



## **MAJOR EUROPEAN INITIATIVE ON CONTRACT LAW OPPORTUNITY FOR REFORM IN IRELAND**

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### **1. Introduction**

Irish Contract Law is a mess and EU intervention in the area is not much better.

The European Commission and Parliament have decided to embark on a process of reform. The scope and ambition of what they contemplate is breathtaking. It amounts to no less than a review of the entirety of Contract Law in the Member States and a comprehensive restatement of the common position in each area, or where there is not a common position, adopting that which is perceived to be the best solution.

This process, in which the Law Society has taken a leading part is a major challenge and also an opportunity to use the work at European level as a basis for the reform of Irish Contract Law.

### **2. Confusion in Irish and European Law**

Contract law at the heart of all business transactions. Irish contract law has evolved through judicial decisions and piecemeal legislative intervention. In recent years a great deal of that intervention has been driven by directives promulgated by the EU, mainly for the protection of the consumer.

It has long been recognised that there are major difficulties with the EU legislation (so called "acquis"). The acquis is inconsistent, does not define terms, or where it does define them uses them differently in various parts of the acquis. Some parts of the acquis provide for different rules in similar situations. There are even examples of inconsistencies in the one directive.

At national level there are further difficulties. Directives merely set a minimum standard for harmonisation of the basic rules in a particular area and are intended to be elaborated upon and implemented by national legislation. There are, however, substantial differences in the manner in which directives are implemented throughout the EU.

The result is that, even in areas governed by the acquis, there are divergences between legal rules throughout the EU.

In some sectors, such as the insurance sector, where efforts have been made to create an internal market, such divergences make it very difficult for insurance business to operate on an EU-wide basis.

In Ireland we have transposed directives, particularly in the consumer area, in a lazy way, by simply deeming them to have full legislative effect. In many cases we have not bothered to place the directive within the existing Irish legal context. For example, the Unfair Contract Terms Directive was adopted by



statutory instrument without a backward glance at the over-lapping provisions of the Sale of Goods and Supply of Services Act 1980. Our ill-considered approach has also meant that no effort has been made to correct or filter the errors in EU legislation in the course of implementation in Ireland.

### **3. Problem identified at EU level**

In 2001 the EU Commission launched a process of consultation and discussion about the way in which problems resulting from the divergences between national and contract laws in the EU should be dealt with at European level. In February 2003 the Commission communicated an Action Plan to the European Parliament and the Council. The Action Plan suggested a mix of measures in order to solve these problems.

### **4. The Way Forward**

In its document "The Way Forward" published in October 2004, the Commission set out its proposals in relation to three measures which had been identified in the Action Plan:–

#### **4.1. To increase the coherence of EU contract law**

This is the main focus of the Commission's activities.

#### **4.2. To promote the use of EU-wide general contract terms**

This is to be done by the establishment of a specific website to promote the development and use of EU-wide standard contract terms. In effect this will merely be a platform for the exchange of information between industry groups on existing and on planned EU-wide general contract terms. The Commission, however, will have no hand in the preparation or approval of these contract terms. This is a measure that can be implemented immediately.

#### **4.3. To examine the usefulness of the adoption of an optional instrument**

An optional instrument is a statement of contract rules which parties could adopt and adapt for their own purposes.

The development of an optional instrument, however, is only a possible project. It will only be initiated if it is concluded that it would be useful to have such an optional instrument.

The mention of such a possibility has awakened in certain quarters fears of a conspiracy to subvert the sanctity of national laws with a pan-European civil code. The fact that researchers chosen by the Commission had been part of a group working on such a civil code was seized upon as further evidence of such conspiracy. The Commission has been at pains to say that no such decision has been made and that indeed at the moment there does not exist the legal or political basis for any such decision.

### **5. Coherence of EU Contract Law**

The Commission is adopting a twin track approach.

The Commission itself will embark on an exercise of examining how consumer protection rules are being applied and what effects they are having. This will identify areas of consumer law that require urgent attention.



On the other hand, the Commission wants to develop a handbook of contract law which would serve as a statement of the common rules in European contract law and which would be available as a framework within which new and amending legislation would be drafted. The Commission calls this framework a “Common Frame of Reference” (CFR). The Commission has appointed a consortium of researchers, whose task will be to prepare the CFR.

## **6. Content of CFR**

The Action Plan had suggested that the CFR would set out principles, definitions and some model rules of contract law. However, the Way Forward proposes a much more elaborate document. It sees that there would be an initial chapter setting out the common fundamental principles of European Contract Law and the exceptions to those principles. A second chapter would set out definitions of legal terms. A third chapter would set out model rules. The headings for the suggested model rules indicate a comprehensive restatement of the law of contract.

The researchers are expected to deliver a final report by 2007. That report will contain a draft of the CFR. By 2007 the Commission will also have identified the elements of the existing consumer legislation that need to be reformed. After the publication of the researcher’s report, the Commission will prepare a Green Paper. There will be a period of political consultation and the intention is that the CFR should be adopted by the Commission by 2009.

## **7. Time Table**

The Commission has prepared a timetable of workshops to take place in 2005 and 2006. These workshops are to deal with the proposals of the researchers in relation to each of the areas of contract law that will build to a comprehensive restatement. The Commission has also established a network of experts on contract law (the “CFR-Net”). The CFR-Net is intended to be composed of experts nominated by stakeholders who will review the work of the researchers from a practical point of view.

## **8. Law Society’s Response**

The Law Society has taken a leading role in Ireland in relation to the Commission’s proposals. The Commission organised a major conference in May 2004 to consider the Action Plan. There were 300 delegates representing stakeholders and governments from all over Europe at that meeting which was addressed by the then Irish Commissioner, Commissioner Byrne. The Law Society was the only Irish organisation represented. The Law Society was also represented at the conference to consider the Way Forward document.

In order to ensure that the Society would deal with the matter in a structured fashion, the Society engaged Professor Robert Clark to prepare a detailed briefing document for the information of the relevant committees and representatives of the Society.

The Society was also represented by the writer at two workshops held in March 2005. The first one related to Services including specific areas such as construction, processing, storage, design, information and medical treatment. The other dealt with the not inconsiderable topics of commercial agency, franchise and distribution agreements.



## 9. **Why should we bother?**

Even if the CFR were to be used exclusively as a handbook for the Commission's own legislative purposes, it is important that Ireland's specific concerns be taken into account in the preparation of such a restatement of the law. Of course, we and the UK are the only countries in Europe which have adopted the Common Law. We have an interest, accordingly, in making common cause with our neighbours.

However, if the CFR does develop as a generally recognised restatement of the law of contract in Europe, it becomes all the more important that we do our utmost to ensure that it suits our legal and commercial environment.

Apart from these European considerations, a European restatement of the law of contract could serve as a basis for a coordinated and structured reform of our own contract law. Such reform is long overdue.

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