a position to receive them? Does it depend on supervening events or those which predate the agreement, but unknown to the parties? We are a step away from the frustration

---

118 A. D'Adda, 'Principi Acquis e disciplina delle conseguenze dell'inadempimento: il risarcimento del danno contrattuale', in ed. De Cristofaro, *supra* n. 10, at 533–558.

119 D'Adda, *supra* n. 118, at 539.

120 Calvo, *supra* n. 117, at 509–532.

theory (well known in all European legal systems, *teoría de la Previsión/ presupposizione/ presuposición/Voraussetzung*), where an unforeseen event undermines a party's principal purpose for entering into a contract, and both parties knew of this principal purpose at the time the contract was made. The supervening event which nullifies the contractual basis of the agreement imposes not the discharge of the contract, but a substitute transaction. If the creditor does not put the goods back into the market, s/he loses the right to ask for payment of the sum due to him/her by the other party. An alternative rule could be to recognize a right of withdrawal for the creditor of a non-monetary obligation, save for a duty to indemnify the debtor for expenses already incurred where such losses cannot be covered by the substitute transaction.[121]

Article 8:202 ACQP is also a grey rule taken from Article III-3:302 DCFR. The creditor is entitled to enforce specific performance of an obligation other than one to pay money.

The choice of remedy is for the creditor, in line with the *acquis communautaire*, which is based upon Directive No. 1999/44 (Article 8:301 ACQP), but the novel feature is that the ACQP construct the *restituito in integrum* as an ordinary action available in contract law. Article 8:202(4) ACQP once more invokes lack of cooperation, in connection with the notion of 'avoidable loss' of the creditor: 'The creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense.'

Further causes for concern from Italian scholars' standpoint relate to Article 8:301 ACQP, in relation to remedies, because it provides grounds both for termination of the contract and for reduction (*actio quanti minoris*).

The first comment concerns the fact that the creditor may reduce his/her own performance appropriately without going to court, as in the German case (§ 441 BGB) or the CISG (Article 50), but differing from the Italian system, for example, where the intervention of the court is always required (Article 1492 Italian CC and Article 130(7) Italian Consumer Code).

The creditor, therefore, has these alternatives: to reduce his/her own performance appropriately, or to terminate the contract: (a) if the creditor has no right to performance or cure under section 2 ('performance and cure of non-performance'); or (b) if the debtor has not provided the remedy under section 2 above, within a reasonable time. Finally, the creditor is not entitled to terminate the contract if the debtor's failure to perform amounts to a minor non-performance.

---

[121] Calvo, *supra* n. 117, at 524.

A hierarchical criterion in the choice of remedy mentioned above is inserted here, non-performance and minor non-performance, but this represents an improvement over the *acquis communautaire*. Article 8:301(2) ACQP provides that notwithstanding paragraph (1) quoted above, the creditor is entitled to terminate the contract for non-performance if the creditor cannot be reasonably expected to be bound by the contract, in particular because of the kind of non-performance or because of the nature of the obligation.

It is possible, therefore, to terminate immediately, even if full performance is theoretically possible, when non-performance is such as to lead the creditor to lose the trust s/he has placed in the reliability or competence of the debtor.

Article 8:301(3) ACQP provides for partial termination as well: the creditor can terminate the contract under paragraph (1) quoted above, only with respect to that part which is affected by non-performance, unless partial performance is of no utility to the creditor.

The remedies therefore operate according to the simplified rules (in imitation of the German solution based in the BGB and in the Vienna Convention) under Article 8:302 ACQP, a grey rule taken from Article III-3:507(1) DCFR: 'A right to terminate under this section is exercised by notice to the debtor.' It means outside a judicial process and on the unilateral initiative of the creditor, within a reasonable time. The termination of the contract takes effect through the declaration of the party which has the right to do so, which brings the right to terminate close to the right of withdrawal.[122] However, the ACQP do not accept Article III-3:508(3) DCFR as a grey rule, so that if the notice of termination is not issued within a reasonable time after the right has arisen, the creditor loses his/her right to terminate. This provision of the DCFR introduces an exception in favour of the consumer/debtor, who does not lose his/her right to terminate.

From what has been set out so far, in the way the ACQP and the DCFR are organized, there is an entitlement to damages without fault; however, under Article 8:401 ACQP the creditor is entitled to damages for loss caused by non-performance of an obligation which actually occurred to the creditor as a *consequence* of the non-performance.[123] Without losses, in principle no damages are due. Actual loss must be proved – damages for pecuniary and non-pecuniary losses – in line with the Civil law tradition, while the Common law doctrines, which permit claims for nominal damages (actionable on proof of breach of contract) alongside consequential loss, seem, on the other hand, to have been rejected.[124]

---

122 Calvo, *supra* n. 117, at 530.

123 D'Adda, *supra* n. 118, at 539.

124 Despite the fact that the ECJ 7 Feb. 1990, Case C-343/87 *Culin v. Commission,* seems to have allowed the compensatory remedy without proof of loss (nominal damages), subject to certain reservations.

A corollary to limiting compensation to proof of actual loss is that punitive damages have no place in Article 8:402 ACQP. The clear choice in the ACQP is in favour of the function of compensation, despite the fact that in connection with the prohibition on discrimination under Article 3:202(2) ACQP, it is stated that the deterrent effect of remedies may be taken into account.

Loss is therefore the damage consequent upon non-performance. Under Article 8:402 ACQP, it is the payment of the amount necessary to put the creditor into the position in which it would have been if the obligation had been duly performed; a compensatory principle underlying the basic rule of reparation in tort law too (see Article VI-6:101 DCFR[125]), which also excludes punitive or exemplary damages.

Article 8:402 (4) ACQP provides that the notion of damages also covers non-pecuniary losses (as in the PECL, the Unidroit Principles and the famous ECJ *Leitner* case, C-168/00), but a filter is immediately applied: only to the extent that the obligation includes the protection or satisfaction of 'non-pecuniary interests'. The Italian commentator notes with appreciation the caution exercised by the ACQP, which reflect modern thinking on the actionability of non-pecuniary losses in contract law: risks linked to indiscriminate compensation claims, given that non-pecuniary loss always produces an economic enrichment of the claimant. It is the solidarity-based/satisfactory function of reparation for non-pecuniary loss which can appease the victim's own sense of justice. The interpreter, therefore, needs to ascertain the existence of non-pecuniary loss and the direct causal link with the non-performance, which will be awarded only if the non-performance includes the protection or satisfaction of non-pecuniary interests or 'non-material interests' of the creditor (e.g., relaxation, tranquillity, loss of amenity), which indeed look like *tortious* heads of damages for non-economic loss and not *contractual* ones.

Article 8:403 ACQP provides that damages are reduced or excluded to the extent that the creditor wilfully or negligently contributed to the effects of the non-performance or could have reduced the loss by taking reasonable steps. According to the Italian commentator, this is based on the principle of full restitution of the loss, and the debtor may also be liable for the consequences of the damage, even if they were not foreseeable at the time the contract was concluded.[126] This differs from the provisions under the DCFR (Articles III-3:704 and III-3:705) where there is a reduction of loss applying the criterion of the foreseeability of loss at the time the contractual obligations were undertaken.

---

[125] A comparison of Principles of European Tort Law (2005) written by the European Group on Tort Law and the DCFR (1st ed., 2008) was undertaken, for example, by D. Barbierato, 'Il risarcimento del danno. Prospettive di diritto europeo', *Responsabilità civile e previdenza*, fasc. 12 (2008), at 2644–2651.

[126] D'Adda, *supra* n. 118, at 554.

Under the ACQP, compensation is reduced or denied only if the creditor contributed to the effects of non-performance (*contributory negligence*) or did not take adequate steps, which s/he could reasonably have taken, to mitigate the loss (*mitigation*). The provision regulates both mitigation of damages, which imposes a duty on the creditor to take steps to reduce the amount of damages, with the exception of reimbursing the necessary costs sustained[127] – a concept unknown to Civil law, although analogous notions exist,[128] according to certain parts of legal scholarship, having been garnered from French case law, or from Italian case law under Article 1227 Italian CC – and contributory negligence by the creditor.

This provision has the positive effect of making the creditor assume some responsibility for his/her situation.

4. Concluding Remarks

To sum up, the Italian commentators welcome the promotion of the Europeanization of private law through the process of improving greater coherence of EC legislation in the areas of consumer and contract law, although they appear to conclude that the DCFR and the ACQP fall significantly short of achieving those goals. According to the majority of Italian commentators, indeed, the DCFR and the ACQP contents show gaps and shortcuts, certainly explicable by the EC's *pointilliste* approach to legislation, in contrast to other works such as CISG, the Lando Principles and the Unidroit Principles, which contain full sets of rules.

With regard to the DCFR, in particular, a number of Italian scholars agree that it is a 'construction site for civil law in Europe' and 'a huge opportunity for European culture and civil society'.[129] Having said that, the DCFR is not ready to become the European reference text for civil and contract law. A critical point is that the drafting of the DCFR was accompanied by the so-called 'revision of the consumer *acquis*' through the action of the Acquis group. Yet, from an ontological perspective, it is debateable whether the two operations had to be carried out on parallel tracks, notwithstanding a number of logical reasons underlying a comprehensive revision of consumer rights based on the principles on which the DCFR is structured.[130]

Another drawback in connection with this process of ordering and restyling European law in the field of consumer protection and the law of contracts, in the constitutional remit, is that it does not entail a democratic process in the classical sense: although the policy decisions taken by the working groups involved in this process gained support of the majority of the members present and voting in

---

127 This latter head of damages is not provided for in the ACQP, but it is under the Unidroit Principles, in the PECL and in the DCFR, Art. III-3:705(2): the creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

128 As a duty to mitigate the prejudicial consequences of non-performance.

129 Bisogni, at 614, and MEDEL, *supra* n. 11.

130 Cf. Castronovo, *supra* n. 12, at 288.

the meetings,[131] it is true that the DCFR did not involve the national parliaments during the ascendant phase (the formation of these rules) and it hardly involves the European Parliament at all. It is probable that the 'political CFR' will overcome fragmentation and inconsistency by means of a more democratic process.

Finally, for some undisclosed reasons the DCFR has not become such a suitable 'toolbox' as the Commission expected, given the fact that this informal instrument, with a target-oriented structure, was not even taken into account for developing the Proposal for a Consumer Rights Directive.[132] However, as the Acquis group outlined,[133] it is the proposal that has fallen short of achieving the goal of promoting the ongoing process of Europeanization of Private Law. It is, first of all, debatable that full harmonization promoted by the proposal[134] ought to be the appropriate instrument[135] in light of its doubtful compatibility with the subsidiarity and proportionality principles and the consequent reduction in the level of protection for European consumers that accompanies it. This proposal, moreover, fails to provide common framework definitions for EC consumer law, and it further fails to create greater coherence within the existing *acquis*. In this regard, the present interplay between EC law and domestic law would be adversely affected if the proposal finally became a directive.

---

131 On the Joint Network CoPECL which had to compile these legal rules and on its legitimation, see the summary by Gerhard Dannemann, in particular explaining the legitimacy of the Acquis group based on the 'freedom of research'. Cf. G. Dannemann, at xlvi, in *Principles of the Existing EC Contract Law (Acquis Principles). Contract II*, *supra* n. 19.

132 *Supra* n. 75. As recently highlighted by R. Zimmermann, 'The Present State of European Private Law', 57 *American Journal of Comparative Law* (2009): 479–512, at 487 et seq. Cf. the definitions of consumer, durable medium, producer; or the duties of information or the withdrawal period; the list of standard contract terms, etc.

133 See European Research Group on Existing EC Private Law (Acquis Group), 'Position Paper on the Proposal for a Directive on Consumer Rights' (2009) *Oxford University Comparative Law Forum* 3, at <ouclf.iuscomp.org>.

134 It should be stressed that the Commission's proposal for a directive on consumer rights does not contain any single reference to the DCFR. As it has been pointed out by the Committee on Legal Affairs of the European Parliament (cf. working document 15 Apr. 2009, at 3), this is strange 'given that the whole purpose of the CFR was meant to serve as a toolbox for the Commission when revising the *acquis communautaire* in the area of contract law'.

135 Cf. the Opinion of the Committee of the Regions on consumer rights (2009/C 200/14), C 200/76, Official Journal 25 Aug. 2009. At point 10, the Committee 'notes that full harmonisation on a broad scale represents a new departure in European consumer protection that does not appear to be strictly necessary. Full harmonisation should be considered selectively, i.e., in specific technical cases only, where the different national provisions in place up to now are genuinely and demonstrably placing a burden on cross-border businesses or represent a substantial obstacle to achieving the four freedoms of the European Union'.

EUROPEAN REVIEW OF PRIVATE LAW
REVUE EUROPÉENNE DE DROIT PRIVÉ
EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

Guidelines for authors

The European Review of Private Law aims to provide a forum which facilitates the development of European Private Law. It publishes work of interest to academics and practitioners across European boundaries. Comparative work in any field of private law is welcomed. The journal deals especially with comparative case law. Work focusing on one jurisdiction alone is accepted, provided it has a strong cross-border interest.
The Review requires the submission of manuscripts by e-mail attachment, preferably in Word. Please do not forget to add your complete mailing address, telephone number, fax number and/or e-mail address when you submit your manuscript.
Manuscripts should be written in standard English, French or German.

Directives pour les Auteurs

La Revue européenne de droit privé a pour objectif de faciliter, par la constitution d'un forum, la mise au point d'un Droit Privé Européen. Elle publie des articles susceptibles d'intéresser aussi bien l'universitaire que le praticien, sur un plan européen. Nous serons heureux d'ouvrir nos pages aux travaux comparatifs dans tout domaine du droit privé. La Revue est consacrée en particulier á l'étude comparée de la jurisprudence. Les travaux concentrés sur une seule juridiction sont admissibles, à condition de présenter un intérêt dépassant les frontières.
Nous souhaitons recevoir les textes par courrier électronique, de préférence en Word. Ajoutez l'adresse postale compléte et le numéro de téléphone de l'auteur, un numéro de télécopie et l'adresse électronique.
Les textes doivent être rédigés en langue anglaise, française ou allemande standard.

Leitfaden für Autoren

Die Europüische Zeitschrift für Privatrecht will ein Forum bieten, um die Entwicklung des europäischen Zivilrechts zu fördern. Sie veröffentlicht Arbeiten, die für Akademiker und Juristen in ganz Europa grenzüberschreitend von Interesse sind. Vergleichende Untersuchungen aus jedem Bereich des Zivilrechts sind willkommen. Die Zeitschrift befaßt sich insbesondere mit vergleichender Rechtsprechung. Artikel, die sich auf ein einziges Hoheitsgebiet konzentrieren, können angenommen werden, wenn sie von besonderem grenzüberschreitenden Interesse sind.
Wir möchten ihre Beiträge per E-Mail erhalten und bevorzugen Dateien in Word. Bitte geben Sie ihre Anschrift, Telefonnummer, Telefaxnummer und/oder E-Mailadresse an.
Manuskripte sind in korrektem Englisch, Französisch oder Deutsch zu verfassen.

Style guide

A style guide for contributors can be found in volume 11, issue No. 1 (2003), pages 103–108, and online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

Index

An annual index will be published in issue No. 6 of each volume.

List of Contributors

REGINA AEBI-MÜLLER
Prof. Dr Regina Aebi-Müller
Ordinaria für Privatrecht und Privatrechtsvergleichung
Hirschengraben 31 · Postfach 7460 · 6000 Luzern 7
Tel.: +41 41 228 61 19 ·
Fax: +41 41 228 77 04
regina.aebi@unilu.ch
www.unilu.ch

BRAM AKKERMANS
Dr Bram Akkermans LL.M.
Assistant Professor European and Comparative Property Law
Tel.: +31 43 388 3268
Fax: +31 43 388 4868
E B.Akkermans@MaastrichtUniversity.nl

Universiteit Maastricht,
Faculty of Law
Bouillonstraat 1-3, NL-6211 LH Maastricht
P.O. Box 616,
NL-6200 MD Maastricht
www.law.unimaas.nl

ALAIN ANCERY
A.G.F. (Alain) Ancery
Doctoral candidate
University of Groningen
Faculty of Law
Oude Kijk in 't Jatstraat 26
9712 EK Groningen
The Netherlands
A.G.F.Ancery@rug.nl
Tel.: +31 (0) 50 363 5742

EMANUELE ARIANO
Emanuele Ariano
(Ph.D. Candidate in Private and Comparative Law)
Università degli Studi di Torino
Facoltà di Giurisprudenza
Via Sant'Ottavio 54
10124 Torino, Italy
E-mail: emaonair@gmail.com

CHRISTIAN VON BAR
Dr jur., Dr jur. h.c. mult., FBA
Direktor des Instituts für Internationales Privatrecht und Rechtsvergleichung der Universität Osnabrück,
Bencher (Hons.) of Gray's Inn (London)
European Legal Studies Institute
Department I - European Private Law, Private International Law and Comparative Law
Heger-Tor-Wall 12
Universität Osnabrück
49074 Osnabrück
Germany
cvbar@uos.de
Tel.: ++49 - (0)541 - 969 4460/62
Fax:++49 - (0)541 - 969 4466

RICHARD BLAUWHOFF
Richard Blauwhoff
Everaert Advocaten
Rokin 69
1012 KL Amsterdam
richard.blauwhoff@gmail.com

SONJA HABERL
Dr Sonja Haberl
Assegnista di ricerca
Dipartimento di Scienze Giuridiche
Università degli Studi di Ferrara
Corso Ercole I d'Este, 37
44100 Ferrara ITALY
Haberl Sonja Elisabeth
[hbrsjl@unife.it]

EWOUD HONDIUS
Professor Ewoud Hondius
Molengraaff Institute of Private Law
Law faculty
Utrecht University
Nobelstraat 2a
3512 EN Utrecht
The Netherlands
Tel.: +31 (0) 31 253 7723
E e.h.hondius@uu.nl

ZOÉ JACQUEMIN
Zoé Jacquemin, LL.M. (Berlin)
Doctorante en droit privé européen
Chargée d'enseignements à
l'Université Paris Descartes
10, Avenue Pierre Larousse,
92240 Malakoff
zoe.jacquemin@u-paris2.fr

AIKATERINI KOUSOULA
RAin Dr Aikaterini Kousoula, M.L.E.
(Hannover), LL.M. (Harvard)
Polytechniou 24, 54625 Thessaloniki,
Greece
Tel.: 0030 2310/543338 or 543348
Fax: 0030 2310/547791
akousoula@post.harvard.edu

MARTIN LÖHNIG
Prof. Dr Martin Löhnig
Universität Regensburg
Juristische Fakultät
D-93040 Regensburg
www.martin-loehnig.de
Martin Loehnig [Martin.Loehnig@
jura.uni-regensburg.de]

GARY LOW
Gary Low, LLB (Lond) BCL (Oxon)
Resident Fellow
Tilburg Institute of Comparative and
Transnational Law (TICOM)
Tel.: + 31 13 466 8957/8033
gary.low@uvt.nl

BRIGITTA LURGER
Univ.-Prof. Mag. Dr Brigitta Lurger,
LL.M. (Harvard)
Institut für Zivilrecht, Ausländisches
und Internationales Privatrecht
Rechtswissenschaftliche Fakultät,
Universität Graz
Universitätsstraße 15/D4, A-8010
GRAZ, AUSTRIA
Fax: 0043/(0)316-380-9425
Tel.: 0043/(0)316-380-3313
(or -3320)
e-mail: brigitta.lurger@uni-graz.at

MARCO DE MORPURGO
LL.M. Candidate
Harvard Law School
Pound 103
563 MassaChusetts Avenue
02138 Cambridge, MA
email: mdemorpurgo@llm10.law.
harvard.edu

BARBARA PASA
Barbara Pasa
Lecturer in Comparative Law
Università degli Studi di Torino
Facoltà di Giurisprudenja
Via sant' Ottavio 20
10124 Torino
Tel.: +39 011 6706111
barbara.pasa@unito.it

MATTHIAS E. STORME
Matthias Storme
Zuidbroek 49
B-9030 Gent
e.mail: matthias@storme.be

GERD VERSCHELDEN
Prof. de Gord Verschelder
Director of the Institute of Family
Law. Department of Civil Law. Ghent
University
Universiteitstraat 4
3-9000 Gent
Belgium
Gerd.Verschelden@UGent.be
Tel.: +32(0)92646860
Fax: +32(0)92646990

MARK WISSINK
Prof. Dr. M.H. (Mark) Wissink LL.M.
University of Groningen
Faculty of Law
Oude Kijk in 't Jatstraat 26
9712 EK Groningen
The Netherlands
+31 (0) 50 363 5732
M.H.Wissink@rug.nl