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TOWARDS A EUROPEAN LAW OF CONTRACTS

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Rezumat. *Dezvoltarea unei pieţe unice este principalul scop al constituirii Uniunii Europene. Deşi în expansiune, contractele cu elemente de extraneitate stau sub tutela unor principii şi norme legislative arhaice, motiv pentru care codificarea dreptului contractual reprezintă astăzi un subiect captivant de dezbatere. Proiectele de codificare a dreptului contractual, elaborate de Comisia Lando, reprezintă principalul câmp de luptă între partizanii codificării dreptului privat şi oponenţii acesteia. Până şi cei mai înverşunaţi susţinători ai Codului lui Napoleon trebuie să admită că autonomia alegerii, aşa cum este impusă în legile dezvoltate în filozofia liberală, este un concept retrograd, iar individualismul va ceda locul unui alt concept, mai altruist, cu privire la contractul ce va accentua principiul bunei credinţe, îl va definitiva şi îl va pune în aplicare, referitor la obligaţia părţilor de a reduce prejudiciile suferite de încălcarea obligaţiilor contractuale, la acceptabilitatea revizuirii contractului din motive neprevăzute, la un nou concept al lezării contractuale, la rezilierea unilaterala a contractului, toate acestea în numele unei noi etici a contractelor, menită să limiteze puterea alegerii individuale. Fără a fi sancţionate juridic, fiind lucrări eminamente doctrinare, acestea se impun din ce în ce mai mult la nivel naţional, fiind absorbite de noile codificări europene, printre care şi noul nostru cod civil, recent promulgat.*

Abstract. *The edification of a unique market represents the main object of the European construction. Although in expansion, the contracts with extraneity elements are still governed by antiquated principles and legislative norms, reason for which the perspective of the codification of the contractual law represents nowadays a captivating debate. The codification projects of the contractual law, elaborated by the Lando Commission, represent the main field of the confrontation between the partisans of the private law codification and its adversaries. Including the most ardent supporters of the Napoleon's Code are obliged to discover that volition's autonomy, as it is imposed in law by the liberal philosophy, is nowadays a revolute concept and that the individualism shall give its place to another concept, a more altruistic one, concerning the contract which shall accentuate the principle of the good faith in concluding and executing it, on the obligation of the parties of minimizing the suffered prejudice by the breach of the contractual obligations, on the admissibility of the revision of the contract for unpredictability reasons, on a new concept about the lesion in contracts, on the recognise of the unilateral resolution of the contract and all these in the name of a new contractual ethic meant to limit the power of the individual volition. Without having a judicial sanction, being a signally doctrinaire work, they are more and more imposing themselves on the national level, being absorbed by the new European codifications, among which our new Civil Code, recently promulgated.*

Keywords: European law of the contract, the principles of the European law of the contracts, the codification of the European private law

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1. *Ius commune* in the Europe

The necessity and legitimacy of codifying the principles of Contract Law in an European manner bring again into debate the place and role enjoyed by the Roman Law in relation to the legislation of the EU member states. Could one speak about Common Law in Europe, between 1100-1800? This is the key question of a debate initiated by the Journal of International and Comparative Law at the beginning of this millennium[1], receiving answers which were to be invoked, in one way or another, both by the upholders of an European Code and the opponents of such a perspective.[2]

The argument is not a new one. The Roman Law was naturally rediscovered during the Middle Ages in Italy, as shown by the Italian inter-war doctrine[3] which speaks about three stages in the history of *ius commune*:

a) the XII-XIII century, in which the Roman law was imposed as an absolute law, being superior to any other law source;

b) the XIV-XV century, when the subsidiary Roman law filled only the gaps of *ius proprium*;

c) the period following the XV century, when the authority of the Roman law was affected by the kings' power. Yet, the influence of the Roman law did not stop at that point. The Roman law became very powerful throughout the history of the European Law, without being enforced directly, by means of the rational character of its concepts and institutions, of its concise content and logical presentation, thus providing an unquestionable authority to the principles existent in formulae with a legal tradition which influenced the evolution of law favorably. During modern times, the Roman law survives as a specialized and jurisprudential source, being invoked by what is called *communis opinio doctorum*. So we can speak about an evolution of Roman Law which goes from a dogmatic concept to an optional law and afterwards to a theoretical, specialized argument. Starting with the XVI century, the importance of the Roman Law diminishes as a result of the law becoming a "state property". Nonetheless, the Roman law continues to influence both the process of drafting laws and that of enforcing law with the aid of judiciary force and of some dictums always up to date.

The idea of associating the concept of *ius commune* to the European vocation of

[1]J. L. Halpérin, L'approche historique et la problematique du jus commune, RIDC no. 4/2000, pp. 718-731.
[2]A. Marais, «Plan d'action sur le droit européen des contrats», *Revue des contrats* 2004, p. 460 «Cadre commun de référence et Code civil européen», *Revue des contrats* 2006, p. 1276.
[3]P.del Giudice, *Storia del diritto italiano*, Milano 1923. The research was continued by F. Calasso, in *Introduzione al diritto commune*, 1951; the work was re-published in 1962 and 1970.

the Contract Law's principles was embraced, among others, by important German upholders; thus, starting with 1973, the Max-Planck Institute magazine, presenting the history of European Law, is named *Ius commune*. An important work within the field is named *Handbuch der Quellen und Literatur* and is published by the Max-Planck Institute in 1973, being coordinated by Helmut Coing, an author which captures the history of European Law in two volumes called *Europäisches Privatrecht*, published in 1985 and 1989. In Coing's opinion, *ius commune*, the age of glory of the Roman-canonical law dated back between the end of the Middle Ages and the French Revolution, being the moment when a legal literature in Latin appeared; the latter was essential for European universities and not only that it evinced a theoretical and specialized character, but it also proved to be pragmatic, thus influencing the act of justice. From this perspective on the evolution of European Law, the author considers that all the European systems of codification did nothing but affect Europe's legal unity, determining the existence of two legal orders inside every European state, among which only *ius commune* crosses the borders.

Ius commune is genuinely praised by the works of the Romanist writer called Reinhard Zimmermann, the most important being *The Law of Obligations. Roman Foundations of the Civilian Tradition*, published in 1996, in which the author proves that the Roman law has survived within the field of civil obligations as an authentic law grammar, not only in the countries with a Roman-Germanic tradition, but also in the *Common law* ones. Reiner Schultze[1], another author, argues that the combination between *ius commune* and the natural law of modern times continues to exist.

Nonetheless, the perspective regarding the influence of *ius commune* upon European law has also had some opponents who argued that the notion in question was quite vague. Without challenging the existence of *ius commune*, those critiques challenged only to the role played the latter – that of main reference within the history of the European law – in the conditions in which the Roman law did not alter in any way the legal efficiency of consecrated law sources. From another point of view, other critiques stated that the vision mentioned above about Roman Law represented a sort of Roman-Germanic-centrism, by unlawfully providing a general character to Italy and Germany's legal experience

The author of the debate on the matter concludes that there must be made a distinction between the law as normative order and the science of law. The Roman law, as perceived by the European one, appears as a common background of Roman-type rules and as a specialized interpretation of the law with creative

[1] *R. Schultze*, "Un nouveau domaine de recherche en Allemagne: l'istoire du droit européen", *Revue historique de droit français et étranger*, 1992, p. 29

features. Even in the Middle Ages, the Roman law had an additional character and was part of a law order and not of cross-border one. "From an European perspective, but also from an international one, the study of *ius commune* can be perceived as an introduction to a double method of studying law: historical and comparative"[1].

Mutatis mutandis, one may wonder whether history repeats, obviously at a different level, and whether if there is any hope regarding the existence of another reference system, of another *ius commune* of the 21st century, in the field of contracts. And if such law does exist, it must not be imposed through the "argument of force" of the imperial army, but only through the "force of the argument". But the ideal perspective is that European principles of contracts contribute to the enforcement of an united Europe in every way, including the legal aspect, just like the Roman law insured Europe's intellectual unity[2].

At the EU level, the achievement previously mentioned was expressed by the European Commission's Notice addressed to the European Parliament on July 11th 2001, stressing the need for a more comprehensive European legislation in the field of contracts.

The prospect of codifying Contract Law is a subject which has made history and which will continue to do. There has been initiated a passionate debate about the efficiency but most of all about the legitimacy of codifying the principles of the European Contract Law, and even about an European Civil Code – called with obvious sarcasm and reasonable sadness the "Civil Euro-code"[3], given that such an work would make the Napoleonic Code becoming a sort of antiquity. Complaining about the fate of their Civil Code, French authors wonder, in the same typical manner, if the founding fathers of the new projects – Ole Lando, Michael Bonel, Giuseppe Gandolfi – will continue to be worshiped just like Domat, Pothier or Portalis[4].

Without knowing if the former personalities desire such posterity, but most of all without being able to anticipate an eventual answer, we can only acknowledge that their projects are not regarded with the same enthusiasm by the European scholars within the field, particularly by the French ones. "The future of the Civil Law's codification in Europe: harmonizing the old codes or creating a new one?" – this is the main question in the European scholars' mind, the most passionate being the French ones. If at the beginning there was a period in which authors

[1] J .L. Halpérin, quoted works, p. 731
[2] The statement was made by a reputed German Romanist.
[3] J. Huet, "Nous faut-il un "euro"droit civil"? D, 2002, p. 463
[4] Th. Kadner Graziano, „Le futur de la Codification du droit civil en Europe: harmonisation des anceins Codes ou création d'un nouveau Code", www.unige.ch

regarded with interest such a perspective[1], there followed more and more reluctant reactions[2], bringing about more and more questions[3]. "*Faut-il un Code civil européen?*"[4] asks with doubt Benedicte Fauvarque Cosson, suggesting at the same time the answer. The various points of view adopted on the matter were not deprived of some hostile opinions expressed by the passionate upholders of the Napoleonic Code[5]. Consequently, the question mostly tormenting the French doctrine is whether a future European Contract Code can be an alternative to national codes.

2. Arguments for the co-existence of different regulations

There have been invoked several arguments in favor of the co-existence of the two regulations presented above, the most significant being[6]:

- the lack of a legal basis is the most strong argument against the codification of the European Private Law. French scholars, the fiercest opponents of the codification of the European Private Law, notice that European Parliament is not entitled to provide regulations in the field of Private Law, so that such an initiative is deprived of any legal basis[7]. If Article 10 of the European Community Community Treaty imposes to the EU member states to be loyal to European institutions, it must also go the same the other way round. But can one speak about loyalty if the European Parliament urges the European Community institutions to meddle in areas under the competence of the EU member states, in the circumstances in which such actions must be performed only by private groups including specialists of Private Law?

In order to find a juridical basis, the text of art. 95 of the European Community Treaty has been interpreted in extension. The problem is that this norm deals only with the measures for the functioning of single market, so that it can be invoked only for removing the obstacles standing in the way of free movement of goods and services. Thus, if in the field of consumer protection there have been drafted directives which made possible even an European code of consumers, the

[1]Cl. Witz, "Plaidoyer pour un Code européen des obligations" D., 2000, p. 79, D. Tallon,"Vers un droit européen?", Melanges Calomer, 1993, p. 485, D. Tallon, "Les principes pour le droit européen du contrat", Defrénois, 2000, p. 683.
[2]C. Jamin, "Un droit européen des contrats", in *Le Droit privé européen*, 1998, p. 40, V. Heuzé, "À propos d'une initiative européenne en matière de droit du contrat" JCP, 2002, I, p. 40.
[3]Y. Lequette, "Vers un Code civil européen?", Ph. Malaurie, "Le Code civil européen des obligations et des contrats, une question toujours ouverte", JCP, 2002, I, p. 110.
[4]This is the title of a study published in RTDciv, 2002, and the following.
[5]G. Cornu, "Un Code civil n'est pas un instrument communautaire", D, 2002, p. 351, Y. Lequette, "Quelques remarques à propos du projet du Code civil européen de M. von Bar", D, 2002, p. 2202.
[6]Th. Kadner Gratiano, quoted works, *www.unige.ch.*
[7]Y. Lequette, "Quelques remarques a propos …",.quoted works, p. 39.

promulgation of an European Civil Code cannot be done by resorting to the same procedures. The Luxembourg Court of Justice actually condemned the interpretation in extension of the text in question, with the Decision from October 5th 2000[1].

Another justification which may be invoked is the implicit competences theory, consecrated in 1956 by the European Communities Court of Justice, which provides for actions to be taken on the basis of the objectives assigned to the EU. But the argument is not valid, since an European Civil Code is not part of the Union's declared objectives, being opposed both to the subsidiarity and proportionality principles;

- another obstacle standing in the way of a single Contract Law is represented by the differences between the Roman-Germanic legal culture and that of *common law*. The two legal civilizations are the result of a distinct evolution, against a different socio-economic background, both in terms of language and tradition. In the continental or Roman-Germanic system, the judge is interested in texts, while in the *common law* one he is interested in facts. These are two fundamentally different systems. The concept of *ius commune* belongs exclusively to the continental system and space, so that, according to Pierre Lambert, one of the fiercest opponents of the idea of closeness between the two systems, the perspective in question reflects a Romanist conception about law[2], while the way it is brought again into debate represents a genuine "intellectual terrorism"[3] , given that the *common law* system is incompatible with the idea of code[4]. An even more touching opinion is that expressed by Gérard Cornu, according to which the "the fusion obsession represents a cultural abnormality"[5]. Even if they do not state it, the problem is in the same for the islanders, they who instead of "besieging" will become the "besieged ones"[6];

- the opponents of codification also invoke a text argument, that is the European Community Notice on "An European Contract Law. A more coherent European Contract Law – an action plan", dated on February 12th 2003, which suggests preserving different regulation systems;

- the same authors argue that the main objective of an European Contract Code is that of replenishing the juridical treatment applied to cross-border

[1]Business C. 876, Imperial Tobaco and C. 74/99, Europe, December 2000.
[2]P. Legrand, "Sens et non-sens d'un Code civil européen", RIDC, 1996, p. 781.
[3]P. Legrand, "Le primat de la culture, Le droit privée europeen", sous la direction de P. de Varreilles, Sommières, Economica Publ. House, 1998, Collection Etudes juridiques, t. 1, p. 1.
[4]P. Legrand, "Sens et non-sens..." quoted espression, p. 794.
[5]G. Cornu, "Un code civil …", quoted works 351.
[6]X. Lewis X., "A common law fortress under attack: is English law being Europeanized?", *The Columbia Journal of European Law*, 1995/96, vol. 2, p. 1.

operations. Such a code could draw inspiration from Article 1 of the United Nations Convention from Vienna, regarding the contract of international sale of goods, both in terms of the uniform and national law enforcement;

- the opinions supporting the replacement of national codes with an European one are expressed only by few certain states, while many others would prefer to maintain them;

- the preservation of national codes could avoid what is sometimes called the "cultural shoc"[1] experienced by certain states, represented by France – which considers that the contract regulation is part of its national patrimony. It has become famous Jean Carbonnier's statement, according to which the French Civil Code is a "genuine Constitution of France"[2];

-it could be thus avoided the loss of a codification which influenced all the law families, without risking to separate "the legal order as mother" from the other "family members"3;

- the idea of assigning internal contracts to an European contractual regime may often turn out to be excessive, given that the old codes have already proven their efficiency, not to mention that Vienna Convention regards them as a viable solution;

- by accepting the diversity which unites us, we must show our tolerance and not just speak about it. If only one code is to be applied, then the diversity of judiciary speeches and styles[4] will be lost. In other words, by quoting a pathetic saying: "The uniform Europe will lose its soul!"[5];

- the co-existence of several systems will be productive for the internal codes under the circumstances in which "competition animates the spirits better than unity"[6]. The message delivered by the codification upholders, stating that "Europe needs a single voice in terms of law" seems to be rather an aspiration towards the "the law of the past". "Where is the effect of the law modernization,

[1]Fauvarque-Cosson, quoted expression, p. 463.
[2]J. Carbonnier, *Droit civil. Introduction*, 26-ed. Paris, 1999, nr. 82: " dans une societé dont le droit public avait changé de constitution dix foix en cent cinquante ans, il était bon de maintenir à la constitution civile – la veritable – cette légimité qu'assure, *more britannico,* la continuité de formes", J. Carbonnier, "Le Code civil" în P. Nova, Les lieux de mémoire, t. 1: La nation, Paris, 1997, p. 1331.
[3]Th. Kadner Gratiano, quoted works.
[4]Legrand, RIDC, 1996, p. 779 (v. e.g. no. 807, 812: "Pluralisme ou monotonie? Difference ou ennui? Europe authentique ou syntétique".
[5]Malaurie, JCP 2002, Doctr. P. 281.
[6]Fauvarque-Cosson, quoted works, p. 463, Fr. Terré, "A propos d'un droit européen des contrats", *La semaine juridique*, ed. Générale, no. 46, 16/11/05.

so much sought for?" ask the opponents of codification[1]. The same authors argue that an uniform law within European space would not reach the ultimate goal of any codification, which is the legal safety.

The conclusion which captures the arguments against an European Code is offered by Yves Lequette who states that "unifying civil legislation in Europe is nothing but the expression of an imperialist vision, a dangerous project from a political point of view, nocuous from a cultural perspective and useless in terms of economy".[2]

3. Arguments for codifying the Contract Law

The replacement of old regulations by an European Contract Code is supported by the following arguments[3]:

- the solution of a single regulation in terms of contracts is regarded as simpler and more efficient than the co-existence of several regulations:

a) national regulations for internal cases;

b) the European code for cross-border contracts,

c) a third system for extra-European relations, provided by the Vienna Convention;

d) a fourth system of private international law, according to the Rome Convention, and European regulations on European cross-border contracts;

- the possibility of going for internal regulations would diminish the importance of the European Code, by affecting its authority[4] and limiting its applicability only at cross-border contracts[5];

- only a set of European regulations could match the internal market requirements, no matter if the parties are to be found on the territory of a state or another;

- on the other hand, it must not be forgotten that old codes represent the past, which is a glorious one. Contractual law does not have the same national specificity as folklore does[6];

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[1]Fr. Terré and A. Outin-Adam, "Codification – l'anee bicentenaire", Recueil Dalloz, 2004, no. 1.
[2]Y. Lequette, "Vers un Code civil européen?" Pouvoirs 4/2003/4, no. 107, p. 124.
[3]Th. Kadner Gratiano, quoted works.
[4]B. Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäische Union*, Wien/New York, 2002, p. 158.
[5]Cr. Von Bar, RIDC 2001, p. 127.
[6]O. Lando, ERLP 2000, p. 59.

- finally, establishing the scope of the two regulations will be a difficult mission.

The author who analyzed the pros and cons mentioned above drew a brief conclusion referring to the upholders of the European Code[1], a conclusion that we consider interesting and agree with, as it follows:

- a single regulation of contracts based on an European Code risks to impoverish us, while the co-existence of the two regulations will enrich our knowledge, by forcing us to become creative;

- nothing will prevent the parties concluding an internal contract from ascribing it to European regulations;

- in practice, there is no choice between the old and the new, since we have the chance of using both regulations.

4. The effects of approaching the Contract Law

The main objective of European institutions is that of building a single market, an objective which can be achieved only by multiplying cross-border contracts. Although these contracts are extremely popular today, they are still governed by obsolete law principles and texts. In terms of the European debate on the Contract Law, the French doctrine – which is famous for its pride of having provided the world with the Napoleonic Code – has no choice but admitting that the Code in question has become out of date, given that, out of the 289 articles of the French Code on civil obligations and contracts, 261 texts – that is 90% of the Code – entered into force on March 21st 1804, an aspect which, according to the European Commission, is nothing but a drawback.

Despite this reality, the European Community Treaty, in its initial form, pays little attention to Contract Law, by using only the expression "closeness between national legislations". The steps made for harmonizing the national regulations of contracts are still few, being connected to the consumers' legal protection.

4.1. Regulations and directives constitute legal instruments provided by the European Community Treaty in order to harmonize national legislations. Besides them, the institutions of member states have also used other procedures, such as resolutions, recommendations or codes of conduct[2].

While regulations can be applied directly within internal law, being assimilated by the national law order, directives seem to be more flexible, a reason for which they have been used mostly in relation to the consumer protection field, touching

[1] *Th. Kadner Gratiano*, quoted works.
[2] For that purpose, see V. Pătulea, Gh. Stanca, *Dreptul contractelor*, C.H. Beck Publ. House, 2008, pp. 367-402.

areas such as: contracts negotiated outside commercial establishments[1], harmonization of legal and regulatory provisions in the consumption credit field[2], journeys, holidays or round tours based on agreements[3], abusive clauses within contracts concluded with consumers[4], consumer protection in relation to purchasing a temporary right of use of real goods[5], contracts concluded from a distance[6], certain aspects regarding the consumption goods sale and guarantee[7].

Nonetheless, such directives have a limited scope and accomplish a sequential harmonization which, from a Community perspective, is represented by a variety of adjustments within internal laws deprived of coherence.

The Maastricht Treaty introduced Article. 153 of the EC Treaty, according to which consumer protection became a communautaire policy, thus encouraging the establishment of an acquis ***communautaire***[8] ***in the field and creating the basis of a Consumption European Code***[9]

4.2 Principles of the European Contract Law (PECL)

Following an international conference held in Copenhagen in 1974 for the purpose of drafting a community convention bill regarding the law enforceable in terms of contractual and extra-contractual obligations, at the initiative Ole Lando, a Dutch professor, there was established a Commission for the European Contract Law, having professors Georges Rouhette and Denis Tallon as French members. This project was subsequently published in 1996 and 1998, representing an attempt of conciliating the two law systems – Roman-Germanic and *common law* one – under the leadership of professor Ole Lando.

4.3. The Common Core of European Private Law[10].

Mauro Bussani and Ugo Mattei, the authors of this project launched in 1995,

[1]Directive 85/577/CE of the Council of Europe from December 20th 1985.
[2]Directive 87/102/CE of the Council of Europe from December 22nd 1986.
[3]Directive 90/314/CE of Council of Europe from June 13th 1990.
[4]Directive 93/13/CEE from April 5th 1993.
[5]Directive 94/47/CE from October 26th 1994 of the European Parliament and the Council of Europe. This Directive was considered to have generated a new type of contract – *time sharing* contract at first, and then a new contract on property right, with the same name. For more details, see *S. Neculaescu*, "Proprietatea time sharing între iluzii şi realitate", the *Annals of the Faculty of Juridical, Social and Political Sciences*, no. 2/2009.
[6]Directive 97/7/CE of the European Parliament and the Council of Europe from May 25th 1999.
[7]Directive 1999/44/CE of the European Parliament and the Council of Europe from May 25th 1999.
[8]For that purpose, see T. Bourgoignie, "L'impact du droit européene de la consommation sur le droit privé des Etats membres", în *L'harmonisation du droit des contrats en Europe*, Economica Publ. House, 2001.
[9]F. Osman, *Vers un code européen de la consommation*, Bruxelles, 1990.
[10]M. Bussani and U. Mattei, "Le fond commun du droit privé européen", RIDC 1/2000, pp. 30/47.

aimed to identify the common components of the European Private Law, by drafting an European legal map and establishing a common legal culture, with the elaboration of the project called *Common Core* – dedicated to teachers – and the publishing of an *European case-books* – dedicated to students.

In the opinion of the two promoters of the project in question, the most efficient integration is not be achieved on a short term, but only by means of some previous mutual knowledge of the features which characterize each and every regulation. It is considered that the European principles which govern the Contract Law must institute a "soft law", that is a flexible and non-binding one.

4.4. The Italian model of codifying the Contract Law

Starting from the idea that the Contract Law needs to be harmonized and that the regulation of the obligations existing in the IV Book of the Italian Civil Code, in its reformatted form, may be an European model, ensuring at the same time the continuity of some well preserved principles of the Roman Code, the Italian professor Giuseppe Gandolfi proposed the model in question for the projects of European codification of the Contract Law[1]. After being accepted, there was established the Academy of European Private Lawyers, with the headquarters at Pavia, which ever since 1995 elaborated works on the topic "***European Contract Code - Preliminary Draft***" – appreciated and considered that, just like Lando Principles, could be taken into account in terms of a future codification of civil obligations. It can be thus explained why the drafters of the Romanian Bill of Civil Code drew inspiration from the project mentioned above when drafting certain norms, particularly those regarding vices of consent.

4.5. The study group on an European Civil Code (ECC)

With its two resolutions from 1989 and 1994, the European Parliament urged the European Commission and European jurists to draft a law on the European Civil Code. In 1998 it was created the "The study group on an European Civil Code", which later on, in 2000, on the occasion of an European Parliament's information session called "A Civil Code for Europe", proposed a new resolution on that matter, a project which, even though was not abandoned, could not evolve as a result of the adverse reactions highlighted in the previous sections.

In an explicative paper of his[2], Professor Christian von Bar asserts that "no one is trying to abandon the already existing national codes. They will continue to exist for a long period of time"[3]. What is currently of interest and exerts a great impact

[1]G. Gandolfi, "Pour un code européene du droit des contrats et des obligations", RTDC, 1992, p. 707.
[2]Cr. von Bar, "Le group d'études sur un Code civil européen", R.I.D.C. no. 1/2002, pp. 127-139.
[3]Ibidem, p. 131

on cross-border contracts are civil obligations, the movable and immovable goods law or credit guarantees.

4.6. Unidroit Principles applying to commercial contracts[1]

In 1971, the International Institute for the Unification of Private Law located in Rome initiated one of the most audacious projects regarding the elaboration of a set of principles applying to commercial contracts. Among the most reputed scholars who contributed to that initiative there was also the Romanian professor Tudor Popescu.

Published in 1994 and afterwards in 2004, in a consolidated variant, Unidroit Principles brought about, as it was expected, an extremely passionate debate, the opinions expressed going from exaggerate optimism to some of the sharpest critiques. The French academic community was reluctant mostly about classifying those principles as law ones, given that legal doctrine defines legal principles as "a legal rules based on quite general texts, applied in various circumstances and having a superior authority"[2]. Since Unidroit Principles do not have a coercive character, they cannot be seen as true law principles, having only doctrinaire value and the vocation of becoming law rules, if they are to be codified. Unidroit Principles may be applied either as *lex mercatoria*, when both parties decide to resort to them in relation to their contract, or as interpretation or addition to the other instruments of uniform law. At the same time, having been studied by theoreticians, academicians, and practitioners, Unidroit Principles became a source of inspiration for national legislations, as it also happened with the Romanian draft of Civil Code (see the following).

4.7. *Common Frame of Reference* (CFR) an alternative to *Draft Common Frame of Reference (DCFR)*?

With its notice from February 12th 2003, the European Commission proposed a new objective for the European Contract Law, that of seeking a reference frame to include a common terminology and a set of guiding principles. After having been acknowledged that until that notice there had been only a limited preoccupation in the field of contracts, it was suggested to improve the *acquis communautaire* by improving the access to Community law and increasing the latter's quality, by giving up at the idea of minimal harmonization, by giving up at the practice of European directives and replacing them with recommendations, a system which would allow the European Commission to interfere in areas where it does not have normative competences[3].

[1]Abbreviated UP.
[2]G. Cornu, *Vocabulaire juridique*, Quadrige, PUF, 1997, p. 720.
[3]For more details, see V. Pătulea, Gh. Stanca, quoted works, pp. 391-398.

Even if most of the French legal doctrine does not support an unique European Contract Law, it could not ignore the fact that the latter became of interest for other European states. In 2005, Henri Capitant Association and the Society of Comparative Legislation, under the guide of professors Bénédicte Fauvarque Cosson and Denis Mazeaud, elaborated a common terminology[1] project, while professors Guillaume Wicker and Jean-Baptiste Racine revised the principles of the European Contract Law, elaborating the Main Principles of the same law mentioned above; their works were concluded in 2007 and then sent to the European Commission, constituting an alternative model to *Draft Common Frame of Reference* (DCFR).

What is the legal nature of CFR? This is the question which nowadays torments the Private European Law doctrine. If the role assigned to such a frame at the beginning was that of stating the main principles of contracts and of defining concepts in order to remove the incoherent expressions based on ambiguous terms used by directives and other specialized instruments, being symbolically called "*boite d` outile*"[2] (tool box), nowadays that role is perceived as that of creating an European Contract Law[3].

At the end of a passionate plea for the French cause[4], the author wonders: "Why not consider that in the field of the European Contract Law nowadays exist two competing offers, which could be compared in order to elaborate once and for all the CFR?".

The answer can only be a political one.

[1]A. Marais, "Plan d'action sur le droit européen des contrats", *Revue des contrats* 2004, p. 460 "Cadre commun de référence et Code civil européen", *Revue des contrats* 2006, p. 1276.
[2]A. Marais, "Cadre commun de référence et Code Civil", *Revue des contrats* 2005, p. 1204.
[3]L. Miller, "The Common Frame of Reference and the feasibility of a common contract law in Europe", *Journal of Business Law*, 2007, June, 378-411.
[4]D. Mazeaud, "La terminologie commune et les principes directeurs du droit des contrats", ERA Forum (2008), published online on August 29th 2008.

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[1] Halpérin, J.L., *L'approche historique et la problématique du jus commune*, RIDC nr. 4/2000, pp. 718-731.

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[3] del Giudice, P., *Storia del diritto italiano*, Milano 1923. Research by Calasso, F., *Introduzione al diritto commune*, 1951.

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[5] Halpérin, J.L., op. cit., p. 731.

[6] Zimmermann, Reinhard.

[7] Huet, J., *Nous faut-il un «euro» droit civil?* D, 2002, p. 463.

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[11] Lequette, Y., *Vers un Code civil européen?*; Malaurie, Ph., *Le Code civil européen des obligations et des contrats, une question toujours ouverte*, JCP, 2002, I, p. 110.

[12] Este titlul unui studiu publicat în *RTDciv*, 2002, p. 463 şi urm.

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[14] Kadner Gratiano, Th., op. cit., www.unige.ch.

[15] Lequette, Y., *Quelques remarques à propos* …, op. cit., p. 39.

[16] Afacerea C. 876, Imperial Tobaco şi C. 74/99, Europe, décembre 2000.

[17] Legrand, P., *Sens et non-sens d'un Code civil européen*, RIDC, 1996, p. 781.

[18] Legrand, P., *Le primat de la culture. Le droit privée européen, sous la direction de P. de Varreilles,* Sommières, Economica, 1998, Collection Etudes juridiques, t. 1, p. 1.

[19] Legrand, P., *Sens et non-sens*... loc. cit., p. 794.

[20] *Cornu, G.,* op. cit. p. 351.

[21] Lewis X., «*A common law fortress under attack: is english law being europeanized ?*», *The Columbia Journal of European Law*, 1995/96, vol. 2, p. 1.

[22] Fauvarque-Cosson, loc. cit., p. 463.

[23] Carbonnier, J., *Droit civil*. Introduction, 26-ed. Paris, 1999, nr. 82: "dans une societé dont le droit public avait changé de constitution dix fois en cent cinquante ans, il était bon de maintenir à la constitution civile – la veritable – cette légimité qu'assure, *more britannico,* la continuité de formes"; Carbonnier, J., *Le Code civil* în P. Nova, *Les lieux de mémoire*, t. 1: La nation, Paris, 1997, p. 1331.

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[25] Legrand, RIDC, 1996, p. 779 (no. 807, 812: *Pluralisme ou monotonie? Difference ou ennui? Europe authentique ou syntétique.*

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[30] Kadner Gratiano, Th., op. cit.

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[33] Lando, O., ERLP 2000, p. 59.

[34] Kadner Gratiano, Th., op. cit.

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[37] Directive 87/102/CE, 22.12.1986.

[38] Directive 90/314/CE, 13.06.1990.

[39] Directive 93/13/CEE, 5.04.1993.

[40] Directive 94/47/CE, 26.10.1994.

[41] Directive 97/7/CE, 25.05.1999.

[42] Directive 1999/44/CE, 25.05.1999.

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[48] Ibidem, p. 131.

[49] Prescurtat, PU.

[50] Cornu, G., *Vocabulaire juridique*, Quadrige, PUF, 1997, p. 720.

[51] Pătulea, V., Stanca, Gh., op. cit., pp. 391-398.

[52] Marais, A., «*Plan d'action sur le droit européen des contrats*», *Revue des contrats* 2004, p. 460 «*Cadre commun de référence et Code civil européen*», *Revue des contrats* 2006, p. 1276.

[53] Marais, A., «*Cadre commun de référence et Code Civil*», *Revue des contrats* 2005, p. 1204.

[54] Miller, L., *«The Common Frame of Reference and the feasibility of a common contract law in Europe»*, *Journal of Business Law*, 2007, Jun, 378-411.

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