

Principles of the Existing EC Contract Law  
(Acquis Principles)

**Contract I**

Pre-contractual Obligations,  
Conclusion of Contract, Unfair Terms



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(Acquis Principles)

# Contract I

Pre-contractual Obligations,  
Conclusion of Contract, Unfair Terms

prepared by

**Research Group on the Existing EC Private Law**  
(Acquis Group)



Sellier. European Law Publishers

ISBN 978-3-86653-023-2

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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Gestaltung: Sandra Sellier, München. Herstellung: Karina Hack, München.

Satz: fidus Publikations-Service GmbH. Druck und Bindung: Friedrich Pustet KG, Regensburg.

Gedruckt auf säurefreiem, alterungsbeständigem Papier. Printed in Germany.

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**The Principles of the Existing EC Contract Law:  
A preliminary output of the Acquis Group**

**I. What these Principles are and what they are not**

This volume presents preliminary results of the Research Group on the Existing EC Private Law. This research group, commonly known as the Acquis Group, aims at formulating the existing EC law in the field of private law in the form of a restatement, which is titled 'Principles of the Existing EC Private Law' or 'Acquis Principles' (ACQP). The methodology used is explained in the introductory articles of this book.<sup>1</sup> At this stage it shall just be pointed out in brief, what the approach and preliminary results presented here are – and what they are not.

It is an academic exercise, carried out by a group of scholars with full academic freedom. Its theoretical basis could be called a 'restatement approach'. This method, originally developed for the purposes of comparative law, has been applied to the somewhat disparate EC legislation and case law. Thus, these Principles have similar aims to the classical restatements of the American Law Institute<sup>2</sup> and the very successful effort to transfer this method to the variety of European national laws.<sup>3</sup> It is an attempt to present and structure the bulky, manifold and rather incoherent patchwork of EC private law in such way that should allow the current state of its development to be made clear, and for relevant legislation and case law to be easily found. Possible functions of such a restatement are listed in Art. 1:101 ACQP, namely the use as a source for the drafting, transposition and interpretation of EC law.

The draft presented here is both preliminary and incomplete. Its main purpose is to stimulate and feed the broad discussion of the ongoing work before its completion. For the moment, the scope and basis are rather narrow. As can be seen from the title, the present draft is only the first part of a more comprehensive programme. This volume only comprises those parts of the Acquis Principles which concern the pre-contractual phase, the conclusion of a contract and its content. In later stages the work will also include remedies and some principles on specific contracts or specific situations. Almost certainly, the

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<sup>1</sup> *Gerhard Dannemann*, Consolidating EC Contract Law: an Introduction to the Work of the Acquis Group, p. XXIII et seq. in this volume; *Gerhard Dannemann/Silvia Ferreri/Michele Graziadei*, Consolidating EC Contract Law Terminology: the Contribution of the Terminology Group, p. XXXIII et seq. in this volume.

<sup>2</sup> See <<http://www.ali.org>>.

<sup>3</sup> Most notably *Ole Lando/Hugh Beale* [eds.] *The Principles of European Contract Law*, Parts I and II, 1999; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann* [eds.], *Principles of European Contract Law*, Part III, The Hague (2003).

continuation of work will require the principles and rules presented here to be amended in the light of comments received from readers and observations made in later stages.

Also the sources from which this draft is derived may be broadened, as it is currently based on not much more than some provisions of primary law and three dozen directives plus the corresponding case law. This material should already illustrate that EC contract law is much more than some pointillistic rules in specific areas, for example consumer law. It remains to be seen, to what extent the exploration of further sources of EC law, for instance in the fields of public procurement and competition, or actual developments like the enactment of the Servius Directive (2006/123) will lead to further differentiation and amendment of the principles and rules presented here.

It may also be important to say what this draft is not. For itself, it is not a draft of the planned Common Frame of Reference on European Contract Law as envisaged by the European Commission<sup>4</sup> and the network of academics<sup>5</sup> who are currently elaborating a first draft of this. The Acquis Principles have their own purpose outlined above, as a restatement of the existing EC law. Within the academic and political process of elaborating the Common Frame of Reference, the Acquis Group and its output have the function to ensure that the existing EC law is appropriately reflected. Therefore this draft is a basis for further discussion in academia and in the political process, be it in the context of the current revision of the consumer law Acquis<sup>6</sup>, or the more comprehensive project of a Common Frame of Reference on European Contract Law. Within the works for the preparation of the draft of a Common Frame of Reference to be delivered to the European Commission by academics, the principles and rules presented here are one of the sources the committee of the participating researchers is harvesting from. Other sources are the Principles of European Contract Law<sup>7</sup>, the drafts of the Study Group on a European Civil Code<sup>8</sup>, and many other drafts or individual comments received by researchers<sup>9</sup> and stakeholders.<sup>10</sup>

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<sup>4</sup> Commission's Action Plan (COM [2003] 68 final) and the Commission's Communication on 'European Contract Law and the Revision of the Acquis: The Way Forward' (COM (2004) 651 final) of 11 October 2004.

<sup>5</sup> Network of Excellence "Joint Network on European Private Law" (CoPECL), organised under the 6<sup>th</sup> EU Framework Programme, for more information see <[www.copecl.org](http://www.copecl.org)>.

<sup>6</sup> As described in the Green Paper on the Review of the Consumer Acquis, COM (2006) 744 final, <[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/green-paper\\_cons\\_acquis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf)>.

<sup>7</sup> Cf. footnote 3.

<sup>8</sup> As to the organisation and the approach of the Study Group see, e.g. *Christian von Bar/Ole Lando*, Communication on European Contract Law: Joint Response of the Commission of European Contract Law and the Study Group on a European Civil Code, published in *Schulte-Nölke/Schulze* [eds.], *European Contract Law in Community Law*, Cologne (2002), p. 291, 297 et seq. (published also in *European Review of Private Law* [ERPL] 2002, 183 et seq.); more information available at the homepage of the Study Group <<http://www.sgecc.net>>.

<sup>9</sup> In particular by colleagues participating in the 'Network of Excellence'.

<sup>10</sup> In particular by the stakeholders invited by the European Commission to the so called CFR-Net, cf. the First Annual Progress Report on European Contract Law and the Acquis Review, COM (2005) 456 final, p. 3 et seq.

We all wish that this draft will not be so much an end point, but the starting point for further discussion on structure, style and contents of a Common Frame of Reference which meets the needs of legislators and lawyers throughout Europe.

## II. Political and Theoretical Underpinnings

Readers who are familiar with the project will notice that the present version of the Acquis Principles does not contain proposals for the planned recitals. Such recitals would outline some fundamental principles on which the rules and definitions of the draft Common Frame of Reference are based.<sup>11</sup> The Acquis Group has begun to draft such fundamental principles which attempt to reflect some of the theoretical underpinnings of EC private law. However, we decided not to finalise the work on fundamental principles before we have dealt with more areas of private law than covered by this volume. The reason is that general principles, setting out some basic policy decisions behind the individual rules, might well give some orientation during the process of elaborating the rules. Furthermore, we thought that such recitals should finally be formulated in the light of all the work done at the very end of the project.

It might, nevertheless, be useful to let readers know about the efforts made to also reflect on the political, economic and theoretical aspects of this exercise. Within the 'Network of Excellence' responsible for the organisation of the preparations of the draft Common Frame of Reference, there are several groups and initiatives entrusted with specific tasks. The final result will be embedded in and influenced by a corona of evaluative works focussing on the philosophical underpinnings, constitutional aspects, economic impact, case law assessments and much more.

Although the Acquis Group and, to a greater extent, the other participating researchers are far from having dealt fully with the issue of fundamental principles, it may be useful to give a first impression of what such principles may look like. According to the overall state of the work, the current Acquis Group draft of fundamental principles only covers contract law issues. Provisionally, the wording of five possible fundamental principles on contract law which could be stated at the very beginning of the Acquis Principles (and – if the other participating researchers agree – possibly also the draft Common Frame of Reference) have been laid down. They read as follows:

### (1) General Functions of Contract

Contract is the basic legal instrument enabling natural and legal persons the freedom to regulate their relations with each other by agreement.

### (2) Binding Force of Contract

A contract will be enforced or recognised by law if it is based on the parties' agreement, as this has been expressed by one to the other, and there is no basis for it to be treated as invalid or set aside.

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<sup>11</sup> *Christian von Bar/Hans Schulte-Nölke, Gemeinsamer Referenzrahmen für europäisches Schuld- und Sachenrecht, Zeitschrift für Rechtspolitik (ZRP) 2005, 165.*

### (3) General Functions of European Contract Law

The principles of European contract law are to be interpreted and applied in a manner consistent with the aims and principles on which the European Union is based, including the aim of establishing an area of freedom, security and justice, and the principle of an open internal market with free and fair competition and free movement of goods, persons, services and capital between Member States, and the protection of consumers.

### (4) Freedom of Contract and its Restriction

Freedom of contract is a fundamental right of European citizens and enterprises. As a rule, natural and legal persons are free to both draw up and agree on terms of their contract. Restrictions on this freedom, whether by way of mandatory rules, avoidance of unfair contract terms or in any other form, may be justified in relation to certain situations or types of contract, particularly where there is, or may be, inequality of bargaining power, knowledge or understanding (examples being contracts involving consumers, SMEs and investors).

### (5) Information

European contract law may contain rules in relation to the making of a contract of a particular type or in a particular situation, requiring one party (typically a business) to provide the other (typically a consumer) with specified information about its nature, terms and effect, where such information is needed for a well-informed decision and is not otherwise readily available to that other party. Such information may be required to be supplied in a particular form and language.

This draft of fundamental principles is accompanied by comprehensive commentaries which explain why such principles can be seen as underlying policy decisions of EC law and which alternatives could be considered. The current wording is the preliminary result of an intense discussion between academics and stakeholders, who met at a workshop organised by the European Commission at Brussels<sup>12</sup>, and since then have exchanged views on several other occasions. The common idea was that it might be helpful to understand and make use of the individual definitions and rules of the Common Frame of Reference (and its preparatory works like the Acquis Principles) if some underlying basic policy statements are spelled out at the very beginning.

Whereas the core content of the five possible fundamental principles outlined above does not seem to be very controversial, other possible fundamental principles under consideration have been seriously questioned, namely a general principle of good faith and a general prohibition of discrimination. It remains to be seen whether the progress of the work will also allow fundamental principles on these issues to be formulated.

In this context, it may be useful to underline one of the basic principles that governs the work of the Acquis Group. Making a restatement means by definition not only to improve the presentation of the law, but also to reflect it as it stands and not to invent

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<sup>12</sup> Workshop held on 6 June 2005. We would like to thank *Lord Jonathan Mance* from the House of Lords for his comprehensive comments after the workshop which were very helpful for the review of this draft.

artificial rules which would be ideal in the view of its makers. Of course, elaborating a restatement of EC law is not just copying the directives. There were many decisions to be made on how to rephrase, occasionally to summarise, and how to present the material. One could call at least some of these decisions “political” in the sense that substantial choices were to be made. We tried to point out many of them clearly in the comments, but one could certainly argue that there are more. Nevertheless, the Acquis Principles do not at all intend to anticipate political decisions to be made by politicians involved in any law-making process. Although the Acquis Principles should be less patchy and much more coherent than the sources they are harvested from, the result nevertheless just reflects many of the imperfections of the *acquis communautaire*. Nevertheless, this might inherently be progress, as now many shortcomings have outcropped at the surface of the Acquis Principles and can therefore be tackled more easily. However, not every part of these Acquis Principles is suitable to be changed into legislation as it stands. But, as already said, the Acquis Principles are anyway not intended to be seen as a final result, but as a new and hopefully inspiring basis for the continuation of the discussion about how to improve the existing EC law and to transpose it into the national laws.

### III. Acknowledgements

It is difficult to spell out precisely all the individual contributions to such a work, as it is the result of a very close co-operation of more than 40 scholars and has been influenced by innumerable discussions with further colleagues and many other stakeholders. However, some tables at the beginning of the book at least try to identify the members of the responsible working teams and bodies of the Acquis Group. We would just like to express our gratitude to all our colleagues from so many jurisdictions who have committed themselves to participate and who will certainly continue to take part in a really European research project. We are also grateful for the encouragement and the support the Acquis Group has received from many institutions, among them the European Commission, which organised stakeholder workshops and other conferences; the other research groups organised in the ‘Network on Excellence’ for the preparation of the draft Common Frame of Reference, in particular, from the Study Group on a European Civil Code; the stakeholders, who contributed very actively to the discussions, and last but not least, the universities and other institutions who hosted our meetings. We also willingly fulfil the obligation to indicate that a great share of the necessary funding was provided under the 6<sup>th</sup> EU Framework Programme within the ‘Joint Network on European Private Law’ (CoPECL), in particular with the immense help from the Universities of Bielefeld and Turin which administer the funds available to the Acquis Group.

June 2007

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## Introduction

### Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group

The European Research Group on Existing EC Private Law was founded in 2002, as a successor to smaller networks founded in the 1990ies,<sup>1</sup> with the primary aim of formulating principles of existing European Community contract law. The short name, Acquis Group, confirms that these principles are formulated on the basis of the *acquis communautaire*, in particular Treaties, Regulations, and Directives, as applied and interpreted by the courts. The Acquis Group presently comprises nearly fifty scholars from most EU Member States.

The present volume compiles the work of the Acquis Group until January 2007. It covers central areas of EC contract law, including key rules on pre-contractual duties, non-discrimination, formation, not individually negotiated terms, withdrawal, and performance. While this falls considerably short of covering the entire EC contract law Acquis, our proposed rules should nevertheless give a good impression of what the final version could look like. We also hope that this first instalment of Acquis Principles will incite a debate from which our final version will benefit.

### Acquis Group and the Joint Network on European Private Law

In May 2005, the Acquis Group became a founding member of the Joint Network on European Private Law, abbreviated as “CoPECL”. In general, the CoPECL network contributes to setting up a European Research Area for Private Law. The present volume relates to one particular task, namely the elaboration of a draft for a so-called “Common Frame of Reference for European Contract Law”. At the core, this will consist of a structured compilation of legal rules. Most of those rules will be drafted by either the Acquis Group or the Study Group for a European Civil Code. The other members of this network include the so-called Insurance Group, the Association Henri Capitant, the Common Core Group, the Economic Impact Group, the Database Group and the European Law Academy. This network allows the Acquis Group to place its work within a common European context, and as the network has secured funding under the 6<sup>th</sup> Framework Programme of the EC, this has considerably contributed to the funding of the Acquis Group’s work.

Within the Common Frame of Reference, it falls on the Acquis Group to formulate those rules which are based on existing EC contract law. So the present volume serves a dual

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<sup>1</sup> See *Schulte-Nölke/Schulze* [eds.], *Europäische Rechtsangleichung und nationale Privatrechte*, Baden-Baden (1999) and *Europäisches Vertragsrecht im Gemeinschaftsrecht*, Köln (2001).

purpose. On the one hand, it formulates and explains rules based on EC contract law as it presently exists and is applied within Member States. On the other hand, the same rules contain our draft contribution to a Common Frame of Reference for European Contract Law, where its provisions should dovetail with those formulated by other members of the network. This is not an easy task. The Study Group, which primarily contributes to the network rules on those numerous areas of contract law which are little affected by EC law to date, uses (and has to use) a very different methodology. Rather than formulating existing rules based on EC law sources, as the Acquis Group, the Study Group formulates what it sees as particularly desirable rules, mainly on the basis of a comparative review of national laws in Europe. More work will be required for a seamless integration of all the different components of the Common Frame of Reference. The fact that a number of scholars are members of both groups will help with this task.

### Toolbox, binding instrument, or Civil Code?

The reader will naturally want to know what the Common Frame of Reference, including Acquis Principles, is meant to be good for. The answer depends largely on the viewpoint of the observer.

1. The European Commission has announced that it will use the Common Frame of Reference (including Acquis Principles) as “toolbox, where appropriate, when presenting proposals to improve the quality and coherence of the existing Acquis and future legal instruments in the area of contract law”.<sup>2</sup>
2. The European Parliament, on the other hand, wants to ensure that “the final long-term outcome could be a binding instrument; all the various possible options for the purpose and legal form of a future instrument should be kept open”.<sup>3</sup>
3. A third, and somewhat controversial, view sees the Common Frame of Reference as a basis which could be used for drafting a future European Civil Code.

Of course it will matter in more than one way whether the rules which we formulate will end up in a dustbin or in a European Civil Code or, perhaps most likely, somewhere in between. That ultimate fate, which we can hardly anticipate, has fortunately rather limited impact on the formulation of the Acquis Principles. If we manage to consolidate what is already there in terms of EC contract law into one largely coherent and consistent set of rules, it can indeed be used as “toolbox” for a revision of EC directives, or for the formulation of new directives, or as a basis for drafting a European Civil Code. The latter is not an ambition of the Acquis Group. Our position is reflected in the first provision within Chapter 1 of the Acquis Principles:

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<sup>2</sup> COM/2004/0651.

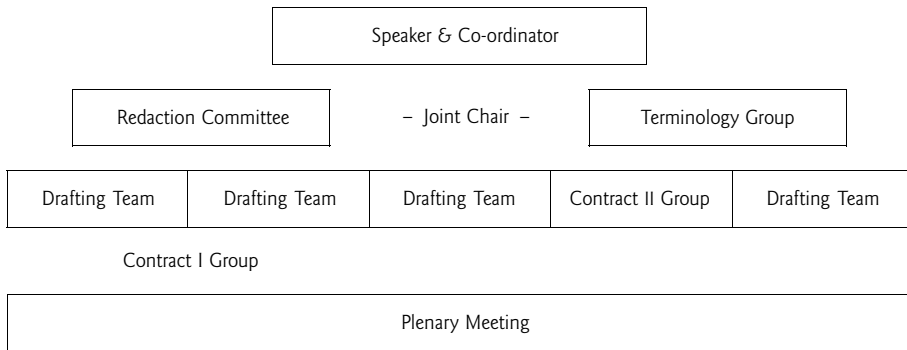
<sup>3</sup> Resolution 7 September 2006, P6\_TA(2006)0352.

### Article 1:101 Scope and purpose of these Principles

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

### Group structure and drafting process

Although the Acquis Group has produced numerous rules, none of those serve to explain how it functions. So the following offers no more than simplified observations of how the Group has actually worked.



The Speaker of the Acquis Group, Gianmaria Ajani from the University of Torino, represents the Group to the outside world, except for day to day dealings with the Commission and within CoPECL. That task falls on the Group's Co-ordinator, Hans Schulte-Nölke from the University of Bielefeld. Both together take much responsibility for the practical organisation of our work. They are also the main founders of the Acquis Group.

The Plenary Meeting is a meeting of all members of the Group, presently convened twice a year. Its most important task is to discuss and adopt all Acquis Principles, and it has the final say in this matter. While this democratic nature can make the decision-making process cumbersome and time-consuming, it also offers considerable advantages. It ensures that we benefit from the combined expertise of our members, and provides transparency within the Group.

The first full meeting of Acquis Group members took place at the European Law Academy at Trier in January 2003, followed by meetings held at the University of Torino (July 2004), the University of Helsinki (March 2005), again at the European Law Academy at Trier (November 2005), at the University of Hull (March 2006), the Autonomous University of Barcelona (November 2006) and at the University of Paris (March 2007). The last four meetings were devoted to the discussion and adoption of rules.

Drafting occurs in stages which involve individual Drafting Teams, the Redaction Committee, the Terminology Group, and the Plenary Meeting.

Drafting Teams are set up for particular topics or areas, such as rules on pre-contractual information duties, unfair contract terms, or withdrawal from a contract. They will produce a first draft of rules with comments for their topic or area.

At the Torino Plenary Meeting in July 2004, a number of Drafting Teams working on various formation issues were set up and pooled into the so-called “Contract I Group”, headed by Reiner Schulze from the University of Münster. Similarly Drafting Teams dealing with performance and remedies issues combined to the “Contract II Group”, headed by Ulrich Magnus from the University of Hamburg. This group structure was initially used for joint meetings of Drafting Teams. The individual Drafting Teams within the Contract II Group eventually merged into one, whereas the Contract I Group has provided a fairly loose structure for its own Drafting Teams. The majority of the more recently formed teams do not belong to either Group.

Drafting Teams will undertake a survey of existing EC law in their area and formulate their proposals for Acquis Principles on that basis. They are assisted by a short written Drafting Guide, and, more recently, the glossary which is appended to the present book.

Once a Drafting Team has completed a first draft, this is passed on to the Redaction Committee. The main task of this Committee is to formulate proposals for making the various drafts by different teams dovetail with each other. The Redaction Committee also generally prepares drafts for discussion and decision by the Plenary Meeting, in particular by ensuring that different options are available for discussion where policy issues are involved. If possible, a member of the Drafting Team concerned will be present during the meeting of the Redaction Committee. This Drafting Team will then amend the draft in light of the views expressed by the Redaction Committee.

The Redaction Committee was formed following the Helsinki Plenary Meeting in March 2005, where the present author was appointed Chair of that Committee. The Committee also includes the Speaker, the Co-ordinator, the Chair of the Contract I Group, and initially other members from Belgium, Finland, France, Poland and the UK. A certain amount of fluctuation amongst members has since shifted the balance between different legal traditions represented in the Committee. Moreover, my initial attempts to achieve a certain gender balance were unsuccessful, as all female colleagues I invited to join were wise enough to turn me down. Any resulting shortcomings in the representativity of the Redaction Committee have fortunately done little to affect the quality of its work. It has increasingly also been used as a general decision making body between Plenary Meetings. The Redaction Committee has to date held seven meetings, three at the Humboldt University at Berlin (September and December 2005, January 2007), and one each at the University Foundation at Brussels (February 2006), the University of Bielefeld (June 2006), the University of Oxford (October 2006) and the University of Torino (February 2007).

The draft is then passed on to the Terminology Group. This group will edit the draft with a view towards harmonising the use of terminology and of improving the language and consistency of drafts. Time permitting, it will pass on its recommendations to the Drafting Team concerned for further consideration and comment before the draft is finalised for discussion and decision by the Plenary Meeting. A substantial number of drafts went through several cycles of deliberation by the Redaction Committee and/or Terminology Group and the Drafting Team.

The Terminology Group was formed at the Torino Plenary Meeting in July 2004, with initially two members, Silvia Ferreri from the University Torino, and the present author as Chair. Michele Graziadei from the University of Piemonte Orientale joined soon afterwards. The Terminology Group meets on frequent demand, mostly in cyberspace, and occasionally at Plenary Meetings.<sup>4</sup>

Keeping the tasks of the Terminology Group and the Redaction Committee separate has been an efficient way of allocating the human resources of the Acquis Group, which in turn has helped both groups to perform their tasks with focus and consistency. The fact that both are chaired by the same person has facilitated the necessary co-ordination between the two bodies.

As mentioned above, all draft principles and rules are debated at, and adopted by Plenary Meetings of the Acquis Group. For some of the provisions in the present book, we have indicated that they still await adoption by a Plenary Meeting. Those rules were provisionally adopted by the Redaction Committee and included in this book in order to give a more complete picture of the scope of Acquis Principles.

Several drafts which were adopted by Plenary Meetings (in particular those on pre-contractual information duties, unfair terms and withdrawal) have subsequently been presented and discussed at so-called Stakeholder Meetings. These are attended by various interest groups and experts. Their comments have been considered within a second cycle of drafting and consolidation of Acquis Principles. Stakeholder Meetings were initially required for the entire work produced in the above-mentioned Common Frame of Reference. These meetings have produced a number of helpful comments. They were nevertheless discontinued for some time. Recent announcements by Commission officials indicate that Stakeholder Meetings might be resumed. As these lines are written, their future is still uncertain.

We have formulated comments which explain our principles and rules. Time does not permit a discussion and adoption of those comments by Plenary Meetings. The cumbersome task of ensuring that comments follow the same outline, the same citation rules and a similar style required much more time. Christoph Busch from the University of Bielefeld and Filip Wejman from the University of Krakow have been instrumental in assisting Hans Schulte-Nölke, myself and the entire Redaction Committee with this task. Thanks are also due to Irene Maier from the Humboldt University at Berlin for having expertly

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<sup>4</sup> See below p. XXXIII for a short introduction to the work of the Terminology Group.

minuted the discussions of the Redaction Committee and of most Plenary Meetings, and to Elisabeth Lege from the University of Bielefeld for her valuable help in organising our meetings.

## Methodology

The previous section explains the drafting process for Acquis Principles in chronological sequence. A more difficult question in the drafting process relates to methodology. How can one formulate EC contract law rules from a compilation of directives, regulations and case law which is not best known for clarity and consistency? And how can one formulate such rules if most of EC law in the area of contracts is primarily concerned with consumer protection?

In dealing with this difficult task, the Acquis Group has to be wary of two potential pitfalls.

The first pitfall would be to insist that EC contract law is confined to some two dozen directives (plus the Brussels I and II Regulations and the Rome Convention), and that there is nothing in them or in their application by the courts which transcends those statutes and is capable of being formulated at a more general level. This would leave as the only feasible product of the Acquis Group a list of existing EU legislation, to which we could add a digest of cases which apply this legislation.

The second pitfall would be to construct a comprehensive EC contract law by generalising consumer protection rules to general rules of contract law. This would clearly overstretch what is there.

The Acquis Group has sought to strike the right balance between those two extremes. It has relied on general methods of interpretation of EC law for formulating rules which transcend the existing piecemeal legislation approach but which at the same time can realistically claim to be based on the Acquis. Particular emphasis has been placed on purposive interpretation and the doctrine of *effet utile*.

Purposive interpretation has been helpful for exploring both the possibility and the limits of generalisation of rules. Generally speaking, EU provisions on a particular aspect of contract law can invite two competing arguments: (a) this is an expression of a more general rule, or (b) this is an exception to a more general rule. Deciding which of these arguments should prevail in a given case, or whether the provision in question is not capable of any such generalisation, involves policy decisions. Blank refusal to engage in any such decisions is largely identical with the first pitfall. Instead, the Acquis Group decided to be open about the policy choices which it has thus taken. In a number of situations, the Acquis has also shown to provide insufficient basis for necessary policy decisions by way of purposive interpretation, so that a political decision through the appropriate organs is required in order to solve a particular problem within the Acquis. Where this is the case, this is expressly mentioned in the comments (under heading A.3).

The doctrine of *effet utile* can further help to decide which gaps remain open, and which can and must be filled. Gaps can and need to be filled to the extent that this is required in order to give an *effet utile* to black letter norms. For example, numerous EC norms require certain information to be given, or a certain form to be observed. These would be deprived of their effect if a violation of these provisions had no consequences whatsoever, or consequences which are so limited that they provide no meaningful incentive. The ECJ said so much more than twenty years ago about the effect of EC anti-discrimination rules on contract law.<sup>5</sup>

The methodology of the Acquis Group can be summarised as follows:

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

## Gaps and “grey rules”

The Acquis Principles offer fairly consolidated rules not only in core areas covered by EC legislation, in particular consumer protection law, but also in general contract law areas such as pre-contractual duties, discrimination, unfair terms, and withdrawal. They present rules with considerable gaps in the areas of formation, form, non-performance and remedies. There are some areas where we can find individual rules surrounded by large gaps, e. g. in the area of validity. And there are some other areas of law for which we felt unable to formulate any Acquis Principles.

The Acquis Group makes no attempt to fill such genuine gaps in the *acquis communautaire* with rules of its own choice. Within the Common Frame of Reference, this is largely the task of the Study Group. It has been mentioned above that due to the different methodology, Acquis Principles will not necessarily dovetail with Study Group rules.

Nevertheless, the present set of Acquis Principles contains some bridges which are referred to as “grey rules”, because they are indicated in grey print. These grey rules are

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<sup>5</sup> ECJ, 10 April 1984, Case 14/83 – *von Colson und Kamann*.

other Draft Common Frame of Reference Rules (as of April 2007), formulated by the Study Group (usually on the basis of the “Principles of European Contract Law”<sup>6</sup>), which we have reproduced in order to show the reader the context in which particular Acquis Principles can operate. For instance, the Acquis contains a number of rules on how a contract is formed, but too little on what amounts to an offer for formulating an Acquis Principle. We therefore decided to adopt the appropriate Draft Common Frame of Reference Rule as such a grey letter rule. In this way, the reader is presented with a more comprehensive set of rules, but also made aware of which of those rules are not based on the *acquis communautaire*.

In order to save time and keep our own tasks separate from those of the Study Group, we decided not to reformulate any grey letter rules. This has one slight disadvantage, namely that the terminology used for those grey rules may differ from that adopted for Acquis Principles.

### Generalisation and domestic pre-understanding

Most lawyers have been trained in one particular legal system, and thus tend to see EC law from the perspective of that system. So we approach EC contract law rules through what Hans-Georg Gadamer has called *Vorverständnis* or pre-understanding. We see everything through spectacles tinted in a particular shade, and are normally not even aware of wearing those spectacles. It was inevitable that proposed rules, and often other contributions to our debate, would be affected by a particular pre-understanding of those who drafted or contributed in another way. Collectively, such contributions do much to enrich the debate, but they can also make drafting more difficult.

Readers may be familiar with a piece by the Hungarian scholar Gyula Eörsi, entitled ‘Unifying the Law. A Play in One Act, With a Song’.<sup>7</sup> The delegate from a country with centuries of case law tradition proposes a rule according to which “The dog shall bark”. A delegate from a country proud of its civil code makes a counter-proposal of “The cat shall mewl”. A conciliatory and generalising proposal is then put forward, according to which “An animal shall make a noise”. This is warmly welcomed by functional comparativists (who always look at the output, in this case the sound), but considered incorrect when looking at fish, who make no noise, and also dangerously broad. A compromise whereby “An animal shall make a non-human noise” is rejected because parrots will do just that. After many more helpful comments, the Drafting Party comes up with a provision of which it will presently suffice to reproduce the first two paragraphs:

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<sup>6</sup> Lando/Beale [eds.], *Principles of European Contract Law*, prepared by the Commission of European Contract Law, The Hague (2000).

<sup>7</sup> 25 (1977) *American Journal of Comparative Law*, 658-662.

## Article 1

1. A noise [sound] shall be made [emitted] by any kind of a non-human [ahuman] being capable of [and fit for] making noise [emitting a sound], including dogs and cats [cats and dogs].

2. A noise [sound] under paragraph 1 may be made [emitted] expressly or impliedly. It shall be of such a nature as can in the given circumstances reasonably be expected to be made [emitted] by the non-human [ahuman] beings of a different kind from the one which has actually made the noise [emitted the sound] as well as noises made [sounds emitted] by human beings, provided that such noises [sounds] sound non-human [ahuman] included, and subject to usages widely known to and regularly observed by [any particular branch of] [the branch involved of] the non-human [ahuman] community capable of [and fit for] making noises [emitting sounds]. Such imitation shall, subject to fraud, be deemed proper, if a reasonable non-human [ahuman] being could under the circumstances reasonably be deceived by the said imitation.

In Eörsi's example, attempts to rise above domestic pre-understanding result in a highly complex, yet rubbery rule which is largely void of content.

Our readers will have to judge for themselves whether we have been able to escape that fate. It will come as no surprise that our first drafts did indeed contain some fine examples of "The cat shall mewl". A draft rule whereby consumer credit contracts must be authenticated by notaries or similar public authorities could have brought banking business in the UK and in Scandinavia to a grinding halt, because no such public authorities exist in those countries. A mandatory rule whereby all contracts of unspecified duration can be terminated for the future at the free choice of either party was similarly on the questionable side.

Rules like those were ultimately not adopted for reasons which show how the Acquis Group has been coping with the issue of pre-understanding. First, we have a built-in personalised comparison by having everything discussed by a large group of scholars from different legal traditions. Issues of pre-understanding are often picked up within Drafting Teams, and otherwise get noticed as a draft moves through Redaction Committee, Terminology Group and Plenary Meeting. Thus, a few years of exchange and debate within the Acquis Group have done much to reduce pre-understanding, and to turn all our active members into comparative lawyers.

Second, closer inspection will usually reveal that there is no basis in the *acquis communautaire* for any particular domestic perspective. One feature which distinguishes the Acquis Group from other international groups aimed at the harmonisation of law is that our primary sources have been drafted with a view towards solving particular problems in a way which can be implemented in very different legal systems. The *acquis communautaire* does generally not attempt to take side in those issues which continue to divide contract laws in Europe.

Nevertheless, when it comes to arranging contract rules systematically, one sometimes has to take sides on issues where the Acquis is silent. One of those issues was whether there is such a thing as a “general part” of Acquis contract law (as frequently contained in Civil Codes, the German *Allgemeiner Teil* being the most radical example), or whether all rules can be made to fit into particular categories of contract law (comparable to the position of English law). The form rules proved particularly difficult to accommodate in this way. We tried pushing those into formation, splitting them over different areas (pre-contractual information, formation, withdrawal), and relocating most of them to definitions, until we finally decided to use a rather small “general part” which defines the scope of our rules, contains key rules on consumers and businesses, and on notice and form.

### Call for comments

As the actual process of drafting began in 2004, it has taken the Acquis Group some two and a half years to come up with the rules and comments compiled in the present volume. This may look like a long time to some readers, but it certainly feels like a short period to all those involved, particularly when considering that all of us have numerous teaching, other research, and administrative duties. It can also be very time consuming for such a large group representing so many different legal traditions to agree on a common view of EC contract law. It is therefore not just the usual caveat, but a serious product safety warning if we add that there are likely to be imperfections and inconsistencies. We are grateful to anyone who points those out to us, or who contributes other comments on our work. As mentioned above, this first instalment is meant to incite a debate. You are invited to contact us using our website at <[www.acquis-group.org](http://www.acquis-group.org)>.

## Consolidating EC Contract Law Terminology: The Contribution of the Terminology Group

### The working team

Looking back at the life of European institutions during the last fifty years is an instructive exercise. In the course of time, these institutions have faced difficult communication problems which have been caused by the lack of a common European language. The ingenious policies and techniques which have been developed to overcome these problems are a telling testimony to the richness of the experience which has matured under the European flag. By and large, the complex linguistic dimension of the European experience is now a constituent factor of its identity.<sup>1</sup>

It is against this background that one should appreciate the choice of the Acquis Group, which has used English as its sole language for drafting, to entrust the delicate task of checking all the draft principles and rules which have been formulated by the Group to three members who are not native speakers of English. In the discussions which led to the Terminology Group being established it appeared that, next to fluency in English, the most important qualification required for this job was an appreciation of the variety of the linguistic experiences and problems involved in the development of European contract law at every level.<sup>2</sup> All members of the trio which was eventually recruited to form the Terminology Group are comparative lawyers, who have regularly published in English over the years. As it happened, two members of this group are Italian, and the third is German. The Plenary Meeting of the Acquis Group decided that this small unit was to revise all draft Acquis Principles for terminological consistency and linguistic quality before they would be submitted to the Plenary Meetings for discussion and adoption. The Terminology Group was also entrusted with a final terminological and linguistic revision of all Acquis Principles, and with compiling a glossary of the legal terms used in the Acquis Principles, which can be found on p. 309.

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<sup>1</sup> B. de Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?', in R. Craufurd Smith [ed.], *Culture and European Union Law*, Oxford (2004), 205.

<sup>2</sup> On the development of the language of the law in this new dimension: R. Sacco/L. Castellani [eds.], *Les multiples langues du droit européen uniforme*, Torino (2006); G. Ajani, 'Alcune considerazioni su comparazione giuridica, traduzione e "coerenza" del diritto private europeo', in E. Ioriatti Ferrari [ed.], *La traduzione del diritto comunitario ed europeo: Riflessioni metodologiche*, Trento (2007), p. 113; B. Pozzo/V. Jacometti, [eds.], *Multilingualism and the Harmonisation of European Law*, Alphen aan den Rijn (2006); P. Rossi, 'The Language of the Law between the European Union and the member States', in G. Ajani/M. Ebers [eds.], *Uniform Terminology for European Contract Law*, Baden-Baden (2005), 23 ff.

## The tasks of the Terminology Group

The aim of the Acquis Group is to provide a more coherent approach to the development of European private law, based on the principles and rules of existing EC law. The very notion of ‘coherence’ employed in this context requires clarification.<sup>3</sup> From a general point of view, the idea of coherence of the law can be linked to fundamental assumptions about what law is for, and what lawyers should achieve when they take part in the law-making process. In a broad sense, every approach that prizes equality before the law values the idea of deciding similar cases in accordance with the same rule. Naturally, the question whether fidelity to this principle is actually possible (or practised) in the light of the plurality of principles and values that the law accommodates is of the greatest importance for legal theory. Nonetheless, this first, general idea of coherence is a starting point for legal development throughout Europe today. Beyond this common ground, however, any discussion about coherence and the law unveils particular attitudes that different legal traditions exhibit with respect to that elusive yardstick. At this level, the notion of coherence involves essentially two aspects of law that are only loosely related to the idea of equality before the law. The first concerns the feasibility of developing general categories and concepts that should carry a consistent meaning throughout different areas and layers of the law. Thus, when moving from the top level domain of general legal categories and concepts to levels of lower generality, one may still rely on the concepts and categories that are provided by the upper level of generality. This type of coherence is often considered – and especially in Germany – as manifestation of a desirable systematic and ‘organic’ dimension of the law.<sup>4</sup> The other aspect of coherence that is relevant in this context is linked to the notion of precision, which in turn requires a univocal relationship between word and concept. The highest degree of terminological precision is therefore obtained when the same word is always used to denote the same concept, and the same concept is always associated with the same word. Lack of coherence is in this case the result of the inability to establish that univocal relationship between word and concept which is required for precise expressions. To give a concrete example of this problem, legal English traditionally had difficulty in obtaining this result, hence such couplets as “null and void”.<sup>5</sup>

<sup>3</sup> Cf. *D. Kennedy*, ‘Thoughts on Coherence, Social Values and National Traditions in Private Law’, in *M. Hesselink* [ed.], *The Politics of a European Civil Code*, The Hague (2006), 9 ff., who notes the contrast with the U. S. experience, where the notion of coherence does not occupy a central place in the everyday discourse of private law. The reasons why legal terminology raises issues of coherence unknown in other fields of EC action is explored by *A. Gambaro*, ‘The Plan d’Action of the European Commission – A Comment’, *European Review of Private Law* 2003, 768.

<sup>4</sup> The role that the notion of ‘legal system’ plays in this respect is highlighted by *V. Lasserre-Kiesow*, *La technique législative. Etudes sur les codes civils français et allemand*, Paris (2002), 93 ff. The importance of a systematic approach to the law is clearly not the same across Europe. National lawyers often have very different attitudes towards this issue. On the ways to overcome these attitudes, see *N. Kasirer*, *The Common Core of European Private Law in Boxes and Bundles*, *European Review of Private Law* 10 (2002), 437.

<sup>5</sup> As for other European languages, the creation of the language of the law in England has been a complex process: *J. H. Baker*, *The Three Languages of the Law*, *Mc Gill Law Journal* 5 (1998),

One can suspect that attitudes towards ‘coherence’ in the law across Europe are not necessarily the same in countries where there is a civil code and in countries where legislation does not occupy central ground. Thus, for example, under a codified legal system, the technique of setting out definitions of legal terms associated with specific legislative instruments is usually considered to be unnecessary, since the civil code provides a general reference tool that should be used unless otherwise provided.<sup>6</sup> However, even within the field of codified legal systems – assuming for a moment that this rough label makes sense – the attitudes towards ‘coherence’ in law-making are far from being uniform. It is well known, for example, that the German Civil Code is a monument to precision in the use of legal terminology, while other civil codes have other qualities, but fall short of that exacting standard.<sup>7</sup>

Working on the *acquis communautaire* within the framework of the Acquis Group, the Terminology Group has been committed to contributing towards the development of a more coherent contract law. But the tasks entrusted to the Terminology Group involved only the restricted sense of ‘coherence’ that covers linguistic aspects of norms. The task of the Terminology Group was to help to prepare drafts that achieved a higher level of terminological coherence, and, possibly, a more satisfactory relationship between general and specific concepts than the ones emerging from the fragmented landscape of the existing Acquis. However, the Terminology Group was *not* to suggest substantive changes to the drafts. Whenever the Terminology Group has found substantive issues hidden behind vague terminology, it referred them to the Drafting Team, to the Redaction Committee, or eventually to the Plenary Meetings of the Acquis Group (see p. XXIII for an introduction to the working method of the Acquis Group). Rather than revising content, the Terminology Group had to ensure that drafts met those linguistic and terminological standards that apply to the drafting of European legislation. These standards are now contained in the Interinstitutional Agreement of 22 December 1998 on

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43. According to B. J. Beveridge, *Legal English, How it Developed and Why it is not Appropriate for International Commercial Contracts*, available at <<http://www.tradulex.org/Hieronymus/Beveridge.pdf>> the transition from law French to English may explain the origins of couplets such as those mentioned in the text above. P. Tiersma, *Legal Language*, Chicago (1999), 13 ff., notes that Anglo-Saxon also exhibited a propensity for alliteration that has left a trace in the language of the law (“*residue and remainder*,” “*to have and to hold*”, “*any and all*”, “*each and every*”). J. Bentham, *Traité de législation civile et pénale*, I, (trans. by Etienne Dumont 1802), p. 368, must have had in mind these aspects of legal English when he gave the following advice to the legislator: «Mêmes idées, mêmes paroles. Ne vous servez jamais que d'un seul mot et même mot, pour exprimer une seule et même idée.»

<sup>6</sup> G. Cornu, ‘Les définitions dans la loi’, in *Mélanges dédiées à Jean Vincent* (1981), p. 77, 79 ff., marks a related difference between the English and French approach to legislative definitions. English legislative texts usually opt for nominal definitions that fix the meaning of the words employed by the legislature. On the other side of the Channel, legislative definitions aim instead to determine the essential features of the object that is defined. These definitions tend to be real definitions. The spread of techniques of legislative drafting inspired by the English model is changing this picture, however.

<sup>7</sup> V. Lasserre-Kiesow, *La technique législative. Etudes sur les codes civils français et allemand*, Paris (2002), 151 ff., 188 ff., 200 ff.

common guidelines for the quality of drafting of Community legislation,<sup>8</sup> a text that in our experience is familiar only to those who take an active interest in how European legislation is drafted. The first part of this document could just as well have been written to set out the tasks assigned to the Terminology Group, and provides the guidelines that were essential for its work. It reads as follows:

1. Community legislative acts shall be drafted clearly, simply and precisely.
2. The drafting of Community acts shall be appropriate to the type of act concerned and, in particular, to whether or not it is binding (Regulation, Directive, Decision, Recommendation or other act).
3. The drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.
4. Provisions of acts shall be concise and their content should be as homogeneous as possible. Overly long articles and sentences, unnecessarily convoluted wording and excessive use of abbreviations should be avoided.
5. Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care.
6. The terminology used in a given act shall be consistent both internally and with acts already in force, especially in the same field.

Identical concepts shall be expressed in the same terms, as far as possible without departing from their meaning in ordinary, legal or technical language.

The very fact that such an Interinstitutional Agreement was considered to be necessary reflects the reality of a lack of terminological coherence in European law. To no small degree, this has to do with the fact that, as far as European private law is concerned, European legislation to date bears little similarity to codifications of civil law, but resembles, amongst its Member States, more closely the common law tradition of having islands of legislation in a sea of other legal rules – this sea being case law in the common law traditions of England and Ireland, and national law of the Member States in the case of European law.

How necessary and successful has the Interinstitutional Agreement been in the area of EC private law? It would be grossly unfair to say that the legal instruments which had been enacted by EC institutions before this Agreement entered into force had systematically fallen short of its guidelines. There are, however, parts of the *Acquis* that fail to meet those standards. Needless to say, these were the first targets for revision by the *Acquis* Group and, more particularly, by its Terminology Group. Revolution was not on

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<sup>8</sup> Official Journal, C 073, 17/03/1999, 1-4. See also the Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of Legislation in the Community Institutions (2003), available at <<http://europa.eu/eur-lex/en/about/techleg/guide/pdf/en.pdf>>. Cf. M. Aziz, 'Mainstreaming the Duty of Clarity and Transparency as Part of Good Administrative Practice in the EU', *European Law Journal* 10 (2004), 282.

the agenda. We did not consider abandoning linguistic expressions upon which settled interpretations of the law have developed. A clean, fresh terminological start with the Acquis would have unsettled the law and would not have helped to obtain the degree of confidence in the meaning of our Principles which the Acquis Group intends to achieve.

## Some examples for problems and their treatment

There are many reasons for the poor quality of some of the Community enactments which provide the primary sources for the Acquis Group. It has been noticed that the sheer amount of work handled by translation services working under heavy time pressure explains why linguistic mischief can occur in the law-making process. But occasional deviations from the standard were not our greatest concern.<sup>9</sup> Instead, major challenges to our work were posed by two factors that cannot be explained by chance alone. The first relates to the introduction of new vocabulary and the second to the fact that directives need to be transposed into the laws of Member States.

Community legislation often introduces new vocabulary, for instance by using more recently “on paper” rather than “in writing”, presumably in order to show that electronically stored texts are excluded (see comment to Art. 1:307 ACQP). Such a change can lead to instability of usage even in a single language environment, as the new term is restricted to new legislation, whereas the older legislation continues to use the old term. So it is left to others to figure out whether “in writing” under older legislation means the same as “on paper” in more recent provisions.<sup>10</sup> As a matter of fact, consistency in the use of new vocabulary is seldom achieved instantly, but requires firm commitment over time. Moreover, the difficulty of maintaining consistency is aggravated by the multilingual character of Community legislation, and by the need to transpose directives into national laws.

Community legislation in the field of contract law offers some glaring examples of this problem, which sometimes arises even between English language versions. For instance, the Doorstep Selling D. defines the consumer as a natural person who is acting for purposes: “which can be regarded as outside his trade or profession”. For the purposes of the Price Indications D., the consumer is any natural person “who buys a product for

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<sup>9</sup> Even the Action Plan on a More Coherent Contract Law (COM (2003) 68 final) presents problems in this respect. V Heutger, *Law and Language in the European Union*, Global Jurist Topic: 3 (2003), Article 3, 1-17, notes: “the Action Plan of the Commission speaks of an optional instrument, the German translation is not following this one term approach, but offers three different expressions. The optional instrument is translated into a *optionelles Instrument*, a *freiwilliges Instrument* and a *optionelles Rechtsinstrument*. Something similar happened to the translated term of general contract term. The German translation offered *Allgemeine Geschäftsbedingungen* as well as *Standardvertragsklauseln*.”

<sup>10</sup> The Terminology Group decided to use the older “in writing” rather than the more recent “on paper” in Art. 1:306, because written information can be stored on a variety of print media made from e. g. plastic or metal, or even be proverbially ‘carved in stone’.

purposes that do not fall within the sphere of his commercial or professional activity". The Unfair Contract Terms D. refers to purposes which are outside the consumer's "trade, business or profession". As concerns the counterpart of the consumer, present legislation resembles a terminological maze. There is not even a single name which would refer to this person, who features as "trader", "seller", "supplier" etc. depending on the directive in question. The definitions that substantiate this shadowy figure vary as well. The Distance Selling D., for instance, defines the "supplier" as "any natural or legal person who is acting in his commercial or professional capacity". On the other hand, the Unfair Contract Terms D. refers to a "seller or supplier" as a natural or legal person who "is acting for purposes relating to his trade, business or profession, whether publicly or privately owned". As the Green Paper on the review of the Consumer Acquis has recently pointed out (Annex, § 4.1 ), such variations cannot seriously be justified by the specific purposes of the relevant directives.

When considering the concordance between different linguistic versions of a directive, the low water mark in terms of coherence and precision is perhaps the terminology used for the consumer's right of withdrawal in the Doorstep Selling D. and in the Timeshare D. The Doorstep Selling D. introduced the technique of the 'cooling off' period into community legislation. Its French, German, Italian and English versions – just to mention four key texts – exhibit inconsistent language that has attracted much criticism.<sup>11</sup> The situation did not improve with the Timeshare D. It was only with the more recent Directives on Distance Selling and Distance Marketing of Financial Services to Consumers that the terminology relating to the consumer's right of withdrawal was eventually settled: "right of withdrawal" in English, «droit de rétractation» in French, „Widerrufsrecht“ in German and «diritto di recesso» in Italian.

When there is significant progress in precision (as in the case just mentioned), the words chosen by the most recent instrument settle the terminological problem, a solution achieved through a process of trial and error. However, learning by doing does not always occur. Hence, in several cases the Terminology Group has felt obliged to point out inconsistent usage and has proposed a common solution for the entire Acquis. The definition of 'business' which features in Art. 1:202 ACQP represents the outcome of such an effort. According to this article, "Business means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to this person's self-employed trade, work or profession, even if this person does not intend to make profit in the course of this activity." The term "business" is to replace the variety of above-mentioned terms such as "trader", "professional supplier", etc. At the same time, this definition overrides distinctions of doubtful utility that have developed either because of the specific nature of a particular Directive, or in order to take into account and to facilitate the solution of problems related to the transpositions of directives into various national laws. One of the authors of this introduction once presented this type of approach as an attempt at 'noise reduction', since distinct linguistic expressions that do not carry different meanings can be considered as a kind of background 'noise' that may reduce the level of attention which is usually required in the interpretation of

<sup>11</sup> V. Jacometti, 'The Terminological Vicissitudes of the Consumer's Ius Poenitendi', in G. Ajani/M. Ebers [eds.], *Uniform Terminology for European Contract Law*, Baden-Baden (2005), 241 ff.

Community law. The eventual drafting of parallel versions for the new Art. 1:202 ACQP in other languages should not strive for the most literal translation of ‘business’, but should rather put to use the specific resources of each particular language in order to express the same concept. Therefore, for instance, ‘business’ as used in this article could (and probably should) be translated in French as ‘professionnel’, or in Italian as ‘professionista’.

The need to produce texts that can be transposed into different national laws is another major factor which causes complexity in the drafting of directives. As mentioned above, this factor reflects the degree of linguistic and legal pluralism that characterises and forms a constituent Element of European reality today. No European directive has ever been drafted in Europanto, the imaginary European language devised by Diego Marani, a linguistic jest with a hodge-podge vocabulary from many European languages. But many European texts show clear traces of the intensive search for those linguistic means that are needed to ensure a harmonised application of Community norms across a space – that of Europe – in which many national laws expressed in nearly as many languages must coexist.<sup>12</sup> The impossibility of being perfect, and even more so in a language which is not your own, as exploited by Marani’s jest, looms large here, and also for the Acquis Group.

On the other hand, drafting in the English language from a European rather than from an English perspective has one advantage. This somewhat reduces the risk of English law rubbing off onto European law more than the laws of non-English speaking legal systems, for the sole reason that English legal terminology is closely connected with English law. An important part of the challenge faced by the Terminology Group relates to terms which look perfectly acceptable to an English lawyer. We did, for example, our best not to use the term ‘consideration’, in order to avoid the connotations with which English law uses this term. We also avoided one expression which British legislative drafters (and also their European counterparts, as is shown *inter alia* by the Interinstitutional Agreement cited above) love to use, perhaps because it appears to add *gravitas* to any provision, namely ‘shall’. This may well be the most ambiguous word which is commonly used in legislative drafting. A rule providing that ‘A dog shall bark’<sup>13</sup> can carry any of the following meanings: (1) a duty or obligation: dogs must bark, (2) a discretion: dogs may bark; (3) a weak or toothless duty: dogs should bark, but there are no consequences if they do not, and (4) a fact or consequence: dogs will bark. Another much-beloved English legal term which makes any legal text appear more dignified, but which also has the

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<sup>12</sup> The interrelationship between translation, legal drafting and the role of jurilinguists at the European level is now discussed by the instructive contributions of G. Castellan/T. Gallas/M. Guggeis, published in E. Ioriatti Ferrari [ed.], *La traduzione del diritto comunitario ed europeo: Riflessioni metodologiche*, Trento (2007). The consultation of the web site of the EC Commission’s Directorate General for Translation shows that the search for adequate linguistic means has led to the development of important aids to translation.

<sup>13</sup> Example borrowed from G. Eörsi, ‘Unifying the Law. A Play in One Act, With a Song’, *American Journal of Comparative Law* 25 (1977), 658 ff.

unwelcome tendency to obscure more than it clarifies, is “deemed”, indicating the use of a legal fiction, which in most cases is entirely unnecessary, and which we fortunately were able to avoid.

Clarity was frequently achieved at the expense of elegance. Perhaps the most obvious examples are frequent repetitions. Rather than using pronouns such as ‘it’, which are sometimes not easy on the eye of English readers, or expressions such as ‘former’ and ‘latter’, which tend to confuse non-native readers, we frequently simply repeated nouns such as ‘business’, ‘consumer’, or ‘party’. Where repetitions would have been too awkward, we used the gender neutral ‘it’ for businesses, parties, etc. and reserved the use of ‘he or she’, etc., to those who are necessarily natural persons, in particular consumers. We furthermore tried to reduce technical jargon, which explains why the reader will look in vain for an ‘informed transactional decision’, and will instead find ‘an informed decision on whether to enter into a contract’ (Art. 2:202(1) ACQP).

As could be expected, much of the work of the Terminology Group focussed on the need to deliver drafts which can serve a readership of mostly non-native English speakers whose expectations are reflected by the guidelines provided by the above-mentioned Interinstitutional Agreement. Some of the materials handed in by the various Drafting Teams, all of which were facing formidable tasks, were impeccable from this point of view, others left more room for improvement. In the latter case, individual Drafting Teams often struggled with the problem of having to put into plain English norms that were first conceived in the environment of non-English language patterns. The Terminology Group has aimed to improve those drafts, most frequently by suggesting simpler expressions for materially the same rule. This recipe could not be adopted when the Drafting Teams had doubts about the proposed alternative versions. In case of doubt, preference was given to a more diffuse and analytical approach, which aimed to avoid ambiguity. Of course, despite our efforts, the drafts that were eventually submitted to the Plenary Meeting quite often did not meet the ideal standard that each member of the Acquis Group had in mind from the perspective of their own national laws. The drafts were thus sometimes considered to be, in due turn, too analytical, too elliptical, too complex or too simple. The result is before the eyes of the reader. If it passed through the crossfire of the entire Acquis Group, it is probably because it usually marks a middle road. Not exciting perhaps, but hopefully not too difficult to follow.