

# Einführung in die englische Rechtsterminologie

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# Today's lecture



1.	Einführung, Rechtsgebiete und Rechtstexte sowie Grundlagen der Rechtsvergleichung	Freitag, 17.01.2014
2.	Case Law und Präjudiziensystem Aufbau und Stil von Urteilen	Samstag, 18.01.2014
3.	Contract Law Sales Law	Montag, 20.01.2014
4.	International Sales Law Tort Law und Property Law	Dienstag, 21.01.2014
5.	Constitutional Law European Law	Mittwoch, 22.01.2014
6.	Rechtsvereinheitlichung und Rechtspolitik	Donnerstag, 23.01.2014
7.	Studium, Ausbildung und juristische Berufsbilder – (ggf. Fallstudie)	Freitag, 24.01.2014



## 6.

## Rechtsvereinheitlichung und Rechtspolitik

- Legal Harmonisation and Legal Policy
  - Foundations of European Contract Law
  - UNIDROIT Principles
- European Contract Law
  - Policy Considerations
- Draft Common European Sales Law
  - Policy



## Contract Law Foundations

- Facilitation of contracts v regulation of contracts
- 19th century: classical law of contract
  - Facilitation of contracts
  - Freedom of contract
  - Parties are the sovereign
  - Law should impose minimal restrictions
  - Contract law rules should be few, clear, consistent with commercial expectations and apply to all contracts
  - Presumption of equality between the parties



## Contract Law Foundations

- 20th century: neo-classical (or modern) contract law
  - Regulations of contracts
  - Limits on freedom and autonomy
  - Regulation and channelling of contracting
  - Responding to inequality
  - Standard form contracts
  - Unfairness of some exchanges
  - Contextual interpretation



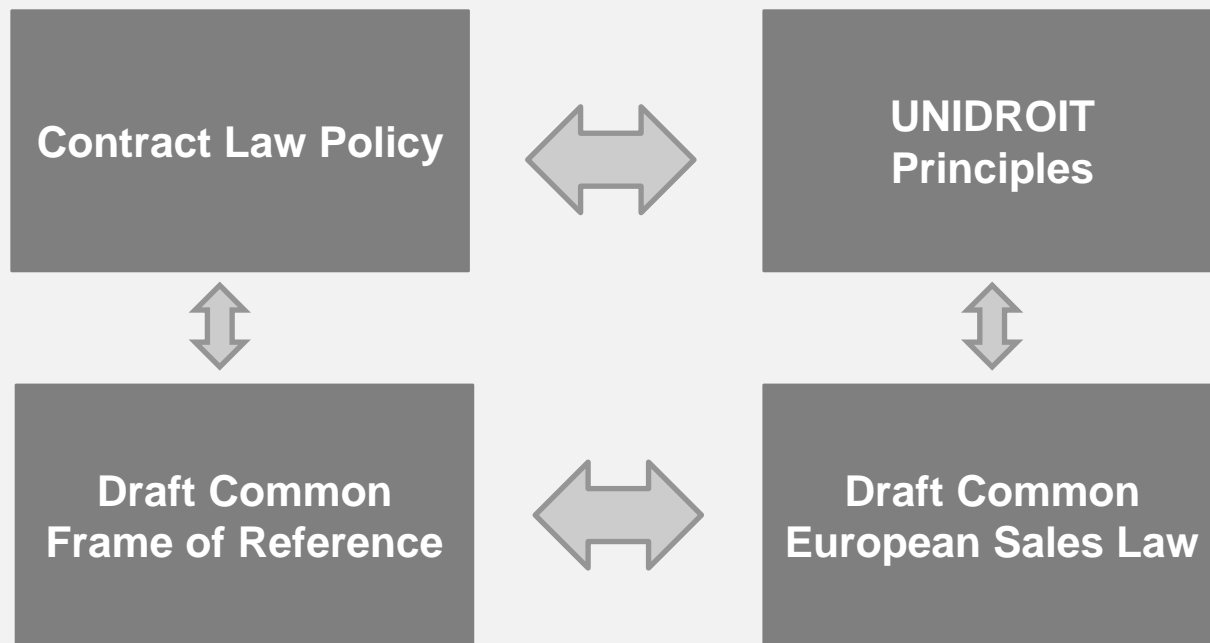
## Contract Law Foundations

- Today: Materialisation of Contract Law
  - Still great influence of classical contract law
  - Special types of contract are generally excluded from the discussion about contract law
    - tenancy, employment, consumer transactions
  - Freedom of contract – limitations of contract in order to enforce freedom

## Contract Law Foundations

- Controlling fairness by procedure and not by substance (Standard Terms)
- Standard Terms
  - Direct control over terms?
    - Indirect control by notice requirement for usual or onerous terms or cooling off period?
- Reciprocity – Fairness?
  - No control over parties' value to exchange
- General Contract law regime for all contracts v specialist regime (consumer law, commercial law etc.)

## ... of European and international legal harmonisation





## UNIDROIT Principles 2010

- UNIDROIT is an independent and intergovernmental body
- UNIDROIT Principles drafted by academics
- Restatement of law (prestatement)
- Used by practitioners as toolbox, model function
- Soft law, not confined to a specific type of contract
  - International contracts
  - Commercial contracts

## A MORE COHERENT EUROPEAN CONTRACT LAW

### AN ACTION PLAN

COM(2003) 68 final

#### Executive summary

(...) In addition to appropriate sector-specific interventions, this [Action Plan] includes measures:

- to increase the coherence of the EC *acquis* in the area of contract law,
- to promote the elaboration of EU-wide general contract terms, and
- to examine further whether problems in the European contract law area may require nonsector-specific solutions such as an optional instrument.

## A MORE COHERENT EUROPEAN CONTRACT LAW

In addition to continuing to put forward sector-specific proposals where these are required, the Commission will seek to increase, where necessary and possible, coherence between instruments, which are part of the EC contract law *acquis*, both in their drafting and in their implementation and application.

Proposals will, where appropriate, take into account a common frame of reference, which the Commission intends to elaborate via research and with the help of all interested parties.

## A MORE COHERENT EUROPEAN CONTRACT LAW

This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like “contract” or “damage” and of the rules that apply for example in the case of non-performance of contracts.

A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application.

The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law. (...)

## GREEN PAPER ON POLICY OPTIONS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES

COM(2010)348 final

### BACKGROUND

(...) The Commission (...) closely followed the work of an international academic network who carried out the preparatory legal research in view of the adoption of the CFR. The research work was finalised at the end of 2008 and led to the publication of the Draft Common Frame of Reference (DCFR). The DCFR covers principles, definitions and model rules of civil law, including contract and tort law. It contains provisions for both commercial and consumer contracts.

The DCFR has built on several projects previously undertaken at European and international level. A network of eminent European academics has elaborated the Principles of European Contract Law (PECL) with the aim of providing the internal market with a uniform contract law. Various international and regional organisations, recognising that diverging contract law rules create obstacles to international trade, have been working to reduce such obstacles by providing uniform model rules.



## GREEN PAPER ON POLICY OPTIONS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES

The United Nations Commission on International Trade Law (UNCITRAL) has created an almost worldwide standard for business-to-business sales of goods – the Vienna Convention on International Sales of Goods - which applies by default whenever the parties have not chosen to apply another law.

The International Institute for the Unification of Private Law (UNIDROIT) has developed the Principles of International Commercial Contracts, which represent model rules on sales of goods and provision of services. These instruments have created standards which have served as model rules for legislators around the world and for parties to commercial contracts who may not designate them as the law governing certain aspects of their contracts but can nevertheless incorporate them by reference (...).

However, their scope is limited to business-to-business contracts, and in the case of the Vienna Convention, to sale of goods. Moreover, there is no mechanism to ensure their uniform interpretation in the Member States. Finally, these instruments cannot restrict the application of national mandatory rules. (...)



## GREEN PAPER ON POLICY OPTIONS TOWARDS A EUROPEAN CONTRACT LAW FOR CONSUMERS AND BUSINESSES

The Union could fill contract law gaps by adopting effective tools for the removal of market barriers relating to diverging contract laws. An instrument of European Contract Law, if sufficiently user-friendly and legally certain, could also serve as a model, in particular to international organisations which have taken the Union as a model for regional integration.

The Union could thus play a leading role in setting uniform international standards in this field, which could in turn give the European economy a competitive advantage in the world. In order to carry out its mandate, the Commission has set up an Expert Group<sup>15</sup> to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty.

The Group will assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions. (...)

## Draft Common Frame of Reference

### Draft Common European Sales Law

#### I. – 1:103: Good faith and fair dealing

(1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.

#### I. – 1:104: Reasonableness

Reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.



## Draft Common Frame of Reference

### II. – 1:101: Meaning of “contract” and “juridical act”

(1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.

(2) A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.

### II. – 1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules.

## Draft Common Frame of Reference

### II. – 1:103: Binding effect

(1) A valid contract is binding on the parties.

(2) A valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance.

### II. – 1:109: Standard terms

A “standard term” is a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties.

## Draft Common Frame of Reference

### II. – 3:301: Negotiations contrary to good faith and fair dealing

(1) A person is free to negotiate and is not liable for failure to reach an agreement.

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract. (...)

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

### II. – 4:101: Requirements for the conclusion of a contract

A contract is concluded, without any further requirement, if the parties:

(a) intend to enter into a binding legal relationship or bring about some other legal effect; and

(b) reach a sufficient agreement.

## Draft Common Frame of Reference

### II. – 4:102: How intention is determined

The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

### III. – 1:103: Good faith and fair dealing

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

## Draft Common European Sales Law

Proposal for a  
**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
on a **Common European Sales Law**

**COM(2011) 635 final**

### **CONTEXT OF THE PROPOSAL**

(...) Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States. (...)

## Draft Common European Sales Law

Contract law related barriers are one of the major factors contributing to this situation.

(...)

The need for traders to adapt to the different national contract laws that may apply in crossborder dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

Additional transaction costs compared to domestic trade usually occur for traders in crossborder situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

(...)

## Draft Common European Sales Law

The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and crossborder purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.

Traders should be able to apply the Common European Sales Law in all their cross-border dealings within the European Union instead of having to adapt to different national contract laws, provided that the other party to the contract agrees. It should cover the full life cycle of a contract and thus comprise most of the areas which are relevant when concluding crossborder contracts. As a result, the need for traders to find out about the national laws of other Member States would be limited to only some, much less important, matters which are not covered by the Common European Sales Law. (...)