Non-discrimination in European Contract Law

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Abstract: - The European codification of the contract law is an ambitious project, yet very consuming. Still, important steps were taken into this direction, steps starting with the launch of the European contract principles and continuing with the publishing of the Draft Common Frame Reference. Apart from the criticism brought to this elaborate project, we would like to emphasize its innovations in fields that were previously neglected by the traditional contract law. Therefore, inserting a chapter dedicated to non-discrimination in contractual relationships, the DCFR moves to a new era of the private law.

Key-Words: - non-discrimination, European, contract, private, law, harmonization

1 Introduction

The year 1994 represented a turning point for the international private law, since it marked the construction of common legal foundation of the contract law. At that moment, the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) published the *Principles of International Commercial Contracts*, and the Commission on European Contract Law finally completed the Part I of the *Principles of European Contract Law* [1].

The UNIDROIT Principles have proved to be extremely successful if we take into consideration the fact that two years after publication more than 2500 copies have been sold worldwide and the great majority of orders of the Principles have come from circles such as international law firms, corporate lawyers, chambers of commerce, arbitration courts and the like, which are the kind of potential users to whom the Principles are mainly addressed. What is more significant is the fact there are already reports of the first court decisions and arbitral awards referring to the UNIDROIT Principles in one way or the other [2]. The project initiated by the Commission on European Contract Law was not as successful as the UNIDROIT, still it emphasised the necessity of a unified contract law in European Union.

The reasons given for harmonising contract law in Europe have been almost exclusively economic. The argument is based on transaction costs: variety in legal rules across borders may cause inconvenience to businesses, who may often have to employ local legal experts to struggle with different and sometimes incompatible law regulations. Such situations can lead to increased expenditure and/or unwillingness to enter the market in a different country. The circumstance in which an agreement concluded in one country may not be valid or may have different effects in another may create frustration for an economical agent. The key to this problem definitely lay down in harmonisation of contractual terms and conditions. Harmonisation may weaken many linguistic barriers and may offer a common ground for all the contract parties. The power of this argument is easy to grasp for a person who has attempted even the simplest of contractual transactions in a foreign Member State.

2 The Crystallization of the European Contract Law

The preparation of a common frame of reference represents the initial steps towards a unified European law of contracts that could in the long run generate a European codification of contract law. The Principles of European Contract Law along with the UNIDROIT Principles of International Commercial Contracts constitute a noteworthy contribution to a unified contract law. However, the Principles of European Contract Law also have great potential significance in respect of further development within the national legal systems in EU Member-States, since they can be regarded as a new *ius commune* in the private law field.

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But before any codification to be done in this area, the project must be tested. Therefore, the consumer contracts have been the primary object of attention, with directives requiring rules controlling the fairness of most of their standard terms, rules governing aspects of contracts made in certain circumstances (as with "distance contracts" or "doorstep-selling") and of certain types (sale of goods, consumer credit, timeshare, package holidays) [3]. Outside the consumer context, directives have required rules governing commercial agency contracts and particular aspects of commercial contracts in general (late payments of commercial debt); the public procurement directives have had a major impact on the process of public contracting; and a series of employment directives have created or reshaped rights of employees in a number of ways.

At first, the EC directives affecting contract law were assessed by most national lawyers in a gradual way, but then it was the merit of the academics who assumed the challenges of a common European contract law.

It was Ole Lando who, in 1976 on the occasion of a symposium on “New Perspectives for a Common Law of Europe” held at the European University Institute, first launched the idea of embarking on the drafting of a European Uniform Commercial Code or, if this proved to be too ambitious, at least a European Restatement of Contract Law [4].

After informal discussions in Brussels, which resulted in a commitment by the EEC Commission to provide some financial support for the project, the Commission on European Contract Law was set up and began its actual work in 1982.

The principles were elaborated in three parts. The first two volumes dedicate themselves above all to the formation of contracts, validity, performance and remedies for non-performance, i.e. themes that are well developed in comparative law literature. Part I of these principles was released in 1995. Part II was completed in 1996 and published in 2000. Part III focuses upon general contract law questions that have only seldom been addressed from a comparative law perspective (prescription, set-off, plurality of debtors, illegality, unconscionability, conditions and capitalisation interest) but whose treatment is nonetheless essential in a work on the foundations of a common European law of contract. The Principles of European Contract Law, Part III, was debated and adopted at the last meeting of the Lando-Commission in Copenhagen in February 2001.

Against this background, the Commission’s Communication of 2001 identified various options for public consideration, from (I) no action, (II) promoting the development of common contract law principles leading to greater convergence of national laws, (III) improving the quality of existing Community legislation (the *acquis*) to (IV) adopting new comprehensive legislation at Community level. On February 2003, the Commission released another Communication that finally set out the ultimate option, namely to develop a “common frame of reference”. This was to “ensure greater coherence of existing and future *acquis* in the area of contract, by establishing common principles and terminology” and “providing for best solutions in terms of common terminology and rules i.e. the definition of fundamental concepts such as ‘contract’ or ‘damage’ and of the rules which apply, for example, in the case of non-performance of contracts” [5]. The Commission, taking account of the scepticism expressed, suggested three areas of work: the construction of a “common frame of reference”; the drafting of model contractual clauses and conditions; the adoption of an optional instrument in the field of European contract law. Then, on 11 October 2004, in a third communication paper entitled “European contract law and review of the framework. The way forward”, the Commission stated that it “did not envisage proposing a European civil code to harmonise the law on contracts of the Member States” and that the “way forward” was that of the common frame of reference, to which an optional instrument might be added [6].

The Commission then appointed a group of researchers known as the Common Network on European Contract Law to draw up a draft common frame of reference on contract law. The Commission’s first and second progress reports on European contract law and the revision of the framework (23 September 2005 and 25 July 2007) stressed the priority accorded to consumer law in order to contribute to the revision of the framework on consumer protection. The Commission stated that the results of work on the common frame of reference were intended to be included in the revision of the EU framework on consumer protection that is the subject of the Green Paper published on 7 February 2007. In the context of the revision of the consumer framework, the common frame of reference would thus constitute “a manual that the Commission and European legislators could use during the revision of existing legislation and the drafting of new instruments in the field of contract law” [7].

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The interim DCFR presented to the Commission in December 2007 contains, in seven books and two annexes, principles, definitions and model rules of private law. The final DCFR presented in December 2008 has added three books and a statement of the principles underlying the model rules, as well as changes to the articles in the model rules [8].

This thesis concludes that the Union has been conferred sufficient competence under *Articles 95 and/or 308 EC (now Articles 114 and/or 352 TFEU)* to adopt a comprehensive European contract law instrument in order to achieve its objectives to ensure the establishment and functioning of the internal market. In line with the case law so far, there are compelling arguments that Article 114 TFEU can serve as the proper legal basis for such an instrument approximating the contract laws of the Member States, and that Article 353 TFEU can serve as the proper legal basis for an optional instrument of contract law to the extent that it creates an optional set of contract law rules running alongside the national contract law regimes [9].

3 Non-discrimination in DCFR

A major innovation brought by DCFR compared to the civil codes of all the Member States is in Book II Chapter 2 dedicated to non-discrimination in contracts. The codification of this subject in DCFR underlines that discrimination is a concern for private law as well as for the public law.

Up to this moment, the secondary law framework of the EU for non-discrimination issues was composed of four EC Directives: EC Directive 2000/43 of 29 June 2000, O.J. 2000 L 180/22 (Race and origin); EC Directive 2000/78 of 27 November 2000, O.J. 2000 L 303/16 (General framework for employment and occupation); EC Directive 2002/73 (Gender equality in employment and occupation) and EC Directive 2004/113 of 13 December 2004, O.J. 2005 L 373/37 (Gender equality in access to goods and services). These Directives cover discrimination on the grounds of racial and ethnic origin, gender, age, religion, belief, sexual orientation and disability. However, only discrimination on grounds of racial and ethnic origin and gender are banned in general private law; discrimination for other reasons is only prohibited in the employment context. Furthermore, the non-discrimination provisions on general private law only apply to the provision of "goods and services, which are available to the public.

It is not clear why the right not to be discriminated against it is limited to the ground of sex, ethnic and racial origin. One should not discriminate between different grounds of discrimination. It is true that this is still an extension compared to the EC Directive 2000/43 of unequal treatment, which was limited to discrimination on the grounds of race and ethnic origin. However, Article 21 of the Charter of Fundamental Rights of the European Union declares that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. There is no reason why the same protection, with the same remedies, should not also be given in cases of these types of discrimination in contractual relationships.

According to its introductory part, the protection of fundamental rights including the fight against discrimination is a goal of specific importance to the DCFR. It states that protection of human rights "is an overriding principle which is also reflected quite strongly… in the rules on non-discrimination in Books II and III".

Moreover, in Principle 1 the DCFR states that "freedom, in particular freedom of contract, may be limited for the sake of an aspect of justice – for instance, to prevent some forms of discrimination or to prevent the abuse of a dominant position". However, "the four principles of freedom, security, justice and efficiency underlie the whole of the DCFR" [8]. This implies that those principles always have to be taken into account. Therefore, freedom of contract should not be subject to unlimited or too far-reaching restrictions for the sake of justice. In every possible situation, including the drafting or the interpretation of the non-discrimination provisions, freedom and justice need to be balanced.

Most importantly, however, three sets of provisions in the DCFR are designed to give effect to the principle of non-discrimination in contract law. Those rules are, first and foremost, the regulations on non-discrimination "on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods or services which are available to the public" in Book II Chapter 2 DCFR. Other relevant provisions are contained in Art. II – 4:201 (3) DCFR, which stipulates that advertisement, catalogues and displayed goods are to be regarded as offers, and Art. III – 1:105 DCFR on non-discrimination in relation to an obligation.

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In order to implement EU secondary legislation of non-discrimination in private law, the DCFR dedicates an entire chapter of Book II ("Contract and other juridical acts") to the problem of discrimination. The basic rule is laid down in Art. II. – 2:101 DCFR. It provides that "a person has a right not to be discriminated against on the grounds of sex or ethnic or racial origin in relation to a contract or other juridical act the object of which is to provide access to, or supply, goods or services which are available to the public." Still, this provision only applies to discrimination based on sex and ethnic or racial origin. Discrimination on the grounds of religion is not included, although it was originally expressly referred to in the introductory part of the interim outline edition of the DCFR [10].

However, this reference was removed in the final outline edition. This, of course, does not mean that discrimination on the grounds of religious belief is generally accepted in the final version of the DCFR. Other provisions, both in tort and contract law, may still limit the "right" to discriminate on that ground. This is particularly true, since the DCFR is to be interpreted in light of fundamental rights, including the right to equality in general and on the ground of religious belief in particular.

The last important non-discrimination rule in relation to contract law in the DCFR can be found in Art. III – 1:105 DCFR. It states that: "Chapter 2 (Non-discrimination) of Book II applies with appropriate adaptations to: (a) the performance of any obligation to provide access to, or supply, goods, services or other benefits which are available to members of the public; (b) the exercise of a right to performance of any such obligation or the pursuing or defending of any remedy for non-performance of any such obligation; and (c) the exercise of a right to terminate any such obligation." The meaning of this rule is not very clear. Art. II. – 2:101 DCFR applies generally "to a contract or other juridical act." This implies that it should also apply to the performance of contractual obligations and other rights exercised in connection with a contract, including the right to terminate a contract. If that is true, Art. III. – 1:105 DCFR would only apply to non-contractual obligations. That, however, would be quite surprising since it is hardly imaginable that a non-contractual obligation "to provide access to, or supply, goods, services or other benefits which are available to members of the public" exists in private law. One might therefore conclude that Art. II. – 2:101 of the DCFR should be read as only relating to the conclusion of a contract.

The effect of Art. III. – 1:105 of the DCFR does not depend on the question of the restriction of freedom of contract since it, in any event, presupposes existence of an obligation.

The remedies provided for by Book III, Chapter 3 of the DCFR can be divided into two categories. While the first category of remedies only applies to cases where a contract has already concluded, the second category comprises remedies that also apply to pre-contractual discrimination. This second category, which is more interesting for our purposes, includes in particular the "right to enforce performance." Art. III. – 3:302 (1) of the DCFR provides for the right "to enforce specific performance of an obligation other than one to pay money."

One might be tempted to argue that this provision is not applicable vis-à-vis discrimination cases, for where there is no contract there cannot be enforcement.

However, Art. III. – 3:302 (1) of the DCFR does not refer to a contract but only to an obligation. Arguably, the obligation of a perpetrator of discrimination is to not discriminate potential contractors, *i.e.* to not refuse to contract because of the aforementioned criteria. If this is correct, enforcing this obligation would indeed entail the right to force the perpetrator to provide a certain publicly offered service or to sell a certain publicly offered good to the victim of discrimination. Regardless of whether one considers that this obligation involves a tacit contract, a noncontractual obligation or some other legal construction, the result is, in practice, that a private actor is obliged to provide performances that are normally of a contractual nature to the victim.

It should be noticed, in this regard, that the right to request specific performance under the DCFR is limited in practice since "[t]he 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." For economic reasons, damages might therefore be the dominant remedy under the DCFR, depending on the interpretation of the courts as to when a "reasonable" substitute transaction can be made without "significant" effort or expenses. If, however, damages in addition to specific performance are typically limited in market situations where a reasonable substitute transaction is possible, it is economically unreasonable for the

debtor not to make a substitute transaction. In this case, he will most likely sue for damages only, rather than for specific performance. Therefore, despite the theoretical starting point of the DCFR, which focuses on specific performance, as it is common in civil law countries, the DCFR provisions might *in concreto* result in a prevalence of damages as the main remedy. If this holds true, remedies of specific performance are only suitable under exceptional circumstances, as it is the case in common law countries, which accept the remedy of specific performance in equity only.80 However, if someone wishes to insist on specific performance, *e.g.* for reasons of justice in discrimination cases, this possibility is always available.

The right to enforce specific performance is only excluded under very narrow conditions, *i.e.* where the performance would be "unlawful or impossible", "unreasonably burdensome or expensive" or "of such a personal character that it would be unreasonable to enforce it," although it might be in many situations inefficient from an economic point of view. The performance may be impossible if it refers to a specific event that only took place once. The other criteria will, however, only be fulfilled in exceptional cases. In particular, the third condition will normally not be applicable, as the non-discrimination provisions apply, as stipulated above, only to contracts which are offered to the public as a whole. It seems, therefore, that the DCFR provides for a right to performance as if a contract had been concluded as a remedy against discrimination.

4 Conclusion

How far the DCFR will be used as the basis for a European Union instrument, and what form such an instrument might take, is still undecided. The development of a harmonised code of European contract law (to which we remain opposed) appears to be off any foreseeable agenda. We doubt the value and feasibility of developing as an alternative an optional instrument which would be available to contracting parties at their option, but would, to be effective, appear to require underpinning by European legal instrument, enabling it where necessary to override domestic law. We do not think that the Community or Commission has a useful role to play in promoting or developing, as a further alternative, sets of contractual terms for use by contracting parties.

We consider that the development of a form of "toolbox" to assist European legislators would be useful both to aid mutual understanding of the diverse legal systems of the EU and to improve the quality of European legislation to which the law of contract is relevant. But we question whether the DCFR, either as a whole or even in its first three Books (in which the main focus is on the law of contract), is in a form which can be used directly for that purpose, and we express concern about the process and value of seeking to reformulate it as a draft code of contract law for that purpose. We suggest that one way forward may be for the Commission to identify particular key areas that give difficulty under existing Community law or are likely to require legislative intervention, and to focus on these, rather than to attempt to restate in the abstract at a European level the whole of the law of contract. We recognise the value of the DCFR as an academic work which may provide useful material for national as well as European legislators, and the value of the discussion and comparative law material which is to accompany it as an aid to mutual understanding of the diverse legal systems represented in the European Union. As well, we recognise the normative challenged that DCFR assumed when its artisans chose to codify the principle of non-discrimination in relationship with private law and especially with contract law.

Finally, DCFR provides a much more substantial basis upon which qualitative and quantitative research and debates can be conducted than any other previous project and we can assert that it represents great progress in the process of harmonization of European private law.

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