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1 June 2009

Lord Bach
Parliamentary Under Secretary of State
Ministry of Justice
102 Petty France
London
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Dear Lord Bach

European Contract Law: Common Frame of Reference

The remit of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

The subject of the Common Frame of Reference (the "CFR") was raised at a meeting of the FMLC on 2 April 2009. The project is one of a series of initiatives by the European Commission to increase the overall coherence of European contract law. It began largely as an academic exercise and, in December 2007, a first draft of an 'academic' Common Frame of Reference (the "DCFR") was published. Since that time, there has been a great deal of discussion as to whether the DCFR can be used as a model for a political CFR and, indeed, what uses a political CFR would serve. Now that the DCFR is in final form, the FMLC feels it appropriate to express its views on the project to the Ministry of Justice.

The members of the FMLC are agreed that the ultimate purposes of the CFR remain unclear. One proposal, to which the FMLC is strongly opposed, is for the CFR to take the form of a mandatory European Civil Code. In the FMLC's view, this would threaten many of the legal fundamentals on which the financial markets rely, including contractual certainty and predictability of legal outcomes, particularly if the CFR were to take a form similar to that of the DCFR.¹

There is however growing support behind a proposal for the CFR to be used as a so-called "tool-box" of terms, principles and model rules for drafting and interpretation of EC contract law.² The purpose of such a tool-box would be as an aid to the resolution of interpretative uncertainties in existing EC legislation and as a "best practice" guide to future EC law making in the field of contract law. There are undoubtedly significant inconsistencies in the drafting and interpretation of legislation in the European contract law acquis and so the FMLC is fully supportive of the European Commission's endeavour to address this. However, the FMLC is concerned, in particular, that the introduction of general principles and model rules for use by

¹ An alternative proposal to use the CFR as a "twenty-eighth regime" might be acceptable, but only unless and until this regime takes on any "hard law" characteristics.

² The Justice and Home Affairs Council endorsed this proposal at its meeting on 18 April 2008.

future EC legislators might result in the incorporation into law of principles and doctrines which could then give rise to an unacceptable degree of legal uncertainty. This would likely be the case where, for example, there is inconsistency between the principles and rules contained in the tool-box and established common law doctrine or equivocal concepts in the tool-box are incorporated into legislation. The FMLC is also conscious that a "best practice" guide for future EC law making may, in the longer term, develop into a European Civil Code.

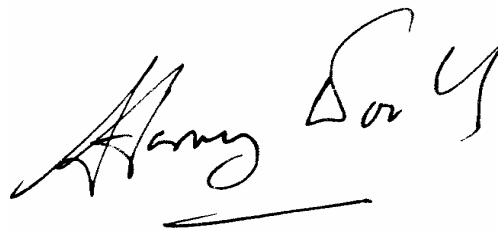
On the other hand, the FMLC considers that the more restricted use of a CFR as a glossary containing definitions of existing European legal concepts might be an acceptable idea and, indeed, a valuable aid to EC legislators, if it can be guaranteed that this is not intended to create new contract law norms for Member States' domestic legal systems. That is to say that such a glossary will only be acceptable if it is to lead to a shared interpretation of concepts already used in the European contract law acquis without any suggestion that these concepts and interpretations will have any general application in Member States' domestic contract law outside the acquis. The FMLC would object very strongly however to the idea that, for example, by defining or interpreting the concept of good faith, the CFR might give rise to the inference that good faith is an essential element of Member States' domestic contract law systems. The FMLC is concerned that such an inference might prove inevitable over time and has, therefore, strong reservations about all but the most limited attempts to harmonise contract law definitions.

Whatever purpose the CFR might serve, the DCFR is almost certainly vitiated by too much ambiguity and by concepts that are too highly equivocal to serve as a model for the final project. As Professor Simon Whittaker explained in his critical assessment of the DCFR:³

From a pan-European perspective, [the DCFR] possesses too many difficulties of scope and structure, suffering from complexity and a good deal of interpretative uncertainty. From the point of view of its substance (both in terms of EC law and especially of English law), its provisions affecting commercial contracts (B2B) qualify too broadly and far too uncertainly the central principles of freedom of contract and the binding force of contracts. Its treatment of 'good faith and fair dealing' is unclear and unsatisfactory and its omission of a principle of the 'relative effect of contracts' unjustified. Moreover, its treatment of 'good faith and fair dealing', its use of 'reasonableness' and its overt empowering of courts to amend the contract represent a fundamentally different understanding of the role of courts in relation to contracts from the one taken by English law.

The FMLC would welcome the opportunity to discuss this further if that would be useful.

Yours sincerely

A handwritten signature in black ink, appearing to read "Lord Woolf", with a horizontal line underneath.

Lord Woolf

cc. Jean McMahon
cc. Paul Hughes

³ The "Draft Common Frame of Reference, An Assessment" (November 2008), p.11.