

Drafting New Model Rules on Sales: CFR as an Alternative to the CISG?

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Abstract

The article compares basic structures of the sales part of the 2009 Draft Common Frame of Reference prepared by the Study Group on a European Civil Code (DCFR) to those of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG). The authors focus first of all on general issues regarding the systematics of sales law and conclude that the interplay of specific sales law and general law of obligations within the DCFR is complicated and in some instances unclear, especially as far as remedies based on mistake and tort are concerned which concur to those based on breach of contract. In the second step the authors address those issues where the DCFR has deviated from the solutions of the CISG and hold that these deviations have been much to the disadvantage of the DCFR. This is in particular stated for the topics of non-conformity as well as remedies for breach of contract. With regard to those legal questions that are not dealt with by the CISG, the authors analyse the ways in which the DCFR has filled these gaps. Three issues are addressed: Pre-contractual duties and liability, non-negotiated terms as well as interest. Again, the authors find the solutions developed in the DCFR to be unconvincing. A final criticism is raised against the codifying style and the techniques employed in the drafting of the DCFR. As a final conclusion in the view of the authors the DCFR in its current state does not provide an alternative to the CISG for sales law, be it as an optional instrument or a toolbox.

A. Introduction

Before turning to the subject matter of our contribution let us shortly recall the role that the CISG nowadays plays in international commerce.

Today the CISG has 74 Member States. Save for the United Kingdom as a prominent exception, this includes all major trade nations in the world.¹ The CISG thus in principle covers approximately 80% of all international sales contracts. An estimated 3,000 published court decisions and arbitral awards as well as an abundant number of scholarly writings, numerous conferences and last but not least the Annual Willem C Vis International Commercial Arbitration Moot show the prominent role the CISG plays in legal practice, legal science and legal education.

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¹ See for the relevant figures I. Schwenzer & P. Hachem, *The CISG – Successes and Pitfalls*, 57 *American Journal of Comparative Law* 457, at 460 *et seq.* (2009). Brazil, Portugal and Turkey will follow in the near future.

Furthermore, the CISG has exerted significant influence on an international as well as domestic level. To name but a few: The PICC, the PECL, the EC Directive on certain aspects of the sale of consumer goods² as well as the OHADA General Commercial Act³ have all been based on the CISG. On a domestic level the Nordic legal systems, the Baltic states, many Eastern European legal systems and especially China took the CISG as blueprint for their revision of the law of contract. Even the modernisation of the German law of obligations was from the very beginning strongly influenced by the CISG.

Although the DCFR drew heavily on the pre-existing unification efforts such as the CISG, PICC and foremost the PECL, there are considerable differences to the CISG with regard to sales contracts.⁴ This is mainly for two reasons. First, the provisions on sales in Book IV.A. themselves deviate from the provisions of the CISG. Second, these provisions have to be supplemented by the general provisions on contract formation and remedies in Books II and III of the DCFR which to an even greater extent are not in accord with those of the CISG.

A major difference between CISG and DCFR relates to the role legal practice played in preparation and drafting of the respective rules. Whereas the practice was strongly involved in the preparation of the CISG, especially the ICC,⁵ the DCFR has been a mainly academic endeavour only followed by the so-called stakeholder process.

With these general remarks in mind, we will now turn to more specific questions relating to the comparison of the CISG and the DCFR, assuming that the model rules of the DCFR will be used in a future CFR.

B. General Questions

Let us begin with some general questions regarding the codification of sales law in the two instruments.

I. Scope of Sales Provisions

The CISG covers international sales contracts. It thereby focuses on B2B contracts. Consumer sales are practically excluded.⁶ The drafters of the DCFR have consciously opted for another approach. The DCFR purports to cover all sales contracts, that means B2B, B2C and even C2C transactions. This implies that the rules of the DCFR go much further than those of the CISG having incorporated

² Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ 1999 L 171/12.

³ Acte Uniforme sur le Droit Commercial Général/Uniform Act Relating to General Commercial Law.

⁴ See for an analysis U. Huber, *Modellregeln für ein Europäisches Kaufrecht*, 16 Zeitschrift für Europäisches Privatrecht 708, at 708 *et seq.* (2008).

⁵ The ICC had already commented on drafts prior to the Vienna Conference and offered proposals, see Document A/CONF.97/9.

⁶ See Arts. 1(3), 2(a) CISG.

the existing harmonised rules on sales contracts, which mainly aim at consumer protection. This often leads to results that are unacceptable for international B2B sales, let alone the sheer complexity following from the ambitious aim to bring together irreconcilable expectations and interests of global commerce and local consumer protection.

II. Interplay with General Law of Obligations

As already mentioned, in the DCFR the rules on sales are established in Book IV.A. and have to be supplemented by the general part of the law of obligations, whereas the CISG covers all aspects from contract formation, obligations of the parties to remedies for breach. The distinction of a general part and a specific part of obligations seems to be mostly inspired by the German Civil Code.⁷ The dispute whether this technique is superior or inferior to an integral codification of sales contracts has already received much attention and shall not be discussed any further. Suffice to mention some of the most urgent problems arising from this approach.

The interplay between a general part of obligations and a special law of sales necessarily entails the danger of inconsistent solutions.⁸ The most striking example in the DCFR are the rules on cure in case of non-performance. Under the general provisions the obligor may remedy any non-conformity in case of an early performance as well as under certain conditions after the time for performance has lapsed.⁹ In the sales part of the DCFR cure by the seller seems to be limited to cases of early performance.¹⁰ This possibility is further restricted to cases where cure does not cause the buyer unreasonable inconvenience or expenses.¹¹ The interplay of these provisions on cure is unclear. Probably, in cases of early performance the cure provision of the sales part prevails according to the principle of *lex specialis derogat legi generali*. But how about cure after the date of performance? Is it excluded or could the seller rely on the general provisions?

Highly problematic are issues of concurring remedies. Especially, the relationship between the rules on mistake and the remedies for non-conformity raises serious concerns. Where already at the time of the conclusion of the contract the goods are irreparably non-conforming or subject to third party rights it may be argued that both parties are mistaken¹² and therefore, for example, the seller may rescind the contract under the general rules on mistake thus escaping liability for breach of contract under the sales provisions. By the same token, the buyer may rely on mistake notwithstanding that remedies for breach of contract are excluded, for example because the buyer has not given timely notice of a non-conformity. Legal systems are split on the question whether provisions on mistake may be

⁷ See W. Ernst, *Zur Struktur des CFR*, in M. Schmidt-Kessel (Ed.), *Der Gemeinsame Referenzrahmen – Entstehung, Inhalte, Anwendung* 55, at 60 (2009).

⁸ See *id.*, at 68 *et seq.*

⁹ Art. III.-3:202(1), (2) DCFR.

¹⁰ Art. IV.A.-2:203 DCFR. This rule is obviously based on Art. 37 CISG.

¹¹ Art. IV.A.-2:203(1) DCFR.

¹² Art. II.-7:201(1)(b)(iv) DCFR.

relied upon concurrently to those on remedies for breach of contract. Under the CISG it is now recognised by court decisions and the great majority of scholarly writings that the rules on mistake are inapplicable in case of breach of contract.¹³ In this regard the Convention has achieved a great degree of legal certainty. The DCFR remains silent on this question thus causing legal uncertainty.

Similar problems arise where the breach of contract at the same time triggers tort remedies. Having regard to the extensive discussion this issue has caused in domestic legal systems, one might have expected a clarifying word in a modern instrument such as the DCFR. Under the CISG we are only slowly progressing with reconciling the different domestic approaches.¹⁴ Under a new instrument it would again take decades to bring about clarity. Under the DCFR this problem is even aggravated by the fact that tort remedies and remedies for breach of contract seem to be on the same level, whereas under the CISG it can be argued that uniform sales law may not be jeopardised by domestic tort law.

C. Amended Rules

After these general questions, we would like to have a closer look at those core areas of sales law where the DCFR has deviated from the CISG.

I. Non-Conformity

The acid test for any sales law are the rules on non-conformity of the goods.

The CISG offers clear and convincing solutions in this regard which have in many instances proven to yield satisfactory results. Consequently these provisions have served as a role model for domestic as well as the European legislator.¹⁵ The CISG rules emphasise the importance of the contract being the first and foremost reference point for the conformity of the goods.¹⁶ Only if the parties have not made provision in their contract for any specific features of the goods, the CISG establishes subsidiary presumptions to decide whether the goods conform to the contract.¹⁷

Without any need the DCFR has deviated from the convincing concept of the CISG. In particular, deviations were not dictated by consumer protection. Firstly, the DCFR does not recognise the important distinction between contractual

¹³ See OGH, 13 April 2000, CISG-online 576; Cass civ 1er, 14 May 1996, J.C.P. 1997, I, 4009; LG Aachen, 14 May 1993, CISG-online 86; I. Schwenzer & P. Hachem, in I. Schwenzer (Ed.), *Schlechtriem/Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (2010), Art. 4, para. 19, [hereinafter referred to as 'Commentary'], I. Schwenzer, *Commentary*, Art. 35, paras. 46-48 with numerous references.

¹⁴ See for an overview on the discussion and references Schwenzer & Hachem, *supra* note 13, Art. 5, paras. 12-15.

¹⁵ In particular, Art. 2 of the Directive 99/44/EC, *supra* note 2, was based on Article 35 CISG which has thus found its way into all domestic legal systems which have implemented the Directive.

¹⁶ See Art. 35(1) CISG.

¹⁷ See Art. 35(2) CISG.

designation of conformity and the statutory default rule. Instead, it requires the goods to comply with contractual requirements as well as the default criteria for non-conformity¹⁸ thus relying on a mixed subjective/objective approach.¹⁹ This may well lead to absurd results as goods may be perfectly conforming to contractual requirements but not pass the objective test. Foodstuff that is no longer fit for human consumption may well be sold as animal food. Goods without a CE label that may not be sold in the EU may perfectly be fit for export to other regions in the world.²⁰

A further amendment is that statements by third persons on specific characteristics of the goods according to the DCFR have to be taken into account in determining the conformity of the goods.²¹ This rule having no counterpart in the CISG clearly has been inspired by the Directive on consumer sales²² and may cause severe problems in international B2B sales. Especially again, the relationship between the contractual requirements for conformity and the role of statements of third persons is unclear.

Both the CISG and the DCFR require the goods to be free from any right or claim of a third party which is based on industrial or other intellectual property.²³ However, whereas under the CISG goods must be free from these encumbrances in states contemplated by the parties for resale or alternatively in the state of the buyer,²⁴ the DCFR does not contain any territorial restriction. Although this may be appropriate for a law exclusively dealing with contracts in one legal system, it is certainly unacceptable on a global scale. Although the seller may be expected to investigate existing intellectual property rights of third persons in certain countries where the buyer intends to resell the goods, this cannot hold true for any and all countries of the world.

II. Remedies

The second core area of any sales law codification is remedies in case of breach of contract. CISG and DCFR agree on the basic structure of remedies, as they apply the remedy oriented approach rather than the old Roman cause oriented approach. As concerns the details of remedies, however, remarkable differences appear.

¹⁸ See Art. IV.A.-2:301: ‘The goods do not conform with the contract unless they: (a) are of the quantity, quality and description required by the contract [...]; and (d) comply with the remaining Articles of this Section.’

¹⁹ See Huber, *supra* note 4, at 719.

²⁰ See for the interplay of the CE mark and conformity of the goods Schwenzer, *in* Commentary, *supra* note 13, Art. 35, para. 14.

²¹ Art. IV.A.-2:303 DCFR.

²² Cf. Art. 2(d) Directive 99/44/EC.

²³ See Art. 42 CISG; Art. IV.A.-2:306 DCFR.

²⁴ See Art. 42(1) CISG.

1. Specific Performance

The first remedy to discuss is specific performance. As is well known, the CISG has not bridged the gap between Common Law and Civil Law legal systems concerning the general remedy of specific performance. Instead it leaves it to the court or arbitral tribunal to decide whether it enters a judgment for specific performance.²⁵ It has to be emphasised that this compromise has not given rise to difficulties in practice. In accord with continental legal thinking the DCFR from a systematic perspective instead seems to envisage specific performance as the primary remedy.²⁶ It can be doubted, whether such an approach is acceptable to any Common Law lawyer. A reasonable restriction of the remedy of specific performance in case where the creditor should resort to a substitute transaction is only revealed to the experienced reader by a second look.²⁷

A special form of specific performance in case of non-conformity of the goods is repair and replacement. The CISG restricts the seller's obligation to replace non-conforming goods to cases where non-conformity amounts to a fundamental breach of contract in order to avoid costly and unreasonable transportation of the goods.²⁸ This restriction is not found in the DCFR. It may be questionable whether this even makes sense between a Lithuanian seller and a Portuguese buyer. It certainly cannot serve as a model on the global scale.

2. Avoidance of Contract

Both the CISG as well as the DCFR in principle allow avoidance of contract in case of a fundamental breach of contract. Both sets of rules use the essentially same definition for the fundamentality of the breach.²⁹ However, the DCFR goes one step further by holding that fundamentality is also given where the breach of contract is intentional or reckless.³⁰ Although it may be conceded that the question whether there was an intentional breach may be taken into account when determining whether a breach is fundamental,³¹ holding every intentional breach to be fundamental independent of its significance does not fit to international trade practices and cannot be justified by the legitimate interest of the non-breaching party.

Differences can also be found in relation to the avoidance mechanism. Whereas the CISG always requires a declaration of avoidance for reasons of legal certainty

²⁵ See Art. 28 CISG: 'If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.'

²⁶ See Huber, *supra* note 4, at 714 *et seq.*

²⁷ See *id.*, at 722 *et seq.*

²⁸ See Art. 46(2) CISG.

²⁹ Cf. Art. 25 CISG; Art. III.-3:502(2)(a) DCFR.

³⁰ See Art. III.-3:502(2)(b) DCFR.

³¹ CISG-AC Opinion no. 5, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents*, 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel, Comment 4.4.

and predictability³² and thus thirty years ago³³ has convincingly discarded the concept of *ipso facto* avoidance used under its predecessor ULIS,³⁴ the DCFR surprisingly exhumes this approach. In case of an excusing impediment being permanent, the obligation as well as the ‘reciprocal obligation’ is automatically extinguished.³⁵ In all other cases avoidance depends upon a declaration of the non-breaching party. This raises the obvious question how the aggrieved party shall know whether the impediment is excusing in the first place and permanent in the second. At the very same point in time – whether known by the parties or not – duties for restitution of performance received arise. Thus, the old Roman law concept of *impossibilium nulla obligatio est* celebrates its triumphant resurrection.

3. Damages

The rules on damages in the DCFR³⁶ by and large follow those of the CISG.³⁷ The DCFR now clarifies that non-economic loss is encompassed.³⁸ Although the wording of Article 74 sentence 1 CISG is already broad enough to also cover non-economic loss, given the reluctance in many legal systems to acknowledge non-economic detriments as loss in the technical sense, this clarification is to be welcome. The same holds true with regard to the express reference to future loss and thus the loss of a chance which is still disputed under the CISG.³⁹

However, again in this area slight differences remain. The CISG clearly distinguishes between a causation of the breach by the creditor and the mitigation of damages.⁴⁰ Where the creditor has caused the breach of contract by the debtor, it may not resort to any remedies. In contrast, a breach of the duty to mitigate only entails a reduction or exclusion of damages. The difference between these concepts is reflected by the CISG also with regard to its systematic approach. The causation of breach by the creditor is dealt with under the section on exemption from liability, while the mitigation of damages appears in the section on damages. Although the DCFR in principle distinguishes between the two cases, both of them only restrict the creditor’s right to damages. This systematic failure has severe consequences; for example, the creditor being able to avoid a contract, even though it caused the breach itself.

³² See C. Fountoulakis, *in* Commentary, *supra* note 13, Art. 26, para. 1; for the general principle derived from Article 26 CISG that under the CISG a party’s rights take only effect upon declaration see Schwenger & Hachem, *supra* note 13, Art. 7, para. 30.

³³ Study bei CF Art. 26 Rn 2

³⁴ Fountoulakis, *supra* note 13, Art. 26, para.1 with references.

³⁵ Art. III.-3:104(4) DCFR.

³⁶ Art. III.-3:701 DCFR *et seq.*

³⁷ Huber, *supra* note 4, at 730.

³⁸ Art. III.-701(3) DCFR. On the understanding of ‘non-pecuniary loss’ and its consequences for the CISG see I. Schwenger & P. Hachem, *The Scope of the CISG Provisions on Damages*, in D. Saidov & R. Cunnington (Eds.), *Contract Damages: Domestic and International Perspectives* 100 (2008).

³⁹ See Schwenger, *supra* note 13, Art. 74, para. 37; Schwenger & Hachem, *supra* note 38, at 97 *et seq.*

⁴⁰ Arts. 80, 77 CISG

III. *Force Majeure* and Hardship

Both the CISG as well as the DCFR provide that the debtor is exempted from liability for damages in case of an impediment beyond its control.⁴¹ Except for the already mentioned *ipso facto* avoidance in case of a permanent impediment, the DCFR *force majeure* provision can be regarded as being more or less equivalent to that of the CISG.

Unlike the CISG the DCFR contains a specific provision on variation or termination by court in case of a change of circumstances commonly referred to as hardship.⁴² For various reasons, this provision is not convincing. First, it seems preferable to deal with both *force majeure* and hardship under the same provision as it is done under the CISG.⁴³ All too often drawing the line between *force majeure* and hardship is not possible. Most subsequent events do not render performance impossible and thus do not constitute a veritable impediment; they just render performance more onerous for the debtor. The prerequisites as well as the consequences for both cases should be the same. Especially, contrary to what the DCFR suggests,⁴⁴ there should be no difference between an initial hardship and hardship caused by a change of circumstances subsequent to the conclusion of the contract. In case of initial hardship under the DCFR the debtor would have to rescind the contract for mistake. Finally, the consequences of hardship laid down in the DCFR are unsatisfactory – at least with regard to sales contracts. The parties' duty to renegotiate⁴⁵ as well as a possible adjustment of the contract to the changed circumstances by a court or arbitral tribunal is of practical use only in long-term relationships but usually not in sales contracts. All in all, here again, the results achievable under the CISG are more satisfactory than those under the DCFR.⁴⁶

⁴¹ Art. 79 CISG; Art. III.-3:104 DCFR.

⁴² Art. III.-1:110 DCFR.

⁴³ The modernised German law of obligations also contains independent rules on impossibility (§275 CC) and hardship (§313 CC). In particular, the relationship between the provision on impossibility due to performance having become overly onerous for the debtor (§275(2) CC) and the provision on adaptation of the contract to changed circumstances rendering performance overly onerous for the debtor (§313(1) CC) has now caused considerable debate as regards their delimitation, see P. Schlechtriem & M. Schmidt-Kessel, *Schuldrecht – Allgemeiner Teil*, para. 485 (2005).

⁴⁴ See Art. III.-1:110(3) DCFR: “applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred.”

⁴⁵ Art. III.-1:110(3)(d) DCFR

⁴⁶ See for the solution offered under the CISG Schwenzer, *supra* note 13, Art. 79, para. 54; I. Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39 *Victoria University of Wellington Law Review* 709, at 721 *et seq.*, 724 (2009); I. Schwenzer, *Die clausula und das CISG*, in W. Wiegand *et al.* (Eds.), *Tradition mit Weitsicht – Festschrift für Eugen Bucher zum 80. Geburtstag*, 736 *et seq.* (2009); Schwenzer & Hachem, *supra* note 1, at 474, 475.

D. Filling the Gaps

To evaluate the appropriateness of the DCFR it is useful to also have a look at those areas of sales law that do not have a counterpart in the CISG. As is well known, it was not possible to make provision for all questions relating to sales contracts in the CISG; significant gaps remain.

It shall be discussed now, how the DCFR has filled these gaps and whether the interplay between the CISG and the DCFR in this respect yields satisfying results. Naturally, only a few select gaps can be discussed here.

I. Precontractual Duties and Liability

The CISG in principle does not contain any rules on precontractual duties; a proposition to insert a provision on *culpa in contrahendo* was even rejected at the Vienna Conference.⁴⁷

In contrast, the DCFR has devoted a whole chapter to marketing and precontractual duties.⁴⁸ First of all, a variety of information duties are established, a number of which also apply to B2B transactions.⁴⁹ Admittedly, these information duties are prolific in B2C transactions for the simple reason of the discrepancy in bargaining power between businesses and consumers. However, in B2B contracts such extensive information duties seem to be inappropriate and by their simple breadth must necessarily lead to legal uncertainty that cannot be tolerated in international trade.⁵⁰

A further problem arises in connection with breaking off negotiations. Under the DCFR a person who breaks off negotiations contrary to good faith and fair dealing⁵¹ is liable for any loss which is not limited to the reliance interest but apparently also includes the expectation interest.⁵² This seems to be in stark contrast to the CISG where primary emphasis is placed on freedom of contract and even the binding effect of an offer is more limited than under the DCFR.⁵³

II. Non-negotiated Terms

Of great practical importance especially in international sales contracts is the use of non-negotiated terms. The CISG does not even mention this notion. By contrast, the DCFR even distinguishes between non-negotiated terms and standard terms. For the latter it practically copies the German Civil Code⁵⁴ and defines standard terms as non-negotiated terms which have been formulated in

⁴⁷ See U. G. Schroeter, in Commentary, *supra* note 13, intro to Arts. 14-24, para. 54.,

⁴⁸ Arts II.-3:101 – II.-3:501 DCFR.

⁴⁹ Arts II.-3:101 – II.-3:109 DCFR.

⁵⁰ See S. Whittaker, The 'Draft Common Frame of Reference' – An Assessment, Report commissioned by the Ministry of Justice, United Kingdom 100 *et seq.* (2008).

⁵¹ See Art. II.-3:301 DCFR.

⁵² Cf. Art. II.-3:501 DCFR.

⁵³ Compare Art. 16(2)(a) CISG and Art. II.-4:202(2), (3) DCFR.

⁵⁴ § 305(1) sentences 1, 3 CC

advance for several transactions involving different parties.⁵⁵ The necessity for such a subtle distinction at best remains obscure. The dualism of two distinct concepts in this regard is unknown to any legal system be it on a domestic or on the European level.⁵⁶

The DCFR contains a specific regime for non-negotiated terms and standard terms as regards the incorporation of such terms into the contract as well as the judicial control of unfair terms.

1. Incorporation

On the level of incorporation, problems arise where non-negotiated terms are to be incorporated by reference. The DCFR explicitly states that mere reference is not sufficient.⁵⁷ Whether this means that also in B2B contracts the terms actually have to be sent to the other party remains unclear.⁵⁸ If this were the case this would be a true obstacle to swift contract formation on the international level that hardly any trader will expect.⁵⁹

Further difficulties arise with regard to the battle of forms. The provision dealing with this issue only applies to standard terms but not to mere non-negotiated terms.⁶⁰ It is hard to see the underlying ratio of this approach. Regardless of this fact, this provision in essence does not add much to what is the prevailing opinion under the CISG.⁶¹

2. Substantive Control

Whereas under the CISG the substantive control of (all) contract terms in principle is a question of validity and thus left to the applicable domestic law,⁶² the DCFR contains specific provisions for this matter. However, under the DCFR in B2B

⁵⁵ Cf. the definitions in DCFR Annex I.

⁵⁶ See Art. 3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which dispenses with the requirement that the terms have been drafted for use in more than one transaction.

⁵⁷ Art. II.-9:103(3)(b) DCFR.

⁵⁸ Under the CISG the matter is disputed. The German BGH has held that non-negotiated terms must be sent to the other party, see BGH, 31 October 2001, CISG-online 617. Subsequent decisions of other courts have also adopted this requirement. Nevertheless, there are also court decisions and a number of scholarly writings taking a different view. See for this dispute and an account of the opinions voiced with references Schroeter, *supra* note 13, Art. 14, paras. 36–46.

⁵⁹ This criticism has also been advanced against BGH, 31 October 2001, CISG-online 617, see M. Schmidt-Kessel, *Einbeziehung von Allgemeinen Geschäftsbedingungen unter UN-Kaufrecht*, 36 NJW 3446 (2002).

⁶⁰ See the heading and wording of Art. II.-4:209 DCFR.

⁶¹ Under the Convention the dispute has narrowed down to two approaches; the so-called last-shot-doctrine and the so-called knock-out-doctrine. Under the first doctrine the non-negotiated terms which have been sent last become part of the contract. Under the second doctrine, conflicting terms are stricken out and replaced by the default rule. This second view has come to be the prevailing view under the CISG, see Cass civ 1er, 16 July 1998, CISG-online 344; BGH, 9 January 2002, CISG-online 651; Schroeter, *supra* note 13, Art. 19, para. 36 with numerous references also for domestic laws and uniform projects.

⁶² See Art. 4 sentence 2(a) CISG; Schwenzer & Hachem, *supra* note 13, Art. 4, para. 30.

transactions a contract term may be regarded unfair only if it is forming part of standard terms – neither negotiated terms nor simple non-negotiated terms are subject to judicial scrutiny.⁶³ These rules significantly lag behind any domestic and international standard for a control of unfair terms even in B2B contracts. This is reinforced by the fact that the DCFR actually seems to allow to exclude or restrict any remedies for intentional or grossly negligent breach of contract as long as this does not relate to personal injury.⁶⁴ This is a result unknown to any other legal system.

III. Interest

A last lacuna under the CISG which is of great practical importance must be addressed here. Although the CISG provides that interest is due on any sum in arrears,⁶⁵ it does not state the applicable interest rate.⁶⁶ The DCFR contains two provisions on interest one of which is a general rule on interest (Art. III.-3:708 DCFR) whereas the other specifically applies to commercial transactions (Art. III.-3:710 DCFR). However, apart from the type of transaction, the respective scope of these provisions also depends on what kind of sum is due. While Article III.-3:708(1) DCFR applies to the payment of any “sum of money,” thus including damages, Article III.-3:710 DCFR by its wording only applies to “the payment of a price.”⁶⁷ This difference is crucial in practice. From these provisions it follows that in case the buyer is late in paying the purchase price in a B2B sales contract, the interest rate is fixed at seven percentage points above the interest rate applied by the European Central Bank.⁶⁸ On the other hand, where either of the parties is liable for damages, it is the interest rate at the average commercial bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place where payment is due.⁶⁹ While the approach taken towards late payment of the price in commercial contracts is reasonable and practical, this cannot be said for the approach taken towards payments of damages. Determining the average interest rate would first require to know the exact date of payment, which at the time a court decision or award is rendered is wholly unpredictable. Even if the date of payment were known, to determine the average interest rate necessitates complicated mathematical operations as the short-term lending rate fluctuates from day to day and depends on the number of days defined as ‘short

⁶³ Art. II.-9:405 DCFR

⁶⁴ Art. III.-3:105(1) DCFR

⁶⁵ Art. 78 CISG.

⁶⁶ See K. Bacher, in Commentary, *supra* note 13, Art. 78, para. 2 with references.

⁶⁷ Oddly enough, the heading to Art. III.-3:710 DCFR reads ‘Interest in Commercial Contracts’ and thus seems to establish a *lex specialis* for commercial contracts. As the provision does only refer to payment of a price, the plain wording would suggest that in commercial transactions there is no interest on damage claims. This was certainly not intended.

⁶⁸ See Art. III.-3:710(4) DCFR. This corresponds to the Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions.

⁶⁹ Art. III.-3:708(1) DCFR.

term'. We fail to see why in commercial contracts sums payable as damages are subject to a wholly different interest rate than the purchase price. Interest rates fixed in accordance with Article III.-3:710 DCFR regularly exceed the interest rate fixed in accordance with Article III.-3:708(1) DCFR by approximately 2%. In our opinion, the approach taken by the DCFR is hardly reconcilable with the principle of full compensation under the CISG. Rather, decision making and especially enforcement proceedings become unnecessarily complicated.

E. Codifying Style and Techniques

As concerns the different codifying style and techniques of the CISG and the DCFR, one is first struck by the sheer length of the DCFR compared to the relatively short CISG.⁷⁰ This is partly due to the approach taken towards definitions. Under the CISG definitions are a rare exception. Their absence has not led to any problems. Contrary to the CISG, the DCFR first of all contains an Annex with no less than 163 definitions. While it is to be lauded that the drafters have attempted to achieve a common understanding of legal terms, it is hardly understandable why the text of the DCFR again is packed with sometimes repetitive and sometimes further definitions.⁷¹

The sheer length of the DCFR does not, however, contribute to clarity.⁷² Already the attempt to include as many scenarios as possible into the wording of the DCFR has considerably embellished the text. Often, too, where the CISG needs but half a sentence to express an idea, this translates into a whole paragraph in the DCFR.⁷³ This prolixity, however, has not prevented the drafters from an exorbitant⁷⁴ use of general clauses. The CISG although using much less general clauses already has been blamed for its vagueness.⁷⁵ The DCFR from this viewpoint will be hardly acceptable especially to Common Law lawyers.⁷⁶

Furthermore, the drafters of the DCFR have opted for extensive cross-referencing, whereas this technique is only rarely to be found in the CISG. To say the least, this does not enhance easy readability. Apart from the German Civil Code there is no international or domestic codification making use of such

⁷⁰ Harsh criticism from Huber, *supra* note 4, at 742: "The provisions on sales law have to be completely reformulated. [...] The reader should not be given the impression that the drafters think it to be slow-witted." Also H. Eidenmüller *et al.*, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht – Wertungsfragen und Kodifikationsprobleme*, 2008 *Juristen Zeitung* 529, at 549: "Reading the DCFR is tiring, because so much of its content is superfluous and because it contains numerous repetitions."

⁷¹ See Eidenmüller *et al.*, *supra* note 70, at 530.

⁷² See *id.*, at 549; Huber, *supra* note 4, at 742.

⁷³ Compare Art. 39(2) CSG and Art. IV.A.-4:302(3) DCFR.

⁷⁴ See Eidenmüller *et al.*, *supra* note 70, at 536 who provide an impressive account of the excessive use of general clauses in the DCFR.

⁷⁵ Against this criticism Schwenzer & Hachem, *supra* note 1, at 467.

⁷⁶ See for the concerns raised in the United Kingdom the Report issued by the European Union Committee of the House of Lords, *European Contract Law: The Draft Common Frame of Reference – Report with Evidence*, London: House of Lords, Stationary Office para. 31 *et seq.* (2009).

extensive cross-referencing. Also modern codifications such as the 2002 Estonian Law of Obligations Act or the 1999 Contract Law of the People's Republic of China manage to do without this technique.

Finally, it has to be regretted that the DCFR does not use the same terminology as the CISG. The drafters of the CISG endeavoured to depart from domestic legal concepts instead seeking an independent legal language. Indeed, to a large extent, they succeeded. The DCFR tries to reinvent the wheel changing terminology that for almost thirty years now has become the *lingua franca* of international sales law. A prominent and for trade practice crucial example is the replacement of the term 'avoidance for breach of contract' used by the CISG by the term 'termination' in the DCFR. The fact that the very term avoidance is used by the DCFR in the context of mistake is hardly helpful to ease communication.⁷⁷

Last but not least, let us imagine lawyers in court or arbitral proceedings cite the provisions of the CFR such as Article IV.A.-4:302(3) CFR instead of simply Article 39(2) CISG.

F. Conclusion

The question whether the future CFR can be an alternative to the CISG must be discussed on two levels, the European as well as the global one.

Considering the CFR as a European instrument, be it an optional instrument or just a toolbox for legislators, it does not provide a viable alternative to the CISG. Practice needs a simple uniform law for all international and domestic sales contracts. This is why many modern legislators, especially in Eastern Europe, modelled their domestic sales law according to the CISG.⁷⁸

Imagining the CFR being an optional instrument on the European level, probably no sensible trader would opt for it. In essence this would mean that sellers and buyers would need to adapt their contracts to three different situations, domestic, European and global. Furthermore, the experiences made with the PICC clearly show that parties do not make use of optional instruments in their choice of law clauses.⁷⁹ Whereas about 80% of disputes resolved under the auspices of the ICC contain a choice of law clause, in only 0.8% of these contracts opting-in instruments such as the PICC are chosen, although they may be well appropriate

⁷⁷ We are aware that PICC and PECL follow the same terminology as the DCFR. However, both sets of rules do not contain specific provisions on sales law and already their departure from the language of the CISG is most unfortunate.

⁷⁸ See P. Schlechtriem, *25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts*, in H. M. Flechtner et al. (Eds.), *Drafting Contracts Under the CISG* 167, 174, 177 (2008); F. Zoll, *The Impact of CISG on Polish Law*, 71 *Rechtszeitschrift für ausländisches und internationales Privatrecht* 81, at 81 *et seq.* (2007).

⁷⁹ P. Mankowski, *CFR und Rechtswahl*, in M. Schmidt-Kessel (Ed.), *Der Gemeinsame Referenzrahmen – Entstehung, Inhalte, Anwendung* 401 (2009).

to supplement the CISG.⁸⁰ It seems all the more improbable that parties would opt out of the CISG and into the CFR which in itself would have to be supplemented by domestic law.

But also as a toolbox, the CFR is not an alternative to the CISG. The CISG itself has already proven as a useful toolbox not only on the European but also on the global level. The foregoing remarks have shown that the sales rules of the DCFR would not be an amelioration of the CISG. To the contrary, where the CISG has started to build reliable bridges between Civil Law and Common Law and continues to foster the acceptance of the idea of the unification of laws, the DCFR has fuelled old disputes and prejudices. This is particularly due to the fact that it has been influenced heavily by German legal thinking culminating in the adoption of exclusively German concepts⁸¹ and quasi-literal translations of provisions of the German Civil Code.⁸²

In conclusion, it does not come as a surprise that the CFR will never serve as a model on a global scale. Rather, let us continue to develop solutions under the CISG and to guard its uniform application and interpretation. It is important that Europe maintains its leading position in the development of the CISG and raises its voice in the global concert. Therefore, the only recommendation is to even strengthen the role of the CISG in the area of sales law in Europe. Any harmonisation or unification of laws in Europe must ensure that the CISG remains untouched.⁸³

⁸⁰ *Id.*, at 401.

⁸¹ This is particularly obvious for the term 'Juridical Act' which is an attempt to retain the German concept of 'Rechtsgeschäft', see Ernst, *supra* note 7, at 58: hardly successful translation. Another example is the formal confirmation of contract between businesses in Art. II.-4:210 DCFR which codifies the classic German concept of 'Kaufmännisches Bestätigungsschreiben'.

⁸² See with regard to the unwinding of contracts upon breach of contract B. Jud, *Die Principles of European Contract Law als Basis des Draft Common Frame of Reference*, in Schmidt-Kessel (Ed.), *Der Gemeinsame Referenzrahmen – Entstehung, Inhalte, Anwendung* 87 (2009).

⁸³ For different scenarios which are conceivable and advocating convincing solutions U. G. Schroeter, *UN-Kaufrecht und Europäisches Gemeinschaftsrecht – Verhältnis und Wechselwirkungen* (2009), § 18, para. 1 *et seq.*