TIBOR TAJTI

SYSTEMIC AND TOPICAL MAPPING OF THE RELATIONSHIP OF THE DRAFT COMMON FRAME OF REFERENCE AND ARBITRATION
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“We, the academic teams that in 2005 contracted with the European Commission to deliver […] the Academic Common Frame of Reference, hope to bring about a framework set of annotated rules to which the European and national legislators and the European and national courts, including arbitral tribunals, can refer to when in search for a commonly acceptable solution to a given problem. This ‘Common Frame of Reference’ is also drafted with a view to allowing parties to a contract, whether cross-border or purely domestic, to incorporate its contents into their agreement.” [Emphasis added.]²

Christian von Bar, Co-editor of the Draft Common Frame of Reference
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<th>Full Form</th>
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<tbody>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>BGB</td>
<td>German Civil Code (Bürgerliches Gesetzbuch)</td>
</tr>
<tr>
<td>B2C</td>
<td>Business to Consumer Contracts</td>
</tr>
<tr>
<td>B2B</td>
<td>Business to Business Contracts</td>
</tr>
<tr>
<td>CLOUT</td>
<td>Case Law on UNCITRAL Texts</td>
</tr>
<tr>
<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FAZ</td>
<td>Frankfurter Allgemeine Zeitung</td>
</tr>
<tr>
<td>FDCPA</td>
<td>(US federal) Fair Debt Collection Practices Act</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce (Paris)</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes (Washington D.C.)</td>
</tr>
<tr>
<td>IFA</td>
<td>International Franchise Association</td>
</tr>
<tr>
<td>INCOTERMS</td>
<td>International Commercial Terms (ICC)</td>
</tr>
<tr>
<td>PECL</td>
<td>Principles of European Contract Law (Lando Commission)</td>
</tr>
<tr>
<td>ROT</td>
<td>Retained Title (in Europe and DCFR: Retained Ownership)</td>
</tr>
<tr>
<td>UCP</td>
<td>Uniform Customs and Practice for Documentary Credits (ICC)</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNIDROIT</td>
<td>International Institute for the Unification of Private Law</td>
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A. INTRODUCTION OR WHY DEAL WITH THE RELATIONSHIP OF THE DCFR AND ARBITRATION

1. THE QUERIES

Having the above succinct formulation of what the Draft Common Frame of Reference (hereinafter: DCFR) is meant to be used for – as put forward by Christian von Bar, one of the chief-editors of the project leading to this voluminous, code-like yet soft-law instrument – three interrelated issues offer themselves to be explored. Out of these three, the following ones will be focused upon in this article: firstly, is the DCFR exploitable by arbitrators, in what form(s) and subject to what limitations, as well as, secondly, can the DCFR, in toto or its parts, serve as the law applicable to the substance of dispute, either as a codified source of rules of law, or as lex mercatoria? These goals admittedly reach beyond giving a thought to whether the DCFR could be used to ‘find commonly acceptable solutions to concrete problems’ suggested by von Bar in the above quotation.

The ensuing discourse will also be a reflection on the third query that is related to the exploitability of the DCFR for teaching European and comparative private law. In fact, at the moment, exactly the third use seems to be the most realistically achievable goal. Embedded in the elaboration there are also thoughts on the extent, form(s) and caveats corollary to DCFR’s perusal in other forms of alternative dispute resolution (hereinafter: ADR), or in court proceedings with international elements. Generally speaking, it seems that most of what will be said here applies also to these other dispute resolution forms though with the necessary adaptations to fit the distinguishing features of these.

The most mundane justification behind this paper is that notwithstanding the upheaval that surrounded the launching, work and the appearance of the instruments making the DCFR, or the quite significant scholarly attention in Europe, no publication seems to have dealt specifically with the relationship of the DCFR and arbitration so far. It ought to be admitted as well that the information on the very coming of the DCFR into being has bypassed well known and established arbitral communities. In fact, outside the world of scholars that had been linked to the project or have become interested in it, the DCFR has made its debut essentially only

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before the ECJ. At any event, no reported arbitral award with references to it seems to have seen the daylight so far. Having that in mind, this article will be seminal.

Two further preliminary, yet quintessential points need to be added. On the one hand, what we will refer to here in a shorthand manner as the ‘DCFR’ is in fact made of more documents of varying nature: viz., the so-called Outline Version of the DCFR with a code-like structure, contents and style, the six volumes of the Comments, and the yet-to-be published national notes together making the so-called ‘full version’ of the DCFR. On the other hand, the above and numerous other related queries will be taken a look at in this paper by the author of this paper who has not participated in the drafting of the DCFR nor has had any stake in the

3 On 24 Aug. 2012, reference was made to the DCFR, all in the Opinions of Advocate General Trstenjak, in cases Nos. C-540/08; C-227/08; C-215/08; C-137/08; C-489/07; C—275/07; C-445/06 and C-180/06.

See, e.g., note 54 of the Opinion of Advocate General Trstenjak aptly pointing to another potential use of the DCFR: “As long as there is no uniform European civil law, the Court of Justice continues to be dependent on the information provided by the national courts on the points of national law arising in a given domestic case for the purposes of interpreting the concept of unfairness under Article 3(1) of Directive 93/13 in relation to a specific term. That said, in principle, the Court could conceivably also draw, in the alternative, on codification models developed by European academics, such as the Draft Common Frame of Reference (DCFR), in order to find appropriate solutions to disputes at civil law.” See Case C-137/08 VB Pénzügyi Lízing Zrt. v. Ferenc Schneider (Reference for a preliminary ruling from the 2nd and 3rd District Courts of Budapest [II. és III. Kerületi Bíróság] (Hungary)).

See also note 57 of the Opinion of Advocate General Trstenjak (delivered on 4 Sept. 2008) in Case C-445/06, Danske Slagterier v. Germany (Reference for a preliminary ruling from the Federal Supreme Court [“Bundesgerichtshof”], Germany). In the note, reference was made to DCFR paragraph (2) of Article III 7:201 providing for three years as general time of prescription. In the case, one of the issues revolved around what the reasonable time limits “[…] for bringing proceedings constitutes an application of the fundamental principle of legal certainty with the result that, in principle, time-limits are compatible with Community law […]” Id. point 89.

4 The Outline Edition of the DCFR (hereinafter: Outline DCFR) is available electronically at <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf>; last visited 8 May 2013. Following continental European traditions, besides a quite detailed introduction, the text is divided into ten books (as the largest units), which are then sub-divided into chapters, sections and articles (articles into paragraphs). Note that the General Introduction is the same in the Outline Version and in the Comments. Hence, hereinafter they will be referred to as the “DCFR General Introduction.” The ‘national notes’ are not yet available and hence will not be referred to in this paper.

5 The full reference to the six volumes of the commentary is Christian von Bar and Eric Clive (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), (published by Oxford University Press and Sellier, 2010); hereinafter “DCFR Comments” or “Comments.”

6 The full version is foreseen to include also notes “on the solutions adopted by the laws of the Member States.” At this point in time it is unclear what level of detail would that entail. See Eric Clive, European Initiatives (CFR) and Reform of Civil Law in New Member States: Differences between the Draft Common Frame of Reference and the Principles of European Contract Law, available electronically at <http://www.juridicainternational.eu/index.php?id=12719 >; last visited on 8 May 2013.
success or failure of the project. The modicum of optimistic support for the DCFR to be felt while reading the text is attributable merely to a comparativist who is modestly enthused with the developments, the leap forward that might ensue in Europe due to the appearance of the DCFR – especially in the domain of two such important fields of economy as franchise and financial law, including secured transactions law as materialized in Book IX of the DCFR.

7 Given the close linkage of the Common European Sales Law (CESL) and the DCFR, it ought to be mentioned here that the author of this paper was one of the guest speakers at the EPP (Group of the European People’s Party – Christian Democrats) Public Hearing on the CESL “A balanced proposal between consumers and traders?” held in Brussels, on 6 Dec. 2012.
2. THE THESES ON THE POSSIBLE EXPLOITATION OF THE DCFR

Speculating on the ranking order in which the DCFR may be realistically exploited, the position of this paper is that – at least, from today’s perspective – the DCFR is primarily useful as a supplementary educational tool for teaching European and comparative private law. The perusal of the DCFR as a handy repository for arbitrators (and perhaps also judges) allowing easier finding and determination of the meaning of laws should not be excluded either. Still, this alternative must rank second only especially in the lack of empirical evidences to the contrary. The DCFR’s potential use by lawmakers of countries\(^8\) that plan to modernize their domestic laws to match contemporary European standards is equally realistic already now. This notwithstanding that lawmaking is obviously such a complex process which is influenced by myriad factors from politics to the personal preferences and the background of involved experts – and the attitude of these towards the DCFR.\(^9\)

As far as the arbitrability of the DCFR is concerned, von Bar’s vision that the DCFR could serve as a box wherefrom rules of law for “commonly acceptable solution[s]” could be selected is not unrealistic either.\(^10\) Suffice to take a look at the encouraging data on the number of ICC cases decided based on general principles extrapolated from similar sources of law.\(^11\) Moreover,

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\(^8\) That might be the case, for example, with Montenegro and some other successor countries of Yugoslavia (i.e., West-Balkans).

\(^9\) This should not be mixed up with the process of what has come to be known as the ‘Europeanization of private law’ – a centrally orchestrated project that has already received fierce criticism, has led to resistance and the dropping of the idea that the DCFR could morph into a European civil code. The Italian opinion on the DCFR, for example, was succinctly expressed by Pasa, claiming that while Italian scholars have welcome the “promotion of the Europeanization of private law through the process of improving the coherence of EU legislation in the areas of consumer protection and contract law [however] the DCFR and the [Acquis Principles] fall significantly short of achieving these goals.” Some other concerns of the Italians were: 1/ gaps in the DCFR, 2/ democratic deficit (i.e., only a group of elite scholars was involved); 3/ the parallel revision of the EU consumer acquis was a mistake (leading to divergences between the two); 4/ the DCFR is often extended to B2B (i.e., business-to-business) contracts without a good reason, and 5/ the contents of some of the general principles give reasons to concerns. See Barbara Pasa, the DCFR, the ACQP (i.e., Acquis Principles) and the Reaction of Italian Legal Scholars, Eur. Rev. Priv. L. 2-2010 (227-258).

\(^10\) In the famous Channel Tunnel case ([1993] A.C. 334), involving a joint-venture between five British and five French construction companies, clause 68 the construction contract provided: “The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French in the English part of the site, to the respective French or English public policy (order public) provisions.” Text available electronically at <http://www.biicl.org/files/2866_translink.pdf>; last visited on 8 May. 2013.

\(^11\) Karton, in a paper devoted to scrutiny of arbitrators’ approaches to interpretation, listed – out of fifty-three published ICC awards – six in which application of general principles of international law was agreed upon, plus eight that contained no discussion whatsoever on substantive law – though the latter.
the DCFR’s *codified* nature cannot but be an advantage compared to the earlier known a-national laws made typically of *fluid* rules and concepts. This is of importance because the reception of *lex mercatoria* or deciding based on *ex aequo et bono* has been lukewarm (to say the least) exactly because of the “amorphous” nature of such a-national transnational sources of law. The codified DCFR containing transnational rules of law coupled with the freedom that an arbitrator enjoys over a judge in perusing such supra-national sources of law is, indeed, what might jumpstart the DCFR. It is also of relevance that *lex mercatoria* has become comparably more acceptable than a few years earlier. The ever wider impact and the success of the UNCITRAL Model Law recognizing the exploitability of such sources of law as law applicable to the substance should also help the cause of the DCFR.

The frequency with which the Unidroit Principles of International Commercial Contracts (hereinafter: Unidroit Principles) – instrument similar in nature yet of narrower reach – have been applied or referred to could also give some hope for the DCFR; even though the

forcing the arbitrators to resort also to international principles of law. See Joshua D.J. Karton, *International Commercial Arbitrators’ Approaches to Contractual Interpretation*; chapter from the forthcoming book *the Culture of International Arbitration and the Evolution of Contract Law* (Oxford, foreseen for 2013), at 13; the chapter is available through <http://www.SSRN.com>.

12 Lehmann is of similar though perhaps of a bit more optimistic pro-DCFR opinion in that respect. See Matthias Lehmann, *Anwendung des CFR in Schiedsverfahren*, in: Martin Schmidt-Kessel (ed.), *Der Gemeinsame Referenzrahmen* 433-455 (Sellier, München, 2009), at 436-39. As he noted, given that §1051 of the German Code on Civil Procedure (“Zivilprozessordnung”) was inspired by Article 28 of the UNCITRAL Model Law in respect of the arbitrator’s rights as to the law applicable to the substance, German law does not prescribe resort to *lex mercatoria* or rules of law – if the parties have so agreed. *Id.* at 436. Yet, if the parties have not contracted for the DCFR (or other a-national) law, according to the same provision, the arbitrators can resort only to a law of a ‘state.’ *Id.* at 440.

13 See, e.g., Lithuania where article 31(1) of the Law on Commercial Arbitration (No. I-1274 of 2 April 1996) allows for the choice not only of a ‘law’, but also of ‘legal norms.’ Furthermore, based on the 3rd subsection of the same article, if so agreed upon by the parties, the arbitrators may decide also *ex aequo et bono* or as *amicable compositeurs*. The 4th subsection allows for taking into account of trade practices of specific industries. Text of the act available at <http://www3.lrs.lt/pls/inte3/dokpaieska.showdoc_lp_id=56461>. In article 39(2) of the new consolidated text of this act (amended in 2012) even the phrase ‘*lex mercatoria*’ is added next to the Lithuanian text.

14 For the impressive list of jurisdictions that have passed law inspired by the 1985 UNCITRAL Model Law see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

15 By analogy, the same applies to the DCFR what van Houtte said about the prospects of the Unidroit Principles becoming ‘*lex mercatoria*’ – to wit, “the Unidroit Principles will become *lex mercatoria* only when accepted by the legal community […] and not merely [by] the … drafters of the Unidroit text, no matter how skilled and reputed these lawyers may be.” Hans van Houtte, the Unidroit Principles of International Commercial Contracts and International Commercial Arbitration: their Reciprocal Relevance, 181-195, in: *the Unidroit Principles for International Commercial Contracts: A New Lex Mercatoria?* ICC Publ. No. 490/1 (1995), at 184.

The Unidroit Principles of International Commercial Contracts (hereinafter: Unidroit Principles) have three editions, the first from 1994, the second from 2004 and the latest one from 2010. The text of
two now essentially compete for preeminence. The statistics concretely say the following: at the moment, UNILEX contains a list with 161 arbitral awards and 133 court decisions that have relied on or referred to the Unidroit Principles. Moreover, the first arbitral awards with references to the Unidroit Principles have appeared very shortly after its release (courts needed a bit more time for digesting the material). Whether a similar scenario awaits the DCFR obviously is contingent on several factors. Compared to the Unidroit Principles (or the PECL), for example, the DCFR comprehensively covers civil law; what may but must not be an advantage when pondering about its acceptability by arbitrators. Yet as it embodies updated law and is supported by more detailed, in-depth going commentaries, these features might also make it attractive to arbitrators.

Still, the future of the DCFR in arbitral circles is uncertain at the moment; it would be naïve to claim anything more than that. It is not only the costs and risks corollary to dissemination of everything that is new, but also the already visible, occasionally quite fierce resistance coming from the side of defenders of local laws that will presumably postpone the appearance of first arbitral awards with references to the DCFR for years in time. One may presume as well that many countries would face even financial problems for providing the means for study of the DCFR by local legal communities. Further, the post-socialist countries’ reform fatigue will undoubtedly play a role as well, let alone the jurisdictions caught by the still unfolding sovereign debt crisis. Last but not least, the code-countries almost certainly will look upon the DCFR as rivals to their venerable codes. Traditional centers for litigating or arbitrating international disputes (like the UK) fear losing their preferential status. Finally, the DCFR will have to ram through the quite closed circles of international arbitrators as well.

On the brighter side, the DCFR might become one of the tools in the hands of countries that aspire to become regional arbitral centers. As in the 21st century international arbitration is less veiled with a kind of aristocratic “mystique” and international scholars openly talk of the financial benefits arbitration generates not just for the arbitrators, but also for the economies of the host states, this is a fact that should be reckoned with as well.

The 2010 version with the official Comments is available at the website of UNILEX, a database of related international case law and bibliography that originated in the research project that had started in 1992 by the Centre for Comparative and Foreign Law Studies. The website is at <http://www.unilex.info/>; last visited on 8 May 2013.


17 Wilske and Fox classified countries into three classes – though without explaining why others have been left out – to wit, 1/ the ‘Big Four’ (England, France, Switzerland and the US), 2/ the ‘runners-up’ (Austria, China & Hong Kong, Germany, Singapore and Sweden), and 3/ the ‘relative newcomers’ (e.g., Dubai, Spain, Turkey, India and Korea). See Stephan Wilske and Todd J. Fox, Chapter II: the Arbitrator and the Arbitration Procedure – the Global Competition for the “Best” Place for International Arbitration – Myth, Prejudice, and Reality Bits, in: Christian Klausegger, Peter Klein, et all (eds.), Austrian Arbitration Yearbook 2009 (C.H. Beck, Stämpfli & Mainz, 2009).

DCFR is a soft law that might apply to the substance only and it cannot play but a supplementary role to the law regulating the arbitral procedure. Still, even though the overwhelming part of the writings on arbitration deals only with arbitral law *stricto sensu* creating the false impression that only procedural law matters, substantive law is also one of those factors that might influence the choice of whether and where to arbitrate.

It is sufficient to take a look at two recent self-promoting efforts: the 2005 campaign of the UK Department for Constitutional Affairs followed by the one of the Law Society of England and Wales in 2007 and the response from Germany in the form of a document entitled “Law – Made in Germany.” The last, with quite eloquent language, suggests that one of the huge advantages Germany as a potential host of international arbitrations is the existence of the venerable civil code – the BGB, which makes German law “more cost-effective and reliable than contractual agreements under English or the US law.” Apart from the fact that numerous glosses could be added to the “flexibility” codified law might offer, one might wonder why the German highly technical code would be more valuable than the French, Lithuanian or such a recent code as the Dutch one. Especially the last one has the obvious advantage of offering updated law more closely reflecting the social and economic conditions of the last few decades. In summary, the time might come when in this race the advantages of the DCFR might outweigh those of predicting that 425 arbitrations will take place in Toronto in 2012 and that each case will involve total expenditures by the parties of approximately $600,000.

To this one should always add the famous words of Lord Cullen of Ashborne, who in his speech supporting the passage of the first modern English Arbitration Act of 1979 claimed that “a new arbitration law might attract to England as much as £500 million per year […] in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.” See Stephan Wilske and Todd J. Fox, Id., at 385.


20 See the Press Release of the Law Society of 5 Oct. 2007 proclaiming that: “The government, the City and the Law Society have joined forces to promote England and Wales as the jurisdiction of choice.”

21 See German Ministry of Justice, Law – Made in Germany – Global, Effective and Cost-Efficient (2008), at 7; available electronically at <http://www.lawmadeingermany.de>; last visited on 8 May 2013. It is also stated that “[c]odification enables swift and straightforward access to law [as well as] provides legal certainty, as legislation contains general principles and guidelines, and defines the terminology used. […]” While codified law obviously has its advantages, like everything in this world, it also has its drawbacks. Suffice to mention the most famous German security devices on movables and intangibles, the so-called ‘contract-based security devices’ or “*kautelarische Sicherheiten*.” Out of these most widely used securities, however, only the simple retention of title exists in codified form, the rest is the product of court decisions and innovation of businessmen and their counsel.

Juxtapose to the German text what the English brochure says about English law: “Beyond the direct and unparalleled expertise of the UK lawyers in different sectors, we are also seeking to export our system, the common law, usually the common law of England & Wales, and the courts and other bodies with responsibility for its administration. Common law is the language of global commerce and is used in the majority of international contracts, even when none of the parties is UK based […]”. Id. at 3-4.
national civil codes. This in particular applies to the potential inherent to the transnational character of the DCFR, which might question the monopoly of local industry groups for “knowing” one’s national law and the linked privileges.

2.1. DCFR AS A SUPPLEMENTARY TOOL AVAILABLE TO ARBITRATORS OR AS THE LAW APPLICABLE TO THE SUBSTANCE

If guided by Article 28 of the UNCITRAL Model Law on International Commercial Arbitration (2006) – as a venerable source of arbitral law – the DCFR could come into the picture via two principal avenues of application. Firstly, it could serve as a valuable supplementary comparative material for easier and more exact determination of the content of applicable substantive national law(s), as well as to ensure that the outcome reached by application of domestic law “corresponds to internationally accepted principles.” In these instances, the DCFR may but must not be a source of law that is in effect relied on but not necessarily referred to formally by arbitrators in the award. It might also be exploited when deciding based on ex aequo et bono or as amiable compositur because the DCFR contains legal rules that represent known or desirable common European standards irrespective that obviously the degree of common features differs from topic to topic and field to field. Here it hast to be admitted, however, that often – in cases where there was a need for choosing one solution offered by one legal system over another one stemming from a different law – the formula on the basis of which the drafters made the choice is not necessarily determinable.

Secondly, and more importantly, the DCFR seems to qualify as a single set of “rules of law [that could be] chosen by the parties as applicable to the substance of the dispute.” This is so because, on the one hand, “[…] the chosen provision need not be ‘law’ as such,” and, on the other hand, “the term

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23 This scenario would be similar to how an arbitral tribunal seated in Berlin in a case from 1990 referred to the Unidroit Principles to show the correspondence of domestic and international law. See case No. SG 126/90 (parties’ names unpublished) in the UNILEX database collecting court decisions and arbitral awards referring to the Unidroit Principles at <http://www.unilex.info/case.cfm?pid=2&id=627&do=case>; last visited on 8 May 2013.

Similarly, the Unidroit Principles were referred to in the arbitral award of 25.11.1994 of the panel formed under the auspices of the Zürich Chamber of Commerce (parties unknown) to support the position of the tribunal based on the quite short definition of ‘error’ in the Swiss Code of Obligations. Here, a similar concept, yet with a more detailed language was of help. Text of the award is available at <http://www.unilex.info/case.cfm?id=642>; last visited on 8 May 2013.

24 Id. Art.28 (3).

25 Id. Art.28 (1).
‘rules of law’ … would allow parties to ‘choose the rules embodied in a convention or similar legal text elaborated on the international level, even if not yet in force. [Emphasis added.]’26 In other words, the DCFR could play not only a supplementary, but also a central role as the law applicable to the substance of dispute. The same could be concluded also with respect to its potential role in such specific contexts as ICSID arbitration.27

As it has already been hinted at, the DCFR is such a codified system that together with its Commentary and the comparative national notes would elevate it to the level of other known codified types of lex mercatoria like the INCOTERMS or the UCP.28 Thus, while Ole Lando could have validly claimed in his often quoted article from 1985 that law merchant is “a diffuse and fragmented body of law [that] will never reach the level of the copious and well-organised national legal systems,”29 now after the emergence of DCFR, that gap has obviously lessened. It is, indeed, justified to mention it as another major building block of the ‘new new lex mercatoria’ – the latest phase in the development of lex mercatoria characterized by being less and less “an amorphous and flexible soft law” and increasingly “an established system of law with codified legal rules […] and strongly institutionalized court-like international arbitration.”30


27 Article 42 of the ICSID Convention – Convention on the Settlement of Investment Disputes between States and Nationals of Other States (amendments of 2006 – text available at <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>; last visited on 8 May 2013) – states that: “(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. (2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law. (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.” [Emphasis added]. See also the related pages of the Center for Transnational Litigation and Commercial Law at NYU Law School at <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=062&CM=8&DF=12/06/2012&CL=ENG>; last visited on 8 May 2013.

28 UCP is presumably besides INCOTERMS the second most successful international effort at creation of supra-national uniform rules. ICC is to be attributed both the drafting of the first version in 1933 and its later constant updating – leading to the latest version (called the UCP 600) formally commencing on 1 July 2007. Text of the 2006 version is available at <http://incoterms.atspace.com/UCP600/UCP600_page_0.html#Article_1_Application_of_UCP>; last visited on 8 May 2013.


30 See Ralf Michaels, the True Lex Mercatoria: Law beyond the State, 14 Ind. J. Global Legal Stud. 447 (2007), at 448, referring to L. Yves Fortier, the New, New Lex Mercatoria, or, Back to the Future, 17 Arb. Int’l’121 (2001). Albeit Michaels was referring solely to the Unidroit Principles of Int’l and Commercial Law as epitomizing the ‘new new lex mercatoria,’ the DCFR could be a fortiori added to the list especially because of its broader reach and the significantly larger pool of information in it.
Similarly encouraging is the resemblance of the DCFR and the CISG – one of the most successful international conventions of modern times (though primarily with respect to sales law). This matters because the DCFR will presumably not become hard law in the foreseeable future yet the similitude may encourage resort to it. The heightened need for predictability as far as the law applicable to the substance is concerned when doing business cross-border might work to make it increasingly attractive especially in fields resting on less stable grounds than sales law. What matters for the purposes of this paper is that it is here presumed that the DCFR is appropriate to serve as a toolbox containing 'rules of law' as a new representative of codified lex mercatoria. A fortiori, the 2008 version of the EU’s Rome One

31 Suffice to mention only the following supporting examples. Firstly, two internationally most influential instruments, the UNCITRAL Model Law (Art. 28(1)) and the ICC Arbitration Rules (Art. 17(1)) both allow for use of lex mercatoria and other non-national rules of law. Out of these two, the latter seems to be more flexible and liberal as it allows not only the parties to choose an a-national system of rules of law, but it even allows arbitrators to apply the “rules of law which [they] determine[…] to be appropriate,” though only in the lack of agreement of parties. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration (Thomson, 2003), at 126, para 2.70.

Secondly, national legislations also tend to open the doors more widely to decisions according to ‘rules of law’ nowadays. Redfern and Hunter mentioned specifically France and Switzerland. Id. at 126, para 2-70.

Thirdly, encouraging court cases could also be found. See, e.g., the case Pabalk Ticaret v. Norsolor (France, Cour de cassation, 1984 – 24 I.L.M. 360 [1985]), in particular the fate of the action to set aside launched in Austria, where the second instance Court of Appeals partially set aside the award arguing that the Arbitral Tribunal “exceeded its powers in referring to lex mercatoria” – apostrophized by the court as ‘world law of questionable validity.’ See the introductory note to the case in Tibor Varady, John J. Barcelo III and Arthur T. von Mehren, International Commercial Arbitration – A Transnational Perspective (West, 4th ed., 2009), at 902.

Finally, Varady listed the “new lex mercatoria” as an important advantage of arbitration over courts, as courts are prevented from applying law merchant. See Tibor Varady, The Standing of Arbitration within the Legal System, in: Mathilde Sumampouw et al. (eds.), Law and Reality: Essays on National and International Procedural Law 351-52 (T.M.C. Asser Institute, 1995).

32 Under ‘codified lex mercatoria’ we mean trade practices that have become enshrined into commonly accepted written sources of law like the UCP or the INCOTERMS.

33 Scholars differ on how many stages of the history of lex mercatoria should be distinguished. If one subscribes to the view that the first body of law that could qualify appeared in ancient Rome, then this could be listed as the first one. As Goldman put it, the predecessor of lex mercatoria in Roman times was embodied in the “illustrious precursor in the Roman ius gentium … as an autonomous source of law proper to the economic relations (commercium) between citizens and foreigners (peregrine).” See Berthold Goldman, Lex Mercatoria Forum Internationale, No. 3 (Nov 1983), at 3; cited in Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (Thomson, student edition, 2003), at 118, para 2-60.

The second stage would be the lex mercatoria of the Middle Ages, which was characterized as being transnational and status-based. The 20th century – characterized by exponentially expanding public ordering essentially doing away with status-based laws yet giving foothold to arbitration and other ADR especially by the end of the century – brought then about the era of ‘new lex mercatoria.’

Due to the increased respect, some codified forms of a-national legal rules – hereinafter including also the DCFR – now in the 21st century thus it is justified to think in terms of an even newer
Regulation on the Law Applicable to Contractual Obligations allows the parties to agree on ‘non-State body of law’ as a law applicable to the substance of their contracts.34

For the advantages of lex mercatoria, much of what is applicable also to the DCFR, suffice to leaf through Lando’s previously mentioned article from 1985 again,35 as in lieu of an abstract and general apologia it is rather the DCFR that should speak for itself. In each of the listed reasons lex mercatoria would be a better choice; it was so then and presumably it is even more so today as by now lex mercatoria has gained more prestige. The chief points listed by him include, firstly, that whenever governments (presumably also government-controlled entities) are involved, they do not want to be subjected to the laws of other states.36 Secondly, for disputes between non-governmental parties lex mercatoria offers even more advantages, some making the job of arbitrators easier, like allowing the disregard of rules and technicalities that do not fit international contracts37 or putting not just the parties, but also counsel and arbitrators on equal footing. Lex mercatoria is also a formula for bypassing of the choice of law process or of mandatory rules,38 both might be cherished by lawyers.39 Furthermore, the combination of lex mercatoria with the mandatory rules of a national law (e.g., the jurisdiction where enforcement is to be sought) is also a possibility.40 Last but not least, resort to this source of law may also be the method whereby arbitrators of different nationalities could reach consensus41 or may find the equitable solution when applying such a domestic law which is unclear.42

stage, at the moment referred to quite awkwardly as ‘new new lex mercatoria.’ The more such codified forms of a-national systematized rules of law will appear in the near future, the more legitimate the existence of this last phase would become. For a three-partite classification see Ralf Michaels, the True Lex Mercatoria: Law beyond the State, 14 Ind. J. Global Legal Stud. 447 (2007) suggesting that lex mercatoria is not fully a-national because it “freely combines elements from national and non-national law.” Id. abstract.


36 Id. at 748.

37 Lando mentioned the common law rules of consideration and privity of contract, though perhaps even more forceful reasons would justify bypassing punitive damages known in the US. Id.


39 Id. at 754.

40 Id. at 748.

41 Id. at 753.

42 Id. at 754.
The list of encouraging reasons and factors based on what one may project a brighter future to DCFR in arbitration does not stop with Lando. In certain specific circumstances the parties agree on arbitration to ensure exactly that a particular substantive law is applied; what may include also a-national law. This notwithstanding that the known records are not necessarily too encouraging. For example, in the period between 1983 and 2002, out of 110 English language ICC awards, only fifteen (13.6%) were based (though only to some extent) on a-national law. A-national law (thus the DCFR as well) may come in, however, also in case when no law is agreed upon. Again, taking a look at the inherently limited (yet handy) ICC data for years 2001 through 2003, in 18.3% to 23% cases the applicable law was not specified; meaning that in such cases it is for the arbitral tribunal itself to find for the case appropriate rules of law – that now could be also the DCFR as a codified form of transnational rules.

### 2.2. DCFR: PROVING AND TEACHING FOREIGN LAW

The triumvirate of the instruments making the DCFR may by hypothesis become of significant use in the process of finding, proving and understanding foreign law – chiefly the

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43 Interestingly, in case of established trade organizations, as some empirical evidences show, parties have agreed on arbitration to apply the ‘more formalistic’ rules than those that courts would have applied. See Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765, 1775-76 (1996).

44 See Klaus Peter Berger et al, the CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration, in: Klaus Peter Berger (ed.), the Practice of Transnational Law 91, 104 (2001). Available electronically at <http://www.trans-lex.org/000003>; last visited on 8 May 2013. The so-called CENTRAL research – sponsored by the Volkswagen Foundation and conducted by the Center for Transnational Law, Cologne, Germany – was not aimed to be representative, either. It was based on a questionnaire that was sent out to in-house counsel, attorneys, arbitrators and scholars, gathering information on the awareness and use of transnational law.

The main findings of the project were: 1/ transnational law is not only known of, but also used in international practice; 2/ lawyers from civil law countries are more inclined to accept the concept than their common law colleagues; and 3/ there is substantial difference between the understanding and opinion on potential use of transnational law between theoreticians and practitioners (“a substantial gap between the assumptions of lawyers who discuss the theory of transnational commercial law and the assumptions and viewpoints of international legal practice”). As determined, a high number of the responses indicated either that they are uncertain whether to resort to transnational law, or refused that possibility outright.

45 Id. at 542.

46 This was based on art. 17(1) of the ICC Rules of Arbitration (1998). For this and other quantitative data on the use of lex mercatoria in arbitration see Christophe R. Drahozal, Contracting Out of National Law: An Empirical Look at the New Law Merchant, 80 Notre Dame L. Rev. 523, 524 (2005), at 539. The article is also available through the SSRN network.
private law of the EU Member States though also that of countries that have followed European traditions but have not acceded to the EU yet. This being so as finding and proving foreign law remain a hurdle for all forms of dispute resolution when handling international cases, notwithstanding of aids like the London Convention\textsuperscript{47} available to courts of the signatory states. Put simply, if the DCFR’s rules were chosen as the law applicable to the substance that would spare the parties, courts as well as arbitrators of a meaningful portion of such burdens, costs and risks. This is far from claiming that corollary problems would disappear simply because of the DCFR’s perusal in some form; yet, it would be a panacea, for example, for Merryman’s three concerns related to proving foreign law.\textsuperscript{48}

More concreteness should be given to these thoughts herein. As it is known, parties to international contracts quite frequently opt for a law that they think is “neutral” thereby often “confusing political neutrality with suitability of the chosen law for international transactions.”\textsuperscript{49} Such frequently misconceived presumptions might eventually lead to unwanted, if not disastrous outcomes. Now, with the help of the DCFR it becomes possible – instead of relying on mere presumptions – to choose a law based on its merits (be it national law or only a set of rules) simply by juxtaposing the DCFR and the potential alternative. In other words, instead of often abstract and general presumptions one could compare the concrete solutions of the possible alternatives in more detail and make the choice based on that given that normally what the DCFR offers is a compromise rather than a solution borrowed from a single jurisdiction.

For instance, in southeastern European socialist countries for long time (surviving up until the 21\textsuperscript{st} century) Swiss law\textsuperscript{50} has been the favored “pet” substantive law and Switzerland the favored seat of arbitrations. Swiss law, however, contains surprises and solutions that radically differ from other civil law systems – like the dichotomy of rules applicable to delivery

\textsuperscript{47} The European Convention on Information on Foreign Law (the London Convention) – creating a system that could be exploited by national courts of the signatory parties in private and commercial matters – stepped into force on 17 December 1969 (three ratifications were the precondition) and has been ratified by most European states (i.e., members of the Council of Europe) plus by Belarus, Costa Rica, Mexico and Morocco. The text and the related data are available at \texttt{http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=062&CM=8&DF=12/06/2012&CL=ENG}; last visited on 8 May, 2013.

\textsuperscript{48} In the seminal article published in 1983, talking of proving foreign law in the US courts, he identified “three factors that ought to concern [the evaluation of the] way in which the law concerning pleading and proof of foreign law usually works in the United States: 1/ the difficulty of access to the applicable foreign law, including the difficulty of identifying a qualified expert; 2/ the added expense that the reference to foreign law entails; and 3/ the tendency for experts to become partisans and for the resolution of foreign-law questions to degenerate into a ‘battle of experts’. […]” See John Henry Merryman, Foreign Law as a Problem, 19 Stanford J. of Int’l L. 151, 154-55 (1983); cited in: John Henry Merryman, David S. Clark and John Owen Haley, Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia (LexisNexis, 2010), at 157.

\textsuperscript{49} See Ingeborg Schwenger & Pascal Hachem, the CISG – Successes and Pitfalls, 57 Am. J. Comp. L. 457 (Spring 2009), at 465.

\textsuperscript{50} Even though Switzerland is not an EU Member State, it may be resorted to here given that it does maintain a quite close relationship with the EU and eventually it is one of the Continental European systems.
of non-conforming goods. Today, the DCFR might in such situations be used not just to show that Swiss law is idiosyncratic in that respect, but more importantly what the rest of Europe offers in lieu of that. Such juxtapositions would easily prove the divergences and thus would ease the choice. This is a valid contention even though the DCFR Comments are admittedly brief, occasionally over-succinct on what national laws say. Furthermore, what the DCFR offers is much more than what was before available as comparative works so far typically have been limited only to the few major European jurisdictions.

With a dose of optimism, one may even speculate whether – instead of such truly unusual idiosyncratic solutions of national laws as the mentioned Swiss ones – the offerings of the DCFR would be the better choice to certain transactions. Admittedly, court decisions giving content to the DCFR are lacking yet initially that was not different in case of the CISG either. Adding up the language barriers, the risks and costs of investigating foreign laws, on the one side, and the risks and costs generated by the unfamiliarity of the DCFR as counterbalanced by its uniform monolingual terminology, on the other side – the choice must not necessarily fall on the former. The reasons that made some renowned commentators side with the CISG could potentially apply by analogy also to the DCFR. Still, the DCFR is not an omnipotent magical wand either, yet, in addition to the International Encyclopedia of Comparative Law, arbitrators now have at disposal another tool not just for extrapolating general principles, but also to determine “whether the rules of the various legal systems, though differently formulated, produce the same result.”

For educational purposes, especially if perusing also the DCFR Comments – and hopefully also the yet-to-be-completed national notes – the DCFR might prove to become quite a useful toolbox. For example, it could be set as the benchmark to which the solutions of domestic laws could be compared to in order to better comprehend what the meaning of one’s own legal rule is and to see and critically evaluate the variations offered not just by the DCFR – as expressing some level of commonality – but also by other Europe systems and beyond. On the specific issue of force majeure clauses, for example, the DCFR would readily show that notwithstanding the differing philosophical bases, the differing terminology, a common core could be found – what businessmen playing in the international arena have long discovered.

51 Schwenzer and Hachem mention, for example, that in case of delivery of non-performing goods the Swiss Supreme Court distinguishes two situations: delivery of inferior goods (peius) versus delivery of different goods (aliud). The central problem is that the thin blue line between peius and aliud is almost completely unpredictable. This is of practical importance for the parties because their linked rights and duties differ radically. In case of peius, namely, a prompt notice must be served by the buyer within a year to preserve his remedies for breach of contract. As opposed to that, in case of aliud, the buyer is entitled to demand performance within a ten years period calculated from the conclusion of the contract without giving a notice. See Ingeborg Schwenzer & Pascal Hachem, the CISG — Successes and Pitfalls, 57 Am. J. Comp. L. 457 (Spring 2009), at 465. See also Christiana Fountoulakis, the Parties’ Choice of ‘Neutral Law’ in International Sales Contracts, 7 Eur. J. of L. Reform 303, 307 (2006).

52 See Schwenzer & Hachem Id. at 466.


54 Schwenzer & Hachem have rightly pointed to the meritless criticism of the CISG for its lacuna due to the alleged “absence of rules pertaining to a severe change of circumstances and the lack of an express
3. THE ROADMAP TO THE ARTICLE

This seminal article will try to formulate some tentative conclusions on the above hinted at issues and dilemmas by combining a systemic (macro-level) and topic-based (micro-level) analysis of the DCFR from a comparative perspective – occasionally going beyond Europe to enrich the comparisons. Such multi-dimensionality entails that the chosen examples obviously will not be of the same breadth and level. Yet, such combined micro & macro level scrutiny is hoped to provide a more precise estimate on the extent to which the DCFR, or its specific structural pieces or rules, are arbitrable or otherwise exploitable by arbitrators, courts or businessmen. As it may be presumed, and as it hopefully will be substantiated, the arbitrability and general usefulness to arbitrators of various branches of private law (sales v. franchise v. secured transactions law) – in the versions enshrined into the DCFR – is not the same. No single formula could be extrapolated from the DCFR with respect to narrower specific subject matters (e.g., pre-contractual liability or force majeure) either. Hence, each field and each narrower topic has its own narrative predetermining their arbitrability a priori.

Admittedly, the selection is eclectic and as such to certain extent subjective, though – as stressed already – such choice makes the analysis revealing on the nature of the DCFR and its arbitrability. Eclectics make the paper, notwithstanding the quite wide coverage of this paper, inherently incomplete as well. Scrutiny of other areas or specific topic may lead to different conclusions on arbitrability yet the analysis of the remaining parts of the DCFR cannot but be left to others.

In the first part of the article, through comparison of selected specific topics it will be showed how the DCFR can be exploited to explain and test the domestic law versions of the capitã selecta. These exercises will show additionally how the DCFR managed to reconcile or otherwise deal with divergent European laws. They are useful also for comparing European standards – both the synthetic combined versions enshrined into the DCFR and the divergent national variants – with those of the US (or other laws), not just to better understand one’s own law, but also to more clearly see the underlying policy choices. Some of the micro-level topics (e.g., force majeure) have found their place in the section on sales law because of their closeness and for ease of analysis. That in the context of sales law required taking a look also at the CISG and its relationship with the DCFR.

The systemic analysis will entail taking a look at the basic features of the DCFR itself and at the distinguishing characteristics of three distinct fields of law covered by it: i.e., sales, franchise and secured transactions law (in DCFR’s vocabulary: proprietary security in movable provision on hardship, rebus sic stantibus or Wegfall der Geschãftsgrundlage.” What these critiques lost sight of is that the CISG contains a force majeure provision, which may also extend to changed circumstances the mentioned national concepts aim to deal with.” The underlying logic is, especially in the context of contemporary commerce and realities, “when most subsequent events do not render performance completely impossible and thus do not constitute a veritable impediment in the 4 sense of Art. 79 CISG [i.e., the CISG force majeure provision]; they just render performance more or less onerous for the obligor. Thus, it seems preferable to deal with both situations under the same heading, establishing the same prerequisites, and imposing the same consequences.” Id. at 474-74.
These have been elected because their features, underlying policy choices – and most importantly the level to which pertaining European national laws differ – vary significantly. Consequently, the extent to which the DCFR rules differ from the respective (sometimes non-codified) national laws – i.e., the **degree of commonality** – is not the same in case of these three fields. On a short account, while every European jurisdiction has a quite resembling and well-established **sales law**, no codified **franchise law** exists in quite a number of jurisdictions where franchise is therefore still an innominate contract.

The third, presumably most complex field, **secured transactions law** – or in the vocabulary of the DCFR: **‘proprietary security in movables assets’** – is a story of its own because it is the first attempt in Europe to offer a comprehensive system for bringing various security transactions utilizing movables and intangibles (in common laws: personal property) as collateral under the same roof. This would be a solution in lieu of the fragmented (i.e., not fully systematized) national laws in which the related provisions are scattered around in more separate branches of law and enshrined in more distinct pieces of legislation – as supplemented by authoritative

55 Various designations are used to cover this specific branch of law. First of all, however, one has to differentiate between systems that have a compact, self-standing branch of law and those in which the related legal issues are scattered over more branches of law. It is thus useful to refer to the first group as **‘the Unitary Systems’** or **‘the Unitary Group’** – including Australia, most of the Canadian common law provinces, New Zealand and the US – and now the DCFR as well. The designation ‘secured transactions’ is used in the US for UCC Article 9 covering all contracts creating security interests on personal property – i.e., real property mortgage law is a completely distinct body of law. In the other common laws the equivalent naming is ‘personal property security law.’ The drafters of the DCFR have opted for **‘proprietary security in movables assets’**. On the comparison of the Unitary Group, with focus on the recent Australian personal property security law, and Europe see Tibor Tajti, *Testing the Equivalence of the New Comprehensive Australian Personal Property Securities Act, Its Segmented European Equivalents And the Draft Common Frame Of Reference*, vol. 24, No. 1 Bond Law Review (2012) (Australia); downloadable at <http://epublications.bond.edu.au/blr/>; last visited on 8 May 2013.

In the fragmented systems, secured transactions law is located at various places. In civilian systems typically in private and commercial laws, primarily under the heading of ‘pledge and mortgage law.’ The ROT-containing contracts, on the other hand, are part of the law of obligations. In Germany, however, an autochthonous body of law has evolved through the innovations of business lawyers and their recognition by courts. These are the so-called ‘contract-based securities’ (“kantelarische Sicherheiten”) lead by the ‘security transfer’ (“Sicherungsübereignung”) proclaimed to be by some scholars as the local equivalent of the common law chattel mortgage – what is too far-fetched a claim given that according to German law the device (just as most of the other personal property securities) are not subject to registration or other forms of perfection – except possessory pledge, as well as liens on ships, aircraft and some registrable forms of intellectual property (e.g., patents). The German security devices have been taken over by a number of Central European countries. The DCFR extends also to these, however, subjecting them to the common regime – including registration and the new priority rules. See DCFR paragraph (3) and (4) of Article IX.-1:102: Security Rights in Movable Asset. On the German security devices see, for example, Chapter on Germany in: Tibor Tajti, *Comparative Secured Transactions Law* (Akadémiai könyvkiadó, Budapest, 2002); Tibor Tajti, *Viehweg’s Topics, Article 9 UCC, the “kantelarische Sicherheiten” and the Hungarian Secured Transactions Law Reform*, 6 Vindobona J. Int’l Com. L. & Arb. 93 (2002).
precedents in common laws and quasi-authoritative\textsuperscript{56}ones is some of the civilian jurisdictions (e.g., Germany).

Finally, it was of importance in selecting the targeted fields of law that franchise and secured transactions laws are such newcomer branches of law in much of Europe that can affect the growth of economies choosing to exploit them. Put simply, these are most telling on the law-growth nexus.\textsuperscript{57} Both branches of law are in particular of use to small and mid-scale businesses (hereinafter: SMEs):\textsuperscript{58} while secured transactions law solves their financing needs, franchise makes the launching of a new business based on a tested model possible. These have become important considerations by the 21\textsuperscript{st} century especially in Central and Eastern Europe (CEE) as these economies still struggle to catch up with Western Europe – in addition to the myriad problems caused by the spillover effects of the 2008 global financial and the still unfolding Eurozone crisis.

\textsuperscript{56} Admittedly, the designation ‘quasi-authoritative court decision’ is unusual, yet, it has its justification. For example, in Germany, according to the conventional wisdom the doctrine of stare decisis is not part of the system. However, in the very domain of secured transaction laws the most widely used security devices – like the expanded and extended security transfer (“Sicherungsübereignung”) – came into being by being first invented and applied by the business, what was then blessed by the courts. These decisions in effect were precedents very close in nature to the ones known in Anglo-Saxon systems. The attribute ‘quasi’ aims to express that.

\textsuperscript{57} See, e.g., Kenneth W. Dam, the Law-Growth Nexus – the Rule of Law and Economic Development (Brookings Institution Press, Washington D.C., 2006). Even though the book is very much reflective of US and the views of mainstream World-Bank and IMF-linked scholars, the linkage of secured transactions law and economic growth is something that should not be questioned – suffice to take a look at the post-1990 comparative data of CEE countries to realize that the claim deserves merit. As the book was written before the 2007 Credit Crunch and the ensuing global financial crisis, it fails to devote any attention to the brakes and limitations that should be imposed on the level (i.e., quantity) of secured credit national economies should provide.

B. THE IMPACT OF THE CHARACTERISTICS OF THE DRAFT COMMON FRAME OF REFERENCE ON ITS ARBITRABILITY

The DCFR is obviously a sui generis product, the features of which thus inherently affect the final answer to our central query – its exploitability by arbitrators. From a holistic point of view, the following deserve commenting: the complementarity of the triumvirate of documents making the DCFR, its academic origins, as well as such formal issues as the DCFR’s coverage, drafting style, systematization, and the employed terminology.

1. THE COMPLEMENTARINESS OF THE OUTLINE VERSION, THE COMMENTS AND THE FULL-DCFRL

Although the text of the DCFR per se might be of use to arbitrators, the utility of the Outline Version increases exponentially if used together with the Comments. This notwithstanding that occasionally the “Comments” are only retelling the text of the pertaining section without (much) added value. At other times, especially where genuinely in-depth and systematized comparative material is given, the Comments are clearly invaluable addenda. The usefulness and generally the quality of the Comments would be higher, for example, had all the reasons that drove the drafters opt for one particular national law’s formula, or a combination thereof, openly been declared. Now, often it is not clear which concrete inducements led to the DCFR’s solutions and which national law(s)’s have been resorted to. For example, while it is obvious that Book IX of the DCFR now makes a single comprehensive system the building blocks of which clearly parallel those of the American UCC Article 9, the resemblances are very cautiously hidden in a few sentences of the Comments thereto. It should also be obvious that the various parts of the DCFR were not written by the same group of people, what inevitably left its imprint.

Let us refer to two institutions from Book IX to illustrate not just the complementarity of its constituent instruments, but also the gaps and inconsistencies that might affect comprehension and eventually the use: to wit, two secured transactions known as field warehousing and consignment. As far as the first is concerned, field warehousing has played

59 Black’s Law Dictionary defines it as “a method of financing an inventory that cannot economically be delivered to the creditor or third party. The borrower segregates part of the inventory and places it under the nominal control of a lender or third party, so that the lender has a possessory interest.”

In the US, field warehouses – as professional businesses – in most cases limited their activities to “the warehousing or custodial aspects of the financing operation” and only rarely have they engaged in providing financing. See Grant Gilmore, Security Interests in Personal Property (Little, Brown and Co., 1965), at 148. The same could also be said about the four Hungarian field warehousing companies controlling the local field warehousing market booming in the 21st century – which was by legal scholars almost unnoticed development.
a pivotal role throughout the history of the US secured transactions law and was enlisted among the so-called ‘independent security devices’ by the chief editor of UCC Article 9, Grant Gilmore. The related laws and business experiences that had been shaped in the pre-UCC era were later used as the basis for the most successful Article of the UCC. The field warehousing companies offered services benefitting especially banks by creating artificial outposted warehouses at the place where the collateral was located (instead of forcing the debtor bear the risks and costs of transporting it to a terminal warehouse), which was then professionally guarded and the collateral handled by the company at the exclusion of the debtor. In the vocabulary of civil law, the field warehousing companies, in fact, offered a form of constructive pledge, holding the collateral for the secured creditor.

In Europe, very little seems to be known about this device, at least, if adjudged based on the extremely scarce pertaining literature. Irrespective of that, surprisingly, this secured transaction is specifically mentioned exactly under this designation in, at least, two points of the Comments;[60] and nowhere in the text of the DCFR itself. True, the Comments talk of them only in general terms, without specifying whether this transaction is available in all covered European countries, in what variants or under what designations. In countries where this device is unknown, the reader would have difficulties understanding the function of the pertaining texts of the DCFR Comments; let alone that in the lack of proper definitions it might be next to impossible to identify the local equivalents. The conclusion for our purposes of this brief field-warehousing-related excursion is, however, not just that preferably all three instruments making the DCFR should be resorted to by arbitrators but that their *sui generis* complementariness is a factor that should be reckoned with.

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[60] To be precise, DCFR Book VIII on Acquisition and Loss of Ownership of Goods has also two Articles of relevance to fields warehousing, to wit Article VIII.-1:207 – Possession by limited-right possessor and Article VIII.-1:208 – Possession through a possession-agent. Yet, as field warehousing is a professional service provided to banks and other financers, its most important role is in the context of secured financing, or the field covered by DCFR Book IX.

In Book IX, the first mention of field warehousing is in point B of the Comments to Article IX. – 3:102 listing the recognized “methods of achieving effectiveness” of security rights (i.e., security interests or liens). Here, as taking possession by the secured creditor is listed as one of the recognized methods of – in the terminology known by those familiar with secured transactions law: ‘perfection’ – is by way of ‘holding possession by the secured creditor (see sub-paragraph (2) (a) of the Article). Even though the possibility of ‘holding possession’ via third agent – like a field warehousing company specialized exactly for the provision of such services to banks and other financers – is in this section specifically not mentioned (it is, however, specifically added to Article IX. – 3:201 (a)), the recognition of such possibility could be indirectly concluded exactly by resort to the Comments which in point B (page 5479 of the Comments) say “Although [possessor pledge] is largely outmoded today, there are still situations in which this form of security can be useful, and not only for luxury goods or pieces of art. For economically relevant situations, recourse is often taken to so-called field warehousing. [Emphasis added.]”

The second instance of cursory mention of field warehousing amidst of the Book on secured transactions law is in the Comments to Article IX. – 3:201 defining the modalities of ‘possession;’ the perfection method for constitution of a (possessorly) pledge and specifically explaining who could be ‘the agent’ holding physical control over the collateral. The crucial requirement in such situation for the creation of a valid security interest is that debtor-security provider “must not have access to the encumbered assets without the express consent of the secured creditor.” See DCFR Comments, vol. 6, at 5489.
As opposed to field warehousing, the other secured transaction – consignment – is directly named in the provisions of Book IX themselves, though unfortunately the very same term figures in exactly the same form in the part on sales as well. This being so as in many (if not most) European systems consignment is hardly looked upon as a form of secured transaction; it is rather only the kin or a version of agency or distribution contracts encompassing also a sales segment. As in case of consignments retained ownership (in common laws: retained title or ROT) plays a pivotal role as a security – i.e., the ROT is added “with the intention or the effect of fulfilling a security purpose” – it is what justifies their metamorphosis into a security device; a solution subscribed to not just by the DCFR, but also by UCC Article 9.

The unusual twist of the DCFR is related, however, to another consignment related domestic law solution: the allegedly long-practiced treatment of consignment as a form of a security transaction by Scandinavian laws is only mentioned as a brief gloss. Nothing more specific could be learnt about the potential national variations or the related experiences – what might be crucial for promotion of such radical changes as what awaits consignment under Book IX of the DCFR. The problem is exacerbated by the fact that, oddly enough, very little is known about Scandinavian laws in the rest of Europe. Hence, if an arbitrator – as suggested by von Bar – by some chance would like to find the “commonly acceptable solution,” he would have hard times reaching by business levels acceptable certainty on consignment-related issues. It is questionable at this point of time whether the national notes will appropriately remedy this and similar dark points of the DCFR.

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61 As declared by DCFR Article IX.-1:103: Retention of Ownership Devices: Scope, paragraph (2) “The term retention of ownership device includes: […] (d) ownership of the supplier under a contract of consignment with the intention or the effect of fulfilling a security purpose.”

62 See, e.g., paragraph (2) of Article IV.A.-2:204 on Carriage of Goods.

63 The last paragraph of point C of the Comments to Article IX.-1:103 characterizes it as a “special method of commercial distribution.” See DCFR Comments, at 5400.

64 Quote from paragraph (d) of Article IX.-1:103.

65 This is what the DCFR Comments to Article IX.-1:103, at 5400, say on this: “[I]n the Scandinavian countries [consignment] is also being used for security purposes because in those countries retention of ownership allowing the buyer to sell the goods to third persons is regarded as void. In order to overcome this legal obstacle, sellers have had recourse to consignment contracts. If this type of contract has been drafted with the intention of achieving a security for the consignor; or if the effect of the parties’ agreement is to achieve security purposes then that intention or this effect prevails. This formula corresponds to [the DCFR].”
2. THE REPERCUSSION OF THE ACADEMIC NATURE OF THE DCFR

The DCFR is the outcome of joint efforts of more academic groups, led by the Study Group on a European Civil Code and the Acquis Group, including the integration of – yet going much beyond – the results of some other projects. Particular attention should be paid to the integration of the Principles of European Contract Law (PECL) of the Lando Group into the DCFR. While the PECL has received international recognition, it is a fact that it remained soft law leaving little traces in arbitral circles. The common denominator of these and the DCFR of utmost relevance to our central question of the arbitrability of the DCFR is that they

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66 The mission of this group led by Prof. Christian von Bar (Osnabrück, Germany) initially was to prepare the bases for a future European Civil Code yet it ended in the DCFR. The website of the Group is at <http://www.sgecc.net/>; last visited 8 May 2013.


68 See points 34 through 40 devoted to the ‘Coverage of the DCFR’ in the General Introduction. Even though the main sponsor, the EU Commission has not asked for such a wide coverage, the drafters’ opinion was that, on the one hand, contract law cannot be limited to consumer contracts given that “consumer law is not a self-standing part of private law [but a set] of some deviations from the general principles of private law,” and, on the other hand, that it is impossible to “determine precisely [what the] correct dividing line between contract law … and other areas of law [is].” Quoted from point 40 of the General Introduction to the DCFR.

69 See point 8 of the General Introduction to the DCFR. The Commission on European Contract Law (became known after Professor Ole Lando – University of Copenhagen – as the ‘Lando Group’) was established in 1982 to draft the first set of common European general contract law rules. The rules were published in three parts, the first in 1995, and the second in 1998 [text available at <http://www.jus.uio.no/lm/eu.contract.principles.1998/index.html>] and the last one in 2003. The website of the Group is at <http://www.jus.uio.no/lm/eu.principles.lando.commission/doc.html>; both last visited 8 May 2013.

Contrary to the Acquis Group, the Lando Group’s mission was to formulate common European principles which would – as put it by Ole Lando – “serve as a basis for a European Code of Contracts. They are intended as a first step [and yet] they differ from the American Restatement on Contracts because they require a more radical approach. They do not simply select from among several solutions extant in a single legal system; as they must provide workable solutions for a widely divergent legal environment, they are designed to embody rules that do not exist as such in any European legal system.” [Emphasis added.] Ole Lando, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation, 40 Am. J. Comp. L. 573, 577 (1992) (published also in Rabels Z 261 [1992]).

70 See, e.g., point 8 of the General Introduction to the DCFR which states that the PECL, shortly upon their publication “received the attention of many higher courts in Europe and of numerous official bodies charged with preparing the modernisation of the relevant national law of contract.”
have set out and have largely remained primarily products of elite European scholars (academia). As aptly put by Antoniolli and Fiorentini, “[a]t the root of the project [was] the belief that European law can emerge only as Professorenrecht [or law of professors], a belief that is reflected in the method of the Study Group’s work, based on Comments and national notes devoted to explain the black letter rules and help developing a shared legal culture in Europe. [Emphasis added.]”

One does not have to go to the other end of the golden rainbow to realize that this academia-industry division, traceable throughout the DCFR and the Comments, might operate as an obstacle preventing easy reception by businessmen. This claim stands notwithstanding that some interaction did exist in the drafting phase through some kind of ‘stakeholder process.’ For example, if one proceeds from the success the CISG acquired in arbitral circles in trying to predict the reception of the DCFR, then it should be borne in mind that the “role legal practice played in preparation and drafting of the respective rules” was much bigger in the case of the CISG. This is of importance notwithstanding that the CISG was at sight in drafting the DCFR and that – contrary to the incomplete CISG – our central document provides for full coverage of sales law.


72 The stakeholder process refers to meetings with stakeholders that was limited, however, only to “taking on board many … suggestions,” notwithstanding that the two central groups “bear responsibility for the content[s].” See point 4 of the General Introduction to the DCFR. In other words, the impact of stakeholders was primarily indirect and it went through the filter of the two academic groups. For some of the topics that were altered following the input from stakeholders – see Id point 52. The stakeholders’ suggestions were also taken into account during the pre-publication systematic revision (what started in 2006). See point 56 of the General Introduction to the DCFR. Section II – 9:101 was, for example, changed because of some stakeholder input.

None of this should, however, lead to the conclusion that the voice of industries has not or should not be heard. In the Comments, for example, typically short and unspecified references to various industrial associations could be found. See, e.g., point II.6 of the Comments to section IV.E.4:101 (scope of franchise contracts), at 2385 with references to the definition of franchise by the Swedish franchise federation or to the ICC Model Franchise Contract document.

Finally, some industries have made public their opinion and reflections on the DCFR. See, e.g. A Position Paper by the European Financial Markets Lawyers Group (EFMLG) of 1 Sept. 2009, available electronically at <http://www.efmlg.org/Docs/2009-09-01%20The%20Draft%20Common%20Frame%20of%20Reference%20-%20A%20Position%20Paper%20by%20the%20EFMLG.pdf>; last visited on 8 May 2013. Needless to say, the document focuses only on those aspects of the DCFR that affect “financial instruments and services (loans, deposits, bonds, purchase contracts and derivatives), settlement of debt obligations, and on certain credit risk mitigation techniques (collateral, set-off and netting, securitization, guarantees and credit derivatives).” See the Introduction of the document at page 1.

73 See, e.g., Ingeborg Schwenzer & Pascal Hachem, Drafting New Model Rules on Sales: CFR as an Alternative to the DISG?, vol.11, No. 4 European Journal of Law Reform (2009), at 460. As noted above, for example, ICC had commented CISG (Document A/CONF.97/9).

74 See points 25 and 63 of the DCFR’s General Introduction. Furthermore, Peter Schlechtriem – a key expert who had directly participated in the drafting of the CISG – was also involved in the drafting of the DCFR and hence the ’spirit of CISG’ was constantly present.
Save for a House of Lords Report\textsuperscript{75} and a freshly launched international moot court competition on the DCFR,\textsuperscript{76} very little is known about what the stakeholders outside the academia think of the whole project, in particular arbitral or potentially affected industrial circles. In fact, as it is visible from the EU Commission’s \textit{Green Paper},\textsuperscript{77} the future of the DCFR is quite uncertain even in the eyes of Brussels. It is unclear as well whether somebody is working on the dissemination of the DCFR especially among practitioners – including arbitrators. The special website reserved for collecting papers written on the DCFR\textsuperscript{78} might in that respect be of little importance as the listed papers have been almost exclusively written by scholars to scholars – and hence one could hardly presuppose that the reach of those publications will transgress the traditional rigid confines of European academia.


\textsuperscript{78} See, in particular, the website ‘Database of CFR Materials’ at \texttt{<http://cfr.iuscomp.org/db/>} and the website of the Study Group on a European Civil Code at \texttt{<http://www.sgecc.net/pages/en/texts/index.draft_articles.htm>}; both last visited on 8 May 2013.
3. IS THE DCFR THE EUROPEAN RESTATEMENT OF PRIVATE LAW OR RATHER A MODEL LAW?

Albeit quite a lot has already been written on the legal nature of the DCFR, at the moment still the best qualification is that it is of a *sui generis* nature. This indeterminacy is attributable to a number of factors starting with the changing political attitudes of Europe – including the Eurozone crisis and the concomitant strengthening of disintegration forces – the resistance of local professional elites, incomprehension, as well as fear from German academic dominance, to all the risks that stem from the magnitude of the project itself. As a result, the initial optimistic voices talking of a ‘Civil Code for Europe,’ have subsided giving

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79 The indeterminacy is known in Brussels. On the one hand, while the European Parliament “[…] reiterates its conviction, expressed in its resolutions of 26 May 1989, 6 May 1994, 15 November 2001 and 2 September 2003, that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law[…]” on the other hand, it also realizes that “whilst it seems that the European contract law initiative as described in the Commission communication of 11 October 2004 (COM(2004)0651) and reported on in the Commission’s First Annual Progress Report (COM(2005)0456) should be seen primarily as an exercise in better law-making at EU level, it is by no means clear what it will lead to in terms of practical outcomes or on what legal basis any binding instrument or instruments will be adopted […]” [Emphases added.]

80 As Bussani succinctly but realistically put it: “The defense of the status quo [that the time … is not ripe to enact whatever Restatement or Civil Code][…] fits perfectly with the need of the professional elite to keep the leadership over national and transnational legal affairs […]”. See Mauro Bussani, the Driving Forces behind a European Civil Code, Zbornik Prav. Fak. Sveuč. Rij. Suppl. Br. 3, xx-xx, at 11.


82 What was noted by Markesinis, the doyen of comparative law, is well reflected also in all aspects of the DCFR, from the leadership of the drafting teams through the structure of the document itself. Namely, as Markesinis put it “[…] [i]n matters of private law, current attempts to produce a European private code or at least to establish common principles of law are … basically in ‘German’ hands (though one must also mention the ‘Trento Project’ run mainly from Italy) […]”. Basil Markesinis (with Jörg Fedtke), Engaging with Foreign Law (Hart Publishing, 2009), at 164. Suffice to scrolls through the long list of drafting team members or the DCFR-related publications to see that – irrespective of the impressively diverse nationality of experts – German leadership is obvious, what in and of itself should not be a problem.

83 Jansen and Zimmermann pointed to three main points: firstly, the fact that the central DCFR academic group is named as ‘Study Group on a European Civil Code,’ secondly, that Christian von Bar – the chairman of the Study Group – has not excluded the possibility of transformation of the DCFR into a genuine civil code in the future, and thirdly, equally convincing, is the 116 articles devoted to ‘trusts’ – legal category still largely unknown to continental legal systems and hence not being capable of “drawing a picture of the existing [European] legal systems.” Nils Jansen and Reinhard Zimmermann, "A European Civil Code in all but Name": Discussing the Nature and Purposes of the Draft Common Frame of Reference, Cambridge L.J. 2010, 69(1), 98-112, at 99-100.
better chances for more modest outcomes\footnote{See the options on the future of the DCFR in the EU Commission Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses (Brussels, 1.7.2010, COM (2010) 348 final).} – including use by arbitrators the prospects of what we try to take a look at here.

Even though most papers see in the DCFR the European equivalent of the US Restatement\footnote{Black’s Law Dictionary (Deluxe 9th ed., 2009) defines ‘restatements’ as follows: “One of several influential treatises published by the American Law Institute describing the law in a given area and guiding its development.”} it seems that it is more the kin of the UCC with the linked Official Comments. The crucial difference, though, is obvious: albeit the DCFR is also recommended for use by lawmakers, the chances of being relied on, either only as a general source of inspiration, or as a model law from which provisions, or larger structural elements, would be taken over by European states, is at this point of time meager. What is unrealistic today in Europe, however, was the case with the UCC in America in the 1950s. Yet, the UCC, indeed, had managed to make the States realign their commercial laws unprecedentedly.

Additionally, the DCFR could be said to ‘restate’ the law only with respect to some specific problems or fields of private law. In case of pre-contractual liability, for example, it extrapolated rules solely from civil law systems and imposed those as common to Europe irrespective that common laws do not even know culpa in contrabendo as such. Book IX on secured transactions, on the other hand, is filled with such profound novelties that make it the most aspirational (i.e., programmatic or de lege ferenda) part.\footnote{Carrie Menke-Meadow talked of appearance of “new forms of less formal regulations, often expressed in aspirational terms” as amounting to a tendency. See Carrie Menke-Meadow, Why and How to Study Transnational Law, 1 UC Irvine L. Rev. 101-138(2011), at 117.} At the moment, albeit numerous arguments have been propounded for why Europe would benefit from a common secured transactions regime, the resistance from all sides seems to be insurmountable. From the perspective of arbitrability this is of importance because the crippling differences of European domestic laws make cross-border-reaching security transactions problematic. Simply because of the low frequency of cross-border security interests, arbitration of related disputes at the moment cannot be but unusual (if not unheard of) in many parts of Europe – save the changes that are ongoing in some countries and some specific market niches (e.g., leasing industry) as it will be hinted at below.

One of the drafters of Book IX, Anna Veneziano, admitted that what the reader could find in this Book of the DCFR could not be but ‘a surprise;’ referring to the high level of innovation. Some of the benefits such a new systematized common secured transactions regime could bring to Europe mentioned by her includes besides such economic reasons as creating incentives for “external financing of enterprises,” also the interest “to prevent the piecemeal development of legislation only favorable to certain categories of creditors.” Furthermore, a common European registry for security interests could make recognition of non-European liens also recognizable – according to the same rules of perfection and priority, thus, thereby increasing predictability – and would make the priorities clear also for the case of conflict of domestic and foreign security interests. See Anna Veneziano, the DCFR Book on Secured Transactions: Some Policy Choices made by the Working Group, in: Sjef van Erp, Arthur Salomons and Bram Akkermans, the Future of European Property Law (Sellier, 2012), at 123-135.
Franchise is yet another story, though similarly to secured transactions law, European franchise laws are also quite colorful and combine industrial self-regulation (codes of ethics), first generation statutory rules, and analogous application of rules on kin nominated contracts to resolve disputes. The other similarity of the two fields is the great level of innovativeness: the DCFR daringly came forward as well with the first (more or less) complete set of relational franchise law for Europe. As the new model is full of mandatory rules imposing obligations on the franchisor, the reaction of the European franchise industries, preferring the light touch approach guaranteed by industrial laws, foreseeably cannot be but lukewarm – presuming that the DCFR will manage to penetrate the industry, at all. In any event, it ought to be admitted that instead of the present European regulatory framework characterized by heavy fragmentation, gaps and not fully compatible sources of law, tainted additionally by industrial dominance – resulting in a relatively high level of indeterminacy of franchise law – the DCFR offers a balanced model that conceivably should have a fair chance as the future model for Europe. Presuming gradually increasing industrial benevolence, such a model might in due time become a more suitable source of law for resolution of franchise disputes than what the fragmented national laws and industrial self-regulatory instruments now offer. Given that franchise is much more concentrated in the hands of the industries and its representative association(s) in Europe at the time being, that makes the prospects of arbitration of franchise disputes based on the DCFR more contingent on the attitude of the industries than in the field of sales law.
4. FORM-RELATED, SYSTEMIC AND TERMINOLOGY ISSUES

A few other caveats should also be borne in mind when pondering whether to make use of the DCFR. Firstly, even though some authors have quite optimistically talked of the DCFR as the future European ‘Civil Code,’ the DCFR is “only” a soft law instrument and additionally it lacks one of the key features of traditional continental European codes: it is not gap-less. For example, family, inheritance or the property law on immovables is not covered. Consumer credit contracts have remained outside its ambit as well because the pertaining EU Directive was enacted in a later phase of drafting the DCFR and hence could not be taken into account – what should not, however, lead to the conclusion that no consumer protection rules have been enshrined into it. Otherwise, its structure, numbering and drafting style resemble, not unsurprisingly, venerable continental European civil codes. It is to be noted as well that it represents a ‘monist’ instrument covering ‘private law’ yet what encompasses also transactions among merchants (i.e., commercial law); the same pattern will be employed throughout this paper as well.

Unfortunately, some of the less praiseworthy building blocks of continental European systems have also been transposed. For business people and arbitrators – being pragmatic, looking for straightforward answers rather than for vague theoretical concepts – it might be striking to see the complex non-transparent matrix of principles in the General

87 This feature makes it resemble the American UCC – which does not cover transactions in real property. The only exceptions in the entire UCC are the rules related to fixtures – “personal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home.” Quoted from the Black’s Law Dictionary.


90 See, for example, section IX. – 2:107 that paternalistically shields consumers, among others, by limiting the security interest “to the value of the property which the security provider has encumbered with the proprietary security right.” See point A of the DCFR Comments to the section, vol. six, at 5422.

91 Suffice to list the variations of principles the reader may encounter scrolling through the General Introduction. Overriding principles are of ‘high political nature’ and hence come to the top of the conditional hierarchy of DCFR principles. These are “protection of human rights, promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and [- as something idiosyncratic to the EU – ] the promotion of the internal market.” See DCFR, General Introduction, point 16.

The so-called underlying principles of freedom (e.g., contractual freedom), security, justice and efficiency rank obviously below overriding principles on the hierarchical ladder of the DCFR and are said to “underline the whole of the DCFR.” See point 1 of the chapter devoted to Principles at 60 in the Outline Edition. These principles are admitted to overlap and conflict with each other though it is less clear – in case of need to resort to them – what the rights of an arbitrator or judge would be in finding the proper balance between them. In brief, it seems that the drafters of the DCFR have transposed the impenetrable matrix of principles from their national systems, what might not be a laudable feature of the DCFR but rather an obstacle that makes the job of arbitrators harder.
Introduction to the DCFR; the principles obviously overlap, conflict and are accompanied by no guidance on their reconciliation and application. Making things worse, this amalgam gets further complicated with the addition of the human rights facet made again of a set of relatively abstract principles. While such broad liberalism might be welcome by constitutional and human rights scholars, or even by some judges and arbitrators, the resulting blurred picture would presumably look in the eyes of practitioners as degradation towards arbitrariness rather than a banner of the desired level of flexibility.

The similarities, however, should not lead to the conclusion that the DCFR is the mere replica either of the BGB or of the Code Napoleon; novelties could, in fact, be bumped into quite easily. Suffice to refer to the already mentioned section regulating franchise in a quite detailed manner or the unique and forward-looking Book X on Trusts. One of the differences is that while in case of national codes ‘living versus obsolete’ rules could be distinguished, the

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92 As it is commonly known, trust is idiosyncratic to Anglo-Saxon laws. Some civil law countries have, however, decided to introduce versions of it. Given the multitude of uses of trust in common laws, German law, for example, knows for devices the exploitation – isolated or in combination with another device – of which brings about similar results. Thus, with the combination of the mutual will (“gemeinschaftliches Testament”) and executorship (“Testamentsvollstreckung”) effects similar to English testamentary trust could be generated. German law has also a general trust-like instrument named the “Treuhand,” which is quite widely used notwithstanding of not being regulated by the BGB. See Sjef van Erp & Bram Akkermans, Cases, Materials and Text on Property Law (Hart, 2012), at 561 et seq.

93 Under obsolete rules here we mean rules that do not play such an important role as they used to at the time when they were enshrined into a code, or in the earlier stages of the validity of the code. The typical scholarly example are the rules on the ‘Loss of Ownership of Bee Swarms’ in Section 961 of the BGB. English text of the BGB available at <http://www.paris-europlace.net/files/French_Sukuk_Guidebook_Nov_2011.pdf> and the Paris Europlace, French Sukuk Guidebook (2011) at <http://www.paris-europlace.net/files/French_Sukuk_Guidebook_Nov_2011.pdf>; both last visited on 8 May 2013.

Yet, the issue of the obsolescence of civil code does not end with these few handy examples. For example, it is little discussed and hence is veiled with indeterminacy how should code systems deal with code obsolescence itself. One of the few eloquent examples is the famous decision of the German Constitutional Court, known as the ‘Princess Soraya Case’ (34 BVerfGE 269 [1973]), allowing the awarding of civil damages for invasion of privacy notwithstanding the lack of explicit rules in the BGB. In the reasoning, the court noted that such extension of private law is possible because “[t]he judge’s task is not confined to ascertaining and implementing legislative decisions [but also] going beyond the positive norms which the state
DCFR is rather about ‘known versus programmatic’ building blocks and elements. Comparing sales law with secured transactions law would clearly illustrate that point: while the former is known and exploited by all European systems, what Book IX contains is to a great extent something only recommended for Europe. As a result, the discrepancies between the sales law of the DCFR and domestic systems are conspicuously smaller than what is the case with the latter branch of law.

The decision about the structure of the DCFR, as stated in the Introduction, “was […] uncontroversial,” though explanations stop basically with this statement. Hence, it might be presumed that continental European traditions have been embraced (or imposed). Some of these ‘presumed’ commonalities are really self-explanatory yet some other are not necessarily such. Unfortunately, occasionally such reliance on presumed foundations makes the use of DCFR uneasy. This applies especially to Books II, III and IV which require constant re-leafing and double-checking of the hardly transparent cross-references as each contains rules on certain aspects of contracts: while Book II contains general rules limited to contracts, Book III already reaches wider by hosting general rules on obligations (i.e., rules that are common to contracts and other types of obligations) – Book IV is restricted to rules on specific nominated types of contracts. The quite frequent over-succinct formulation of the Comments does not lessen the difficulties of orientation in the texts either.

**Terminology** in the multi-lingual Europe cannot be but a major multifaceted†94stumbling block. To start with, choosing English for the – at the time being†95 –

enacts.” This is so as courts have to serve also ‘justice’ and “although ‘law and justice’ are generally coextensive, they may, not always be so.” Moreover, as far as obsolescence is concerned, “the judge’s freedom to creatively develop the law necessarily grows with the *aging of codifications* with the increased distance in time between the enactment of the legislative mandate and the judge’s decision in an individual case.” [Emphasis added.]

94 For example, the clarification of what the phrase ‘global security’ means requires special attention. Namely, based on the pivotal role Ulrich Drobnig played in the work on the DCFR and having followed especially his secured transactions-related publications, it came as a source of confusion to the author of this paper that while the DCFR treats the category of ‘global security’ primarily as a personal security device, the renowned expert in some other works of his talks of this security device as the equivalent of the English ‘floating charge’ (US: floating lien), which obviously has proprietary (in rem) effects. See, e.g., Ulrich Drobnig, Basic Issues of European Rules on Security in Movables, in: John de Lacy, the Reform of UK Personal Property Security Law (Routledge-Cavendish, 2010), at 448, where he writes: “A direct instrument of global security – to some degree an equivalent of a comprehensive English floating charge – is the continental enterprise mortgage which is recognized in five European countries […]” [Emphasis added].

For the ‘global security’ as a personal security see DCFR Article IV.G. – 1:101(f), which defines it as a **dependent personal security** which is assumed in order to secure a right to performance of all the debtor’s obligations towards the creditor or a right to payment of the debit balance of a current account or a security of a similar extent.” [Emphasis added]. Otherwise, global securities are regulated in Part G. on personal securities of Book IX of the DCFR. The meaning and role of the global security language in DCFR Book IX Article IX.‐2:401(3) – on secured transactions that are proprietary securities – is unclear.

95 There is already a Czech translation of the interim Outline Edition and the work on the translation of substantial portions of various part of DCFR is ongoing. See point 47 of the General Comments, Outline Version, at 29.
single language of the DCFR was a rational choice if a number of caveats are kept in mind. Besides the dilemma whether always the right terms was chosen, some other more pragmatic considerations should be pointed at. First and foremost, the overwhelming majority of lawyers in Europe think, comprehend and perceive legal categories, principles and rules, by having the connotations of those in local languages in mind. This includes even English lawyers to whom as well the semantic content known from English law is the point of departure. This will require investment of substantial efforts, not just for the purpose of getting acquainted with the terminology of the DCFR, but equally importantly, for finding the equivalents in the domestic law. For example, finding the DCFR’s substitute for the paradigm English security device, known by the designation of ‘floating charge,’ is everything but a few minutes lasting simple exercise; though admittedly in this specific case the unease is due not just to terminology.96

Another hurdle in finding the local matches is attributable to the fact that typically no official or by wide-consensus adopted English vocabulary exists in European states having other languages as official. Rather, ad hoc sets of English terms are agreed upon for any particular translation project, what then – depending on the background, sophistication and often even personal preferences of the experts – cannot but lead to inconsistencies, incomprehension and communication problems.97 Hence, the arrival at the right spots in deliberations is far from

96 The DCFR in respect of floating security is obviously guided by German law, which does not know for such a self-standing nominated contract. As a consequence, one should look for rules scattered around more Articles of the DCFR to determine what the DCFR in fact offers instead of a floating lien. What one may conclude after losing quite some time searching for the traces of floating liens is that the DCFR offers nothing more in that respect than what is offered by German law: possibility of indirectly achieving similar but hardly equal results through the combined use more known types of narrower-reaching securities. For example, instead of creating a single floating lien (or English floating charge) one could rely on a series of contracts like chattel mortgage, security transfer (extended and expanded). The qualification of Dalhuisen is thus apt, when he characterized the DCFR’s treatment of the floating security as being merely “some contractual extension of existing property rights [in Art IX.2:307].” See J.H. Dalhuisen, Presentation on the Draft Common Frame of Reference (DCFR) pursuant to the Green Paper of the EU Commission of July 1 2010 COM(2010) 348 final (2010), at 43; paper available at <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/87_en.pdf>; last visited on 8 May 2013.

The provisions that make taking of floating security indirectly and conditionally possible are the ones on extension of the security interest to replacement goods (Art. IX.2-307) and on proceeds (Art. IX.-2:306). Dalhuisen rightly criticized the DCFR as its solutions “[…] follow German case law, but it would have been better if the whole structure of security interests in movable property, including intangibles, had been more fundamentally reconsidered and the floating charge had been more solidly founded in the structure of the security rights itself […].” Id. at 50.

97 One handy example proving the importance of terminology is secured transactions law – i.e., the material in DCFR Book IX. For example, the drafters of UCC Article 9 – the law of secured transactions – were conscious of the problems diverse terminology causes and have, among others, substituted old terms with fewer new ones exactly to make comprehension radically easier. This in particular included the substitution of a whole series of differently named security agreements (e.g., pledge, chattel mortgage, factoring, leasing, conditional sales, consignment, field warehousing, trust receipts) with ‘security agreement’ and ‘security interest.’
being easy, especially when one is faced with the task of identifying the equivalent of a locally seemingly unknown category. Indeed, the DCFR has taken over legal categories – and hence as well terms – that are completely unknown by numerous national laws. Moreover, that was undertaken unfortunately often without a proper justification and clarification; what obviously will cause inconveniences. It is equally challenging to deal with the situation when the local analogue seems to exist, but it is uncertain whether equation marks could be put between the two. The example of force majeure in Hungary could be given, where the civil code does not know such a specific category notwithstanding what, businessmen and lawyers alike, are cognizant of the concept and use the expression quite regularly (though in its Latin-originated *vis maior* format). In any case, the ramification of the Babelian confusion of tongues is a factor an arbitrator, lawmaker or lecturer in law should reckon with. Still, the striving of the drafters of the DCFR to make a huge step towards a ‘uniform European legal terminology,’ should be welcome and must be applauded.

As an example of questionable English translations let us mention the English translations or references to the 1996 Polish reform act. This act introduced changes similar to the ones in DCFR Book IX with elements from common laws. Yet the English term chosen as the central category – the equivalent of UCC Article 9 ‘security interest’ – is the problematic ‘registered pledge.’ This may cause confusion already on this level given that strictly speaking ‘pledge’ in common law systems is limited to possessory securities; i.e., the security interest is created by transfer of possession without any registration. In other words, the phrase is a form of oxymoron. The choice is problematic even content-wise given that the great novelty of the Polish act is exactly the introduction of a full range of new non-possessory security devices, none of which is created by way of transfer of possession. The English translation of the text of the Polish Registered Pledge and Register of Pledges Act of 6 December 1996 done by EBRD is available at <http://www.ebrd.com/downloads/legal/core/polandls.pdf>; last visited on 8 May 2013. See also Krzysztof Kaźmierczyk & Filip Kijowski, *Enforcement of Contracts in Poland*, in: Stefan Messmann & Tibor Tajti (eds.), *the Case Law of Central and Eastern Europe – Enforcement of Contracts* (European University Press, Bochum – Germany, 2009), at 607. Use of ‘pledge’ instead of ‘lien’ or ‘security interest’ in English language materials in Central Europe, however, is not characteristic only to Poland.

98 The best example is the brainchild of German dogmatism, the concept of ‘juridical act’ (“Rechtsgeschäft”), which has already been heavily criticized as “being unnecessarily complicated (and …) of no present or likely future importance in the acquis […]”. See Elena Ioriatti Ferrari, *Draft Common Frame of Reference and Terminology*, in: Luisa Antonioli & Francesca Fiorentini, *A Factual Assessment of the Draft Common Frame of Reference* (Sellier, 2011), at 319.

99 Point 23 of the General Introduction, at 17, proclaims this to be the paramount function of definitions.
C. TOPIC-BASED MAPPING: THE REPERCUSSIONS OF THE FORCED COMPROMISES IN THE DCFR: CULPA IN CONTRAHENDO AND FORCE MAJEURE

1. IMPOSED VERSUS THE EXTRAPOLATED COMPROMISES

In Eörsi’s classification of compromises, it seems that the rules on culpa in contrahendo and force majeure\(^{100}\) (or excuse due to an impediment in the DCFR’s vocabulary) are of the “clear and recognizable” type.\(^{101}\) Yet there is a crucial difference between the DCFR’s approach and earlier similar ventures what justifies going beyond the venerable classification of Eörsi. Namely, in case of pre-contractual liability, the continental civil law’s solution is simply imposed as something common to Europe, irrespective that common laws have nothing more than very remote functional equivalents of culpa in contrahendo. This justifies qualifying the culpa in contrahendo rules of the DCFR as a form of ‘imposed compromise,’ what as such obviously lessens, but does not a priori exclude, the chances of a wider exploitation of these rules.

The DCFR’s approach to force majeure is different because – contrary to precontractual liability – all systems have specific rules on frustration of contracts; it is rather the rules’ philosophical underpinnings, structure and the strictness of courts granting relief applying these rules is what differ. Hence, in the case of this segment of private law there was no need to impose an unknown legal category but “only” to find a common formula that could

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100 The other rough equivalent designations are ‘acts of God’ mainly in the US law and ‘vis maior’ in civil law systems. The definition of the Black’s Law Dictionary is a succinct and useful also for European context as a benchmark to compare to all the other typically more detailed and often convoluted and less transparent formulations. It reads as follows: “[Law French ‘a superior force’] An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).”

Difference should be made between force majeure and ‘hardship’ clauses: while in case of the former the supervening event makes performance impossible (for good or only temporarily), the latter is merely “an event that changes the contractual equilibrium between the rights and obligations of the parties in such a dramatic way that performance can become ruinous for one of them […].” Quoted from Melis, Werner, Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practices of the ICC Court of Arbitration, 1 J. Intl Arb. (1984), at 213 et seq, available at <http://www.trans-lex.org/126600>; last visited on 8 May 2013. As the article – though based on experiences in 1984 – noted, ICC arbitrators had tended to give excuse based on any of these clauses very rarely.

properly reconcile national distinctions. Herein comes from the justification for apostrophizing the force majeure rules of the DCFR as an ‘extrapolated compromise; extrapolated’ in particular because the DCFR’s formula is not an exact replica of any national solution but a scholarly synthesis or a refined common core. As a result, it may be assumed that the acceptability of the DCFR’s rules should be higher than those on culpa in contrahendo.

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102 It is not without a reason that the Comments to Article III. – 3:104: Excuse due to an impediment directly state: “[The Article] reflects the results that, broadly speaking, are reached in the laws of all the Member States though in some a different conceptual structure is employed.” It is rather the technicality in the last paragraph of the Article requiring from the party affected by the supervening event (i.e., debtor) to “ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time” that seems to be lacking from most European laws.

The DCFR drafters’ presumption was that in Europe ‘traditional requirements’ of force majeure could be extrapolated from the otherwise substantially differing national laws. Point C of the Comments to the very same Article (page 784) thus starts with the claim that “[t]he requirements laid down for the operation of the Article are analogous to the traditional requirements for force majeure.” What causes some unease is the DCFR’s use of quite unconventional terminology occasionally and instead of talking of ‘lack of foreseeability’ as one of the two main prerequisites for force majeure, sub-paragraph III. – 3:104 expresses the same idea by saying that “non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.”[Emphasis added.]
2. CULPA IN CONTRAHENDO

As it is well-known, in Europe, the doctrine of culpa in contrahendo\textsuperscript{103} is ascribed to the name of the famous 19\textsuperscript{th} century German jurist, Rudolf Jhering. From Germany\textsuperscript{104} then it spread to most other civil laws over the 20\textsuperscript{th} century, sometimes solidifying itself in explicit code or statutory provisions, other times without becoming part of blackletter law.\textsuperscript{105} English and other common laws are devoid of it – though cases exist\textsuperscript{106} that in fact lead to outcomes similar to those of civilian systems through the exploitation of other known contract or other legal

\textsuperscript{103} The Latin phrase roughly means ‘fault in conclusion of a contract’ or liability for leaving the negotiating table or otherwise causing damages or harm to the negotiating partner without a just cause. It is telling that the American Black’s Law Dictionary defines it as “[t]he principle that parties must act in good faith during preliminary contract negotiations” irrespective that US law does not know the concept.

The Comments to article II. – 3:301 entitled ‘Negotiations contrary to good faith and fair dealing’ define it as follows: “The present Article deals primarily with the duty to negotiate in accordance with good faith and fair dealing and with the liability of a party to negotiations for harm caused to the other party by entering into or continuing negotiations with the intention not to make a contract or by breaking off negotiations contrary to good faith and fair dealing.” See DCFR Comments, at 246.

\textsuperscript{104} In Germany, culpa in contrahendo became statutory, however, only in 2001 with the latest modernization of the law of obligations (see §311(2) in connection with §280(1) and 241(2) of the BGB).

\textsuperscript{105} A form of direct regulation exists, among others, in Austria, Bulgaria, Estonia, Germany, Greece, Poland, Portugal, Slovenia, and Spain. See DCFR Comments to Article II.-3:301 at 249-251.

\textsuperscript{106} The typically cited such a case is the English case of Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd. ([1989] 1 Q.B. 433 (1987) 439). In the case Bingham L.J. stated that “[albeit] English law has […] committed itself to no such an overriding principle [as the culpa in contrahendo], but has developed piecemeal solutions in response to demonstrated problems of unfairness [what] may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.” Encouraged (or mislead?) by this reasoning, O’Connor in his book Good Faith in English Law (Dartmouth, 1990) claimed even that there is a rapprochement of English and civil laws. See J.H.M. van Erp, the Pre-Contractual Stage, in: Hartkamp, Hesselink, Hondius, Joustra, Perron and Veldman (eds.), Towards a European Civil Code (Kluwer, 2011), at 371.

The leading US case is Hoffman v. Red Owl Stores (133 N.W.2d 267 [Wis. 1965]) in which the promissory estoppel doctrine was exploited to get to results similar to the one that could have been reached through the doctrine of culpa in contrahendo. The case concerned extended negotiations between a potential franchisee (Hoffmann) and the franchise system Red Own Stores. During the process, the franchisor recommended Hoffmann to sell his livelihood, a small bakery, in order to collect the money necessary for the purchase of a lot for the future franchise outlet. As the franchise deal eventually failed, Hoffmann sued. The court awarded damages having Red Owl’s promissory representations and Hoffmann’s reliance at sight. See, e.g., Gregory Klass, Contract Law in the USA (Kluwer Law Int’l, 2010), at 99.
These remote functional equivalents are, however, limited to remedying excessive injustices. According to one English author, “[…] even if English law does not enforce a rule of fair dealing, it does take account of unfair dealing.” In other words, while culpa in contrahendo is a general rule in civilian systems, the common law remote substitutes are rather mere exceptions. The quintessential reason behind the English position is “[t]he reluctance of English courts to recognize a duty to negotiate in good faith” or to interfere with bargains freely made because of a general mistrust of what are perceived to be over-broad principles not susceptible to clear or consistent application.” The justification of the position seems to go back to the 1883 case of Sanders Bros v Maclean Co.

Obviously, the above distinction should not lead to the conclusion that in civilian systems winning cases based on culpa in contrahendo is easy. On the contrary, the frequency of the doctrine’s appearance in reported cases is low and varies considerably from jurisdiction to jurisdiction.

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107 Kessler and Fine claimed that even though American law knows not for a specific doctrine “many of the doctrinal functions of culpa in contrahendo” were served through such notions as firm offers, mistake, misrepresentation, negligence, estoppel and implied contract among others. See, Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (January 1964), abstract, at 401. The same is roughly claimed by Farnsworth in a more recent article, where he said that if existing contract doctrines are “imaginatively applied,” adequate protection, similar to the one provided by the culpa in contrahendo, is available. See Allan Farnsworth, Precontractual Liability, 87 Columbia L. Rev. (1987), at 219.


109 Here, note that good faith has become part of both Canadian and US law. See Jacob Ziegel, the Legal Academy’s Contribution, in: Sarah Worthington (ed.), Commercial Law and Commercial Practices (Hart Publ., 2003), at 632. Thus, section 1-203 of the American UCC introduces a general ‘obligation of good faith’, however, only for the phase of performance or enforcement and not the pre-contractual phase. As put by Klass “U.S. law does not impose obligations on persons by virtue of the fact that they are engaged in negotiations. The duty of good faith […] applies only to a party’s performance under a contract. It does not extend to pre-contractual negotiations. Consequently, unless the parties have reached a preliminary agreement of one or another type […], the parties are free to break off negotiations for any reason or for no reason at all. This is sometimes called the ‘aleatory view’ of negotiations: unless the parties agree otherwise, each engages and invests in negotiations at her own risk.” See Gregory Klass, Contract Law in the U.S.A (Kluwer Law Int’l, 2010), at 98.

In addition to the mentioned section with the general good faith rule, explicit sections of the UCC further concretize what is meant by good faith in the context of particular commercial transactions covered by the UCC. Thus, Article 2 on Sales defines it as ‘honesty in fact’ and “observance by the merchant of reasonable commercial standards of fair dealing in the trade.” See UCC section 2-103(1)(b).

110 See Roy Goode, Commercial Law (Penguin, 2nd ed.), at 100.

111 The often quoted sentence conveying the essence of the position was that “credit, not distrust, is the basis of commercial dealing; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery […]” See Sanders Bros v Maclean and Co (1883) 11 QBD 327, at 343.
As a result, the small number of reported cases cannot but lead to the conclusion that the outcome of disputes on precontractual liability on the level of national laws is tainted with differing yet obviously existent level of unpredictability. EU law is hardly of much help as the full spectrum of the repercussions of the ECJ’s decision in the Tacconi v. Heinrich Wagner case – adjudicating that pre-contractual liability is not of contractual nature – has not been charted yet.

The inclusion of the culpa in contrahendo into the DCFR could be looked upon as an attempt to artificially promulgate it to the pedestal of a common European doctrine given that it is unknown even by some civil law systems (let alone the common law systems of Europe). That at no price should lead to the oversimplified conclusion that – besides the hinted at national variations – no further blank spots are detectable in the doctrine. To the

Commenting on the German ‘salad leaf case’ (Bundesgerichtshof – German Supreme Court – 28 Jan. 1976, Entscheidungen in Zivilsachen [BGHZ] 66, 51), van Erp noted that “[i]n comparison with Dutch law, the money compensation which can be awarded is somewhat more limited. Generally speaking, only losses [‘negatives Interesse’] can be claimed, although in some cases it seems that a claim for lost profits could also be awarded.” Otherwise, the German case was about a mother and her child, the latter falling and getting injured by slipping on a salad leaf while buying groceries. See J.H.M. van Erp, the Pre-Contractual Stage, in: Hartkamp, Hesselink, Hondius, Joustra, Perron and Veldman (eds.), Towards a European Civil Code (Kluwer, 2011), at 375.

For the Lithuanian position – though not clear whether resting on concrete cases or rather expressing only his own opinion – Klimas states: “Lithuania’s §6.163 echoes that of the PECL with one important difference. The PECL imposed liability for culpa in contrahendo upon a party which has begun or which continues negotiations with no real intention of reaching an agreement. Under the Lithuanian code, however, a party is at liberty to begin or continue negotiations without any real intention of reaching an agreement, unless it also engages in other acts demonstrating its bad faith.” Tadas Klimas, Comparative Contract Law – A Transsystemic Approach with an Emphasis on the Continental Law (Carolina Acad. Press, Durham N. Car., 2006), at 74.

The cautious language in the DCFR Comments well expresses this in the paragraphs reviewing the respective positions of various European national laws.

See Case C-334/00 Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), decision as of 17 Sept. 2001. The ECJ adjudicated that “an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters […].” A similar view is expressed by Tadas Klimas, Comparative Contract Law – A Transsystemic Approach with an Emphasis on the Continental Law (Carolina Acad. Press, Durham N. Car., 2006), at 74.

The pertaining section II. – 3:301: Negotiations contrary to good faith and fair dealing reads:

“(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 a contract.

(3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.

(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.”
contrary: suffice to mention that a divide exists concerning whether the concomitant liability is contractual, tortious (i.e., delictual) or of *sui generis* nature; it is unclear whether the mentioned ECJ decision has changed much in that respect. Still, perhaps the biggest question mark should be placed next to the issue of what the content and the reach of the doctrine is given that domestic laws radically differ in that respect.

Having the differences that subsist even among the European civil laws in mind, the solution of the DCFR could exactly because of that serve as a panacea, especially in cross-border transactions with parties from different European systems each characterized by the differing reach of local variants of the culpa in contrahendo doctrine. Yet, the DCFR’s explicit provision – even though being admittedly quite general – could turn out to be a comparative advantage especially over national laws *without* such explicit rules. Enforceability of awards applying the DCFR doctrine in a common law system would be another issue that would require research. Until the appearance of the first awards and judgments, however, hardly could the DCFR serve but a point of departure in teaching law.

116 This is the case in France and Belgium according to the DCFR Comments, which also adds to this list Luxembourg though with the qualification of ‘probably.’

117 The leading German case on culpa in contrahendo – the *Linoleum case (Reichsgericht [German Supreme Court] 7 Dec. 1911, amtliche Sammlung der Reichsgerichtsprechung [RGZ] – 78, 239*) – properly illustrates also why neither contract, nor tort law, is appropriate. The case was about a customer and her child who were injured by rolls of linoleum that fell on top of them as the shopkeeper moved them when trying to show the shop’s assortment. The court ruled that the parties’ relationship was *quasi-contractual* as they were about to conclude a sales contract and hence the salesman had the obligation to care for the health of the customer. See J.H.M. van Erp, *the Pre-Contractual Stage*, in: Hartkamp, Hesselink, Hondius, Joustra, Perron and Veldman (eds.), *Towards a European Civil Code* (Kluwer, 2011), at 374-75.
3. FORCE MAJEURE (EXCUSE DUE TO AN IMPEDIMENT)

3.1. TERMINOLOGY AND SYSTEMIC CAVEATS

To start with, in Europe, all legal systems “now admit that impossibility of performance should be recognized as an excuse,” though the rules differ significantly. They are based on varying foundations and “the way excuse is given effect varies considerably”\textsuperscript{118} – what then could not but result in a non-unified terminology as well.\textsuperscript{119} In finding the compromise, the DCFR drafters did not

\textsuperscript{118} The quotations are from point I.2. of the Notes of the DCFR to Article III.-3:104 on Excuse Due to an Impediment, DCFR Comments, at 788.

\textsuperscript{119} The multitude of terms is well reflected already in the DCFR and its Comments. While the text of the main article has opted for the phrase ‘excuse due to an impediment,’ in the Comments to the \textit{very same section} a variety of other designations could be found including ‘force majeure,’ or ‘impossibility.’ Unfortunately, it seems that the exact relationship of these has not been properly clarified – what inevitably causes, at least, some unease in the reader. Understandably, some of these are caused by the different conceptual foundations of the covered national systems. Instead of mechanically describing national laws, classification of European systems according to an agreed upon criterion might have made the text more transparent. Now, it is not necessary self-explanatory why the Comments at one instance talk of ‘impossibility \textit{and} force majeure’ (title of the Notes section at 788) and then in point 9 of the very same notes use ‘impossibility \textit{or} force majeure’ that exist in addition to the possibility of excuse based on changed circumstances under “restricted circumstances.” See DCFR Comments, point 9 of the Notes, at 790.

The Hondius & Grigoleit book cited herein more times has opted for ‘unexpected circumstances’ what the DCFR names as ‘impediment.’ It is regretful that the editors of this book found it also unimportant to explain their choice of terminology, apart from indirectly mentioning that the doctrines on unexpected circumstances could be “\textit{put together under the heading frustration of contract},” leading to frustration in a “\textit{very broad sense}.” See Ewoud Hondius and Hans Christoph Grigoleit, Introduction at 6, \textit{in:} Ewoud Hondius and Hans Christoph Grigoleit, \textit{Unexpected Circumstances in European Contract Law} (Cambridge Univ. Press, 2011).

Communication might even further be obscured if proceeding from a national system that uses descriptive phrases and is devoid of both, a separate concept of and also of civil code provisions on force majeure. A good example would be the old Hungarian Civil Code of 1959, which did not specifically regulate force majeure. Instead, a number of potentially applicable provisions could be relied on, though \textit{vis maior} is such a legal category in this country that is widely known not just by lawyers, but also by businessmen. The most important exploitable categories were: 1/ ‘impossibility of performance’ (§312(1) – “\textit{teljesítés lehetetlenné válása}”); 2/ a number of provisions embodying the clausula rebus sic stantibus doctrine – to wit, ‘performance of a preliminary contract’ (§208(5) – “\textit{előszerződés [teljesítése]?”} and, in particular, ‘modification of contracts by courts’ (§241-42 – “\textit{szerződésmódosítás bírósági úton}”); as well as 3/ the sub-section containing \textit{laesio enormis} (§201(2) – “\textit{félén túli sérelem”). Additionally, specific provisions existed that freed some categories of business activities, otherwise subject to a form of objective liability, like § 345(1) on liability for dangerous activities (“\textit{veszélyes üzem}”). As it could be concluded, it is an issue whether any one of these fits the specificities of a force majeure situation in a business-friendly manner? This is a legitimate question though in Hungary – like in most of continental European countries – only a small minority of court cases gets reported what makes research next to impossible. The new Hungarian
significantly depart from known patterns and hence the DCFR’s rules on force majeure should be familiar in all corners of Europe (and beyond). Even though explicitly declared only by the Comments, the rules are non-mandatory, meaning that the parties may modify the DCFR’s “allocation of risk of impossibility of performance,” as it would be also in case of some specific types of contracts having distinct rules on allocation of risk – notably: sales law.\textsuperscript{120} When applicable, trade usages could have similar effects. In other words, it should be borne in mind that the ensuing discussion is about dispositive (default) rules that come into picture only in the lack of agreement. The succinctness and simplicity of the DCFR’s single provision (which though makes references to some others)\textsuperscript{121} as well as the drafters’ ingenuity of being capable of coming forward with something common should be adjudged in the light of that.

Yet, the succinctness might also turn to be the weak point of the provision because it provides no closer guidelines for making projections on how liberal the rules are? Or, in pragmatic terms, how easy it would be to get excuse from courts or arbitrators for non-performance because of force majeure events? This is a crucial issue as systems differ exactly with respect to this criterion. This is commonly known though hardly could one point to even a relatively precise chart showing the rigidity or flexibility of the frustration laws of various jurisdictions. While national systems have court cases or opinions of authoritative scholars for providing some guidance to the inquirer, these are obviously lacking in case of the DCFR as of yet. Hence, the ultimate question is rather what will be more favored by arbitrators: the DCFR with its single relatively short provision or rather the national laws with doctrines and, ideally, with a series of cases providing sufficient guidance for adjudicating force majeure disputes? While the first would leave ample room for the creativity of arbitrators, the latter would be more predictable though at the price of being conditioned on what the known cases (if any) would dictate. The verdict on the arbitrability of the force majeure provisions of the DCFR to a great extent is contingent on the answer to this query.

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Civil Code that is foreseen to step into force in 2014 seems to have kept in essence the old patterns. As opposed to Hungary, the Lithuanian Civil Code, for example, contains a specific clause on force majeure in Article 6.212.

\textsuperscript{120} Quoted from point A of the DCFR Comments to Article III. – 3:104, at 783.

\textsuperscript{121} As a preliminary point: the cross-references in case of this Article make things opaque and uncertain. Concretely, reference is made by sub-paragraph 3 – dealing with force majeure on temporary impediment – to generally applicable Article III.-3:502 defining fundamental non-performance. This cross-referencing may be resorted to by the party not affected by a force majeure if the supervening event would “deprive the creditor of what the creditor was entitled to expect under the contract.” Termination here presupposes a notice communicated to the debtor within reasonable time (see point D of the Comments to III.-3:104, at 786). In other words, unlike in case of permanent impediments, the contractual rights get extinguished only after the notice requirements have been properly adhered to – what obviously requires time, efforts and entails some risks. Against the potential abuse of this right by the creditor, the debtor’s only protection is his right to cure (see point B of the Comments to Art. III. – 3:502, at 856).

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46 TIBOR TAJTI | SYSTEMIC AND TOPICAL MAPPING OF THE RELATIONSHIP OF THE DRAFT COMMON FRAME OF REFERENCE AND ARBITRATION
3.2. CLASSIFICATION OF EUROPEAN SYSTEMS ACCORDING TO THEIR ATTITUDE TO FORCE MAJEURE

3.2.1. THE DIFFERING DEFINITIONS OF FORCE MAJEURE

Another way to cast light on the features of the DCFR’s frustration rules and one of the main ways to classify European systems is along the line whether they have a “general exceptional doctrine specifically addressing the issue of unexpected circumstances that can [additionally] lead to adjustment of the contract.”\(^{122}\) The DCFR belongs to those that have opted for a specific regime. This means that instead of directing the resolution of force majeure-related disputes to such conventional doctrines as mistake, impossibility of performance or *laesio enormis*,\(^{123}\) not necessarily fitting the needs of modern commerce in every situation – a tailor-made provision\(^{124}\) was coined. This, stated again very conditionally, is another business-friendly characteristic of the DCFR, especially over European systems lacking such a mechanism\(^{125}\) or having a complex web of not necessarily transparent interlinked sources of law.\(^{126}\)

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123 *Laesio enormis* is defined by the Black’s Law Dictionary as “[Latin ‘loss beyond half or great] […] [t]he principle by which a seller may rescind a contract if a sale yields less than half the true value of the thing sold.” As stated by Radin “[…] in spite of its imperfections, lesion not only was adopted in all modern civilian systems […], but became the means of testing the validity of contracts generally by their fairness, a principle embodied in the German Civil Code (section 138) and the Swiss Code of Obligations (section 21). […]. In modern courts, in civil-law countries, it invests judges with a discretion not very likely to be abused, but sufficient to act as a deterrent to the grosser forms of economic exploitation.” Max Radin, Handbook of Roman Law 233-34 (1927); quoted by the Black’ Law Dictionary.

124 See DCFR Article III. – 3:104.

125 The DCFR Comments mention, for example, Poland and Slovakia as not having a provision on force majeure. Notwithstanding of what the debtor may prove according to Polish law that his non-performance is due to circumstances for which he cannot be held liable – a cause étranger. See DCFR Comments, point I.7. of the Notes to Article III.-3:104, at 789-90. As opposed to that, Slovak law resorts to impossibility, the related provisions which make the debtor’s obligation extinguished if impossibility appropriately proven. The interesting point is that the debtor is excused from paying damages to the creditor that was caused by the so extinguished performance only if the hindrance was “independent of the debtor’s will” and if it “could [be] reasonably … assumed that the debtor could have prevented or overcome such hindrance or its effects.” Id. point I.11, at 790.

126 Austria could be taken as an example. The first layer of the pertaining law is made of a number of provisions of the Austrian Civil Code (ABGB) specifically addressing particular types of contracts as affected by unexpected changes, to wit, labor contracts, contracts for work and services, lease contracts, agency contracts, mortgage & pledge agreements, or donations. The second layer is made of general contract law rules likewise located in the ABGB, in particular mistake in motive, impossibility, delay, *laesio enormis* and termination related concepts. The third layer is the doctrine of ‘cessation of the basis of the contract (“Wegfall der Geschäftsgrundlage”), described as “the main legal device determining the legal consequences of an
The high regard for business interests is visible also from two straightforward solutions of the DCFR’s single provision on force majeure. *First,* it defines force majeure through control and foreseeability; i.e., the “obstacle must be something outside the debtor’s sphere of control” and “the impediment must … be one that could not have been taken into account by the debtor at the time the obligation was incurred.”[^127] This formulation is especially advantageous over systems that do not specifically foresee force majeure as it is direct and thus predictable. As the DCFR Comments state, and we have no reason to disagree, the DCFR’s’ definition eventually represents such a common position that could be reached even via those national laws that know not specifically for force majeure.[^128]

The *second* point that easily catches the eye is that, apart from the mentioned commonalities, the DCFR introduces an explicit obligation of the debtor affected by the supervening impediment to inform the other party in reasonable time.[^129] No such rules seem to be normally added by national laws, at least, in explicitly formulated form; yet, what is “clearly commercially sensible.”[^130] Apart from the fact that it would have been desirable to add that the communication should ensue using a method of communication ‘ensuring evidence of receipt,’ to make things even more predictable, not much further could be added.

### 3.2.2. THE DIFFERING CONSEQUENCES OF FORCE MAJEURE

Besides the question whether special rules on force majeure exist, the basic contours of a system concerning this specific institution are to be adjudged based on two further main questions: *firstly,* what may happen to the contract itself if a supervening event occurs, and

**unexpected change of circumstances** notwithstanding that it is not codified but is only a creature of courts and scholars. The application of the various layers is tainted with uncertainty. For example, the relationship of the third and the higher ranking layers is unclear. The firm points of departure are that it is known that they come into picture when nothing specific was provided for by contract and that courts tend to apply them cumulatively to justify the result reached. See the part on Austria by Ewoud Hondius and Hans Christoph Grigoleit, at 63 et seq. *in:* Ewoud Hondius and Hans Christoph Grigoleit, *Unexpected Circumstances in European Contract Law* (Cambridge Univ. Press, 2011).

Note that, opposed to Austria, in Germany the doctrine of cessation of the basis of the contract became statutory and enshrined into § 313 BGB with the 2002 reform of the law of obligations, though under a somewhat different designation as ‘disruption of the basis of the contract’ (“Störung der Geschäftsgrundlage”). *Id.* part on Germany, at 55 et seq.

[^127]: See point C of the DCFR Comments to Article III. – 3:104, at 784-85.

[^128]: See point A of the DCFR Comments to Article III. – 3:104, at 783.

[^129]: Slovakia seems to be one of the exceptions, where according to § 577 of the Civil Code, the debtor must inform the creditor without undue delay or else he might be held liable for damages for the loss caused thereby. *See* DCFR Comments, point I.11. of the Notes to Article III.-3:104, at 790.

[^130]: *Id.*
secondly whether the parties have restitutory or other rights whatsoever? The first of these is the formula that makes a system more or less liberal through setting the balance vis-à-vis the fundamental principle of *pacta sunt servanda*, viz. the case with which the parties can escape from their contractual obligations. With regard to this, the DCFR seems to be more liberal than many European national laws,\(^{131}\) though its formula is not a complete carte blanche available to the debtor (i.e., the party affected by the supervening event) either. It allows for easy escape from the contract only in case of **permanent impediments**: in case of the occurrence of which the obligations of the parties are *automatically extinguished* without a need of a formal notice.\(^{132}\)

In case of **temporary impediments**, the DCFR is already more cautious and adds two limitations; neither of them allowing instantaneous escape from the contract — obviously to save the contract whenever possible. The basic rule is that in case of temporary impediments performance of the contract will be temporarily excused — for the duration of the impediment. The second pro-contract rule is the exception according to which even in case the delay caused by temporary impediments amounts to *fundamental* non-performance, the creditor may resort to termination only if satisfying the notice requirements and risking that the delay would not be qualified by the court or arbitrators as fundamental.\(^{133}\)

These rules of the DCFR on temporary impediments may be more onerous from what some national laws offer; still they are more illustrative of the DCFR’s liberal stance rather than of the contrary. Namely, only rigid laws limit themselves to termination — an “**all-or-nothing solution, which might not always be appropriate […] [as it] may completely shift the burden of the unexpected event.**”\(^{134}\)

The DCFR did not opt for renegotiation or adjustment of the contract in case of temporary supervening events either; though one may only speculate what the reasons of the drafters were. In case of the first, presumably the main argument was that **renegotiation** is always a possibility and therefore the law should not impose it. Furthermore, renegotiation is contingent on the willingness of the parties and it is hard to define what standards of behavior would be needed to satisfy the requirement.\(^{135}\)

In other words, by not imposing renegotiation, the DCFR has eliminated a potential additional source of uncertainty. As far as the second issue is concerned, the justification seems to rest on similar grounds: **adjustment of the contract** having the supervening event in sight is also a possibility on which the parties could agree upon and good partners should not hesitate to overcome the dire straight situation that way. The DCFR’s solution differs, however, from other known methods of adjustment which “**leave wide

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\(^{131}\) This is different, for example, under Belgian, French and Luxembourg civil codes that require judicial intervention for termination. See point 1 of DCFR Comments, Notes to Art. III.–3:502, at 857.

\(^{132}\) In case of a **permanent** impediment, both the debtor’s and the reciprocal obligation of the creditor are automatically extinguished as per sub-paragraph 4 of III. – 3:104. The other distinction vis-à-vis temporary excuse is that the DCFR explicitly mandates application of the generally applicable rules on restitution upon termination only in case of permanent impediments (III. – 3:510 and 3:511).

\(^{133}\) See paragraphs (3) and (4) of III. – 3:104.


\(^{135}\) Id. at 10.
discretion to the courts in determining the fair allocation of the risks” what negatively affects the predictability of the outcomes of lawsuits.  

As far as the remedies of the parties are concerned, similarly to modern laws, the DCFR makes restitution available as well; though restitutary rights are explicitly mentioned only with respect to permanent impediments and for contractual obligations only. Although there is no mention of damages in the force majeure Article or in the Comments to it either, the generally applicable clauses might come into picture. According to these, if non-performance is excused – as it is in the case of impediments (force majeure) – the creditor is not entitled to claim damages for the loss suffered.

136 Hondius and Grigoleit made mention of the following methods whereby adjustment of contract could be achieved: firstly, in the Netherlands, Spain and Sweden that is imposed by statutory law and thus courts are expected to enforce those provisions; secondly, according to the German and Italian model the burdened party has the entitlement to request adjustment from courts, thirdly, the same results could be achieved by combining “termination of the contract with a claim of compensation for the party who would have benefited from the contract” – what is the case under the UK Law Reform Frustrated Contracts Act 1943. See Ewoud Hondius and Hans Christoph Grigoleit, Introduction and Context, at 9-10; in: Ewoud Hondius and Hans Christoph Grigoleit, Unexpected Circumstances in European Contract Law (Cambridge Univ. Press, 2011).

137 Suffice to mention the famous UK Law Reform (Frustrated Contracts) Act of 1943 that was passed to remedy the unjust common law rules that had not required partial or full return of pre-payments in case of frustrated contracts. The case of Chandler v Webster ([1904] 1 KB 493) is typically mentioned as the scholarly example of the wrongs the 1943 act was meant to remedy. This was another of the coronation cases, where Mr Webster rented a room to Mr Chandler for the purpose of seeing the coronation of Edward VII; Mr Chander pre-paid the rent (£100). As in the first coronation case (i.e., Krell v Henry, [1903] 2 KB. 740), the King fell ill and the purpose of the contract got frustrated. The court, however, not only refused to order the repayment of the downpaid money to Mr Chandler, but made him liable also for payment of the remainder of the balance (£41 and 15s). The text of the act is downloadable at <http://www.legislation.gov.uk/ukpga/Geo6/6-7/40/contents>; last visited on 8 May 2013.

138 See DCFR Book III – Obligations and Corresponding Rights, Chapter 3, Section 7, Article III.-3:701. Note that damages are available in case of bordering situations, like those governed by the rules on mistake. These would be when a party mistakenly (negligently) concludes a contract knowing already at that point in time about the supervening event that will prevent him from performance. For the mistake-related rules of DCFR see Book II on Contracts and other Juridical Acts, Chapter 7 on Ground of Invalidity, Section 2 Vitiated Consent or Intention, Articles II. – 7-201 through 7-203. Another difference vis-à-vis the rules on excuse due to an impediment is that here the possibility of adaptation of the contract is already foreseen. A similar position was taken by Bineva who compared the DCFR with Bulgarian law – the latter allowing for damages. See Valentina Bineva, Change of Circumstance, in: Luisa Antonioli & Francesca Fiorentini (eds.), A Factual Assessment of the DCFR (Sellier, 2010), at 84.

However, frustration and mistake rules are distinct, because of why I cannot agree with views that liability for negligent contracting and thus potential liability for damages is implicit also in the force majeure Article of the DCFR. Concretely, De Geest claimed that “DCFR III.-3:104 also holds a debtor responsible for not having (reasonably) foreseen the impediment at the time of contracting. Here, the idea of negligent contracting is implicit. If the promissor should have taken the impediment into account at the time of contracting she should not have made the promise in the first place. [Geert then went on and concluded that reliance damages would be appropriate in that situation].” See Gerrit de Geest, Specific Performance, Damages and Unforeseen Contingencies in the DCFR, in: Pierre Larouche & Filomena Chirico, Economic Analysis of the DCFR (Sellier, 2010), at 128.
3.2.3. THE UNIFYING FORCE OF THE DCFR’S FORCE MAJEURE RULES

Perhaps the biggest contribution of the DCFR as far as force majeure is concerned is that it attempts to cut back the effects of the varying doctrinal underpinnings that are present in national laws, the number of which amounts to at least four, each being responsible for the divergences in the rules and outcomes of court cases. These, in isolation or in conjunction with statutory law and court cases, are often impediments rather than aids that blur orientation and reduce predictability in the context of cross-border transactions. This is so because the various national frustration doctrines are theory and case law-dependent – even in civilian systems. The available cases are additionally tainted by such systemic discrepancies as the authoritative versus persuasive force of precedents in common versus civilian laws or simply because of the

139 Hondius and Grigoleit make mention of the following such ‘exceptional’ doctrines tailor-made for unexpected events: 1/ the common law doctrine of frustration of contract; 2/ the loss of the legal basis of the contract (Germany and Austria – influencing also Greece, Italy and Portugal); 3/ the doctrine of assumptions of Denmark and Sweden; and finally 4/ the doctrine of clausula rebus sic stantibus (e.g., Lithuania, Spain and Slovenia – and given that all successor states of the former Yugoslavia inherited the same Yugoslav Act on Obligations that Slovenia has, it could be presumed that they rely also on this doctrine).

On a brief account, the doctrine of frustration had the same origins and shared bases roughly until the 20th century in all common law countries. The doctrine was a departure from the initial theory of absolute contractual liability typically illustrated by the famous Paradine v Jane case from 1647. Capitalism brought with it the first excuse granted due to impossibility (Taylor v Caldwell, 1863), then other impediments and even for frustration of purpose (the Coronation cases) were recognized. Comparative literature mentions the UCC’s doctrine of impracticability as a system with the most liberal (lenient) rules for granting excuse – an approach that was not followed by other common law countries. For an overview see Edwin Peel, Treitel on the Law of Contracts, chapter on frustration 924-991 (Sweet & Maxwell, 12th ed., 2007).

The history of the German “Wegfall der Geschäftsgrundlage” is telling of the hectic history of force majeure because at by the end of the 19th century when the German Civil Code was drafted irrespective that even two doctrines were available – the clausula rebus sic stantibus and the laesio enormis – none was enshrined into the Code. The lack of a doctrine potentially providing for excuse came to be extremely problematic after World War I at times of extreme shortage of goods and hyperinflation. The solution was the acceptance of Oertmann’s concept of Geschäftsgrundlage and subsequent refinement of its meaning – ending with its inclusion into the Civil Code in 2002 with the reform of the law of obligations. See Ewoud Hondius and Hans Christoph Grigoleit, Overview of German law at 61-62., in: Ewoud Hondius and Hans Christoph Grigoleit, Unexpected Circumstances in European Contract Law (Cambridge Univ. Press, 2011).

The doctrine of assumptions is similar to the previous one: it excuses a party to a contract if his obligations “unexpectedly become[…] more burdensome” – which may include (similarly to the Germany concept) mistakes at the time of conclusion and changed circumstances. The doctrine of clausula rebus sic stantibus places the focus on the changed circumstances that arise after the formation of the contract and it excuses if performance has become extraordinarily burdensome (Spain) or “where the balance of contractual obligations is fundamentally altered (Slovenia).” See Ewoud Hondius and Hans Christoph Grigoleit, Introduction and Context, at 8; in: Ewoud Hondius and Hans Christoph Grigoleit, Unexpected Circumstances in European Contract Law (Cambridge Univ. Press, 2011).
different priorities formulated by the forces shaping the legal stratosphere. As a result, force majeure law is far from being similar, let alone equal, even in systems resting on identical foundations.

Comparative lawyers should be additionally ascribed to that the exact meaning and reach of the doctrines has not been comparatively mapped in sufficient detail so far in Europe. In that sense, the drafters of the DCFR seem to have been right by taking a pragmatic stance in lieu of getting lost in the quagmire caused by the myriad doctrines offered by national laws. Some issues, however, remain open like whether the presence of doctrines could be completely excluded if the DCFR is to be applied? Or rather in case of doubt arbitrators should nonetheless resort to the scrutiny of the philosophical underpinnings of domestic laws?

Irrespective whether one looks favorably at the DCFR or not, the versatility of European frustration law is a matter of fact. It should go uncontested as well that considerable convergence has already occurred and force majeure clauses, especially in international contracts, have become standards boilerplates. Such rapprochement is contradicted by the fact that precedents are lacking and that the courts even of those countries that use similar concepts often end up with differing results. The DCFR’s force majeure rules aim ease this tension, among others, by giving presumably the widest freedom to arbitrators to find the most business-friendly solution. The freedom and the familiar language, however, might be also a gate for infiltration of inherited reflections from domestic laws of the individual panel members.

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140 These seem to be the main findings in Ewoud Hondius and Hans Christoph Grigoleit, General Comparative Remarks at 643, in: Ewoud Hondius and Hans Christoph Grigoleit, Unexpected Circumstances in European Contract Law (Cambridge Univ. Press, 2011).
Although it might sound commonplace, yet the differences in the nature of various branches of law covered by the DCFR – some quite novel for many parts of Europe – radically affect their potential exploitability by arbitrators or otherwise as suggested by von Bar. The brief juxtaposition of sales law, as the most stable, by common or largely resembling elements stuffed branch of private law, contrasted with the newer-generation franchise and secured transactions laws might be telling in that respect.

1. SALES LAW

In case of sales law, two main questions will be focused upon: firstly, what follows for arbitrators from the fact that sales contracts are the number one paradigm nominated contracts in Europe, and secondly, how does the popularity of the United Nations Convention on Contracts for the International Sales of Goods (CISG – Vienna, 1980) – the most successful international treaty on sales law141 – affect the potential use of the DCFR in arbitration?

1.1. SALES AS A PARADIGM CONTRACT

As to the first of these queries, sales are not just the “paradigm for contracts”, but “probably [also] the most common contract”142 in all of Europe (and beyond). This preeminence is properly reflected in the prime place this nominated contract has in the DCFR. The downside of these attributes is the – not necessarily user-friendly matrix – of sales rules scattered around even three DCFR Books.143 The eminence sales law has in Europe should go uncontested: its existence as a nominated contract, maturity and even the substantial resemblance of its underlying structure are all well-known. Suffice to juxtapose any of the mature European sales

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141 The CISG was ratified as of December 2012 by 78 countries (major non-ratifying yet economically powerful countries are Brazil, Hong Kong, India, South-Africa, Taiwan and the United Kingdom). Text downloadable from the Database of Pace University at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>; last visited on 8 May 2013.

142 See point A of the DCFR Comments to section IV.A. – 1:101 dealing with the coverage of the Part A on Sales Law at 1207.

143 Concretely, DCFR Book II contains the rules on formation, validity and interpretation, DCFR Book III the ones on performance, and finally DCFR Book IV parties’ rights and duties.
laws and the still developing franchise law to realize that. Because of these parameters, the DCFR’s sales law provisions are presumably the most readily exploitable by arbitrators from among the three contract types discussed herein. Naturally it has to be borne in mind that the DCFR enshrines in itself a compromise model that differs to a varying degree and in respect of different issues from European national sales laws. Still one could be sure that virtually all the constituent legal issues and categories of sales law are known no matter which European country’s law the arbitrator may be familiar with – what is hardly so in case of franchise or secured transactions laws. These considerations are all important determinants for answering our central query of the arbitrability of DCFR’s sales law; yet as we shall see in the following – other considerations deserve attention as well.

1.2. THE CISG AND THE DCFR

The relationship of the CISG\(^\text{144}\) – governing international sales law – and the DCFR deserves attention irrespective of their differing spheres of application: while the former has a global reach, the latter instrument is destined to be confined to the Old Continent only. As it is well-known, the CISG is one of the most successful international conventions due to the high number of ratifications.\(^\text{145}\) It could be claimed as well that the CISG is far from being unknown to arbitrators. Heding to the importance of the CISG, the research leading to the DCFR has taken into account not just national laws, but also such successful relevant international instruments as the CISG;\(^\text{146}\) the DCFR Comments make appropriate references to it as well.\(^\text{147}\) Furthermore, through the presence at discussions on the DCFR of such doyens of CISG law as Peter Schlechtriem – who had directly participated in drafting of the CISG – the ubiquity of the Vienna Convention’s spirit was ensured. The resulting likeness of the CISG and the DCFR might make the arbitrators at home if asked to decide a case by relying on the sales-related provisions of the DCFR exactly due to the familiarity with the material. Yet the resemblance might turn out to be misleading as the DCFR is not a mere replica of the former and in deciding cases, as wisdom suggests, it is the detail wherein the devil is hidden.

For this reason, perhaps, it is easier to deal with the readily determinable differences of the two, starting from the fact that contrary to the DCFR’s full coverage of sales law, the CISG

\(^\text{144}\) For the text of the CISG, with a database of related court decisions and arbitral awards as well as scholarly publications see the Albert H. Kritzer CISG Database maintained by the Pace Law School at <http://www.cisg.law.pace.edu/>; last visited on 8 May 2013.

\(^\text{145}\) In April 2013, the number of parties to CISG is 79. See the related UNCITRAL website at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html>.


\(^\text{147}\) See Id. point 25, at 18.
is an incomplete instrument.\footnote{As per Article 4, the CISG contains only the rules on formation of and the rights and obligations of the parties to international sales contracts. See also Peter Schlechtriem, Uniform Sales Law (Manzsche Verlags, Universitätsbuchhandlung, Vienna, 1986), at 32.} For instance, the CISG does not extend to consumer contracts.\footnote{See CISG Art. 2(a) which excludes the Convention’s application to “goods bought for personal, family or household use unless the seller, at any time before or at the conclusion of the contract, neither knew, nor ought to have known that the goods were bought for any such use.”} Furthermore, the underlying policy choices, affecting a priori also the very nature of the two instruments, are different\footnote{As formulated in a venerable commentary to the CISG “despite the international origin and features of the Convention, once it is ratified by a State, it is fully incorporated within the national legal system displacing the domestic regime otherwise applicable, whether this would be a single regime or a double regime depending upon the civil or commercial character of the transaction.” See Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG) (C.H. Beck-Hard-Nomos, 2011), at 6 – hereinafter: Kröll-Mistelis-Viscasillas CISG Commentary.} given that while the CISG was aimed at unification of international sales law – upon ratification becoming hard law on national level – the functions and the potential perusal forms of the DCFR are more modest. It is crucial for exploitation in arbitration that the CISG is available in certified versions of all the official languages of the United Nations (UN);\footnote{To wit, Arabic, Chinese, English, French, Russian and Spanish. Naturally, the CISG has become translated to many other languages. E.g., as German was not an official language of the Conference drafting the CISG, Germany (then made of the Federal Republic of Germany and the German Democratic Republic), Austria and Switzerland drafted an official German version in 1983. See Peter Schlechtriem, Uniform Sales Law (Manzsche Verlags, Universitätsbuchhandlung, Vienna, 1986), at 20.} the DCFR exists solely in English as of yet.\footnote{Besides the DCFR being first published in English, it is of importance that it was also the working language of all the drafting groups and it is only the English version that has been adopted by the project teams. See point 47 of the General Comments, Outline Version, at 29.} This mono-lingual barrier coupled with the semantic problems brought to the fore by European languages might turn the seemingly simple task of applying the DCFR into a Sisyphean labor in international cases inevitably involving more languages directly or indirectly; at any event, the CISG is a step ahead of the DCFR in that respect. The experiences with the CISG were put forward by the drafters of the DCFR for terminology innovations as well. This happened, for example, in case of the substitution of the CISG ‘avoidance’ with the presumably more widespread term of ‘termination.’\footnote{According to Mac Queen, Clive and Mac Gregor, CISG’s use of the term ‘avoidance’ was a mistake because “it suggests that the contract is made void from the beginning.” This was not a problem for the CISG because validity is not covered by it (Art. 4). Yet, opposed to the CISG, the DCFR “[…] needs to reserve ‘void’ and ‘voidable’ for cases where the contract is either automatically without effect from the beginning or is retrospectively rendered without effect – e.g. for mistake or fraud.” To express that the appropriate terminology was found in ‘termination’ – this term is also used by the Unidroit Principles. See Hector L. MacQueen, Eric Clive and Laura Mac Gregor, the DCFR and the CISG, blog entry on Eric Clive’s page as of 29 Nov. 2009, University of Edinburgh – School of Law, at <http://www.law.ed.ac.uk/epin/blogentry.aspx?blogentryref=7989>; last visited on 8 May 2013.} Yet presumably the most meaningful source of concerns is that not infrequently

\footnote{As per Article 4, the CISG contains only the rules on formation of and the rights and obligations of the parties to international sales contracts. See also Peter Schlechtriem, Uniform Sales Law (Manzsche Verlags, Universitätsbuchhandlung, Vienna, 1986), at 32.}
the exact dimensions of the similarities and discrepancies are hard to sketch. Therefore, even at the price of substantial additional work, it might not be determined with full certainty what the level of overlap between the two instruments is. This, beyond doubt, tilts the balance in favor of the CISG.

1.2.1. ILLUSTRATING THE DIFFERENCES BETWEEN THE CISG AND THE DCFR: REMEDIES FOR BREACH OF CONTRACTS

The issue of remedies for breach of contracts is a good illustration not just of the different solutions adopted by the two instruments, but also of how the drafters of the DCFR have learned from the CISG-related experiences. The gist of the issue relates to the different underlying philosophy of civil and common laws. As comparative law claims, common laws primarily award damages contrary to continental civil law systems that prefer specific performance. Pragmatists would, however, qualify this contention given that by now it has been recognized that such presumptions are “more philosophical than practical and most claimants seek monetary damages.” Partially this is so because rational courts in both legal families care about the time and efforts needed for enforcement of specific performance (or injunctions) yet what is contingent on quite a number of institutional and other factors. For example, the contempt of court rules of common law systems seem to be not just stiffer but much more efficient compared to many European civilian systems. No matter how vague and elusive this and similar general qualifications are, they matter as no exact quantitative data are available to better compare the

154 As Treitel put it “(f)he traditional view is that specific performance will not be ordered where damages are an adequate remedy.” See Günter Treitel, the Law of Contract (10th ed., 1999), at 950-60. Yet this is only a very generally formulated starting point because its applicability depends on a number of factors from availability of a satisfactory equivalent, whether the damages are quantifiable, appropriateness of the remedy through the fact that specific performance is eventually a discretionary remedy. Id. Cited in James Gordley and Arthur Taylor von Mehren, An Introduction to the Comparative Study of Private Law (Cambridge Univ. Press, 2006), at 530 et seq.

Furthermore, important differences exist among common law systems themselves. It was so already in the 1970s, when as opposed to English law that had been “[...] reluctant to recognise the specific enforceability of contracts for the sale of goods other than specific goods [...]”, US courts have extended the remedy of specific performance even to buyers of generic goods whose need for the actual supply was particularly urgent, or who would in fact be unable to get a substitute.” See Guenter Treitel, Chapter 16 on Remedies for Breach of Contract, in: Arthur von Mehren (chief editor), International Encyclopaedia of Comparative Law, vol. VII, Contracts in General, at 16.

155 See Andrea Björklund’s commentaries to the CISG Art. 28 in Kröll-Mistelis-Viscasillas CISG Commentary, at 372.

156 It is thus not without a reason that the DCFR Comments – though only in a single cautious general sentence – note that “the procedural mechanisms available for the enforcement of specific performance are for national laws, as are the sanctions for non-compliance with any judgment ordering specific performance.” See the DCFR Comments, at 829.
two legal families’ attitudes. In fact, so far solely one US international case seems to have dealt with the dilemma of divergent remedies for breach of contracts directly.157 What matters for speculations on the prospects of the DCFR is that contrary to the relatively heightened scholarly attention and – notwithstanding the initial premonitions – no signs of massive forum shopping seem to have been generated by the slight ‘specific performance-bias of the CISG.’158

This brings us again to the gist of the issue: common laws prefer money damages to specific performance159 – the opposite being true for civilian systems.160 As this ‘wisdom’ was revered at the time of drafting the CISG, the outcome could not be but a compromise: while it was pronounced that specific performance is generally available under the Convention – thereby yielding to civil law – the rule was at the same time subjected to an exception aimed at entertaining the expectation of common laws. In the end of the day, thus a court applying the CISG must not order specific performance if such a remedy were not available under its own domestic law.

The DCFR departed already from a more advanced stage, putting aside the unjustified fear that drove the drafters of the Vienna Convention to a compromise solution. Two such discrepancies related to election of remedies for breach of contracts ought to be mentioned in particular. First, both depart from the basic rule that specific performance of an obligation (except obligation to pay money) is available not as a court’s discretionary right. Yet, while in case of the DCFR discretion is a priori excluded, in the context of the CISG that depends on the

157 The DCFR Comments, Note 3, at page 371 mention the Magellan Int’l Corp. v. Salzgitter Handel Gmbh, 76 F. Supp. 2d 919, 924 (N.D. Ill. 1999). The case perfectly illustrates the fact that by now the differences between common and civil laws as far as their remedial preferences are concerned have been theoretical rather than practical. Ironically, in the case it was a UC court that had ordered specific performance (shipment of steel products from Ukraine) to be performed by the German supplier-defendant. Besides pointing to Art. 46(1) of the CISG, the court also looked at domestic law, UCC Article 2 on Sales. It determined as to the latter that UCC § 2-716 was specifically designed, indeed, “to liberalize the common law, which rarely allowed specific performance” and as a consequence of what now specific performance may be ordered as per US law "where the goods are unique or in other proper circumstances." Replaceability – “for example, whether it would be difficult to obtain similar goods on the open market” – was found to qualify as ‘other proper circumstance’ and have been properly proven by the American plaintiff. Text of the case is available in the Pace Law School CISG Database at <http://cisgw3.law.pace.edu/cases/991207u1.html>; last visited on 8 May 2013. 

158 See Andrea Björklund’s commentaries to CISG Art. 28 in: Kröll-Mistelis-Viscasillas CISG Commentary, at 371.

159 Eloquently pronounced, for example, by the US Restatement (Second) of the Law of Contracts (1981), § 359(1), which reads: “Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”

160 Thus, in Germany, for example, specific performance is the rule, unless “performance is impossible, would involve disproportionate cost, would introduce compulsion into closer personal relationships or compel the expression of special forms of artistic or intellectual creativity.” Even though the quotation is from an article published in 1959 (Dawson, Specific Performance in France and Germany, 57 MICH. L. Rev. 495 [1959]), what had been said then seems to be valid also today – moreover, not just in Germany. Cited by Andrea Björklund’s commentaries to the CISG Art. 28 in: Kröll-Mistelis-Viscasillas CISG Commentary, at 373.
applicable national law.\textsuperscript{161} \textit{Secondly}, the DCFR additionally is more specific as far as the election of remedies for breach of contract is concerned compared to the CISG. On the one hand, it itself lists three exceptions when specific performance ought not to be ordered\textsuperscript{162} – in lieu of pointing to the court’s domestic law. On the other hand, it explicitly limits the creditor’s right to request specific performance by subjecting it to the requirement to be made within ‘reasonable time’ and not to be unreasonable in the concrete circumstances. Having these in mind, it seems that the DCFR is, facially at least, more concrete and more pragmatic, what might make it potentially attractive for arbitrators.

The advantages of the DCFR in this context are even more readily visible whenever English law is to be applied, either by courts or arbitrators. Namely, as the UK is not a signatory to the CISG, the hands of English courts, or arbitrators applying English law, are restrained, neither by English law, nor by the CISG and its slight pro-specific performance bias. Consequently, in such cases nothing forestalls giving priority to awarding of damages. Hence, for parties from civil law (or other) countries for whom the right to claim specific performance (or injunctions) is important in a given case, choosing the DCFR as the law applicable to the merits might be the right solution in such instances – no matter that the list of unanswered dilemmas to be tackled in the future is a long one.

1.3. BUYER’S REMEDIES FOR LACK OF CONFORMITY


As far as CISG-linked national law is concerned, it seems that the exclusion of the discretion of courts is another tool for ensuring performance and respect of the \textit{pacta sunt servanda} principle. Thus, neither German, nor French courts have discretion in that respect. \textit{See} Andrea Björklund’s commentaries to CISG Art. 28 \textit{in:} Kröll-Mistelis-Viscasillas the CISG Commentary, at 371. However, point 1 of the Official Comment to UCC s. 2-716 already speaks of the requirement not to curb “\textit{in any way the exercise of the court’s sound discretion in the matter}” [emphasis added] – notwithstanding the importance of commercial feasibility.

In English and Irish law specific performance is also a discretionary remedy – well expressing the basic philosophical choices of these systems. \textit{See} point III. (a) 10 of the DCFR Comments at 836. Section 52 of the English Sale of Goods Act reads: “\textit{In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff’s application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. [...]}. [Emphasis added.]”

\textsuperscript{162} The three exceptions are, i.e., specific performance cannot be enforced when: “\textit{a/ performance would be unlawful or impossible; b/ performance would be unreasonably burdensome or expensive; or c/ performance would be of such a personal character that it would be unreasonable to enforce it.” \textit{See} DCFR article III. - 3:302(3).
This topic is another suitable illustration of the divide that exists between Anglo-Saxon and Continental European civil laws. The DCFR\textsuperscript{163} subscribes to the more lenient position of the latter – which could be conveniently apostrophized as the \textit{Nachfrist} or \textit{additional delivery model} – which posits as the basic rule that when non-conforming goods have been delivered the right to a second attempt is granted by the law save in very exceptional circumstances. That is in stark contrast with the strictness of the \textbf{perfect tender rule} of common laws (no matter the variations in the naming).\textsuperscript{164} This is similar to the position of the CISG, which likewise proceeds from the same Continental European foundations;\textsuperscript{165} though the terminology and the rules of the two instruments differ to certain extent. The justification behind the equal policy choices is, however, different and stronger in case of the CISG. This is so as due to CISG’s global reach “having goods rejected in a faraway country is likely to result in substantial expenses to the seller. […]”\textsuperscript{166} as opposed to that occurring in Europe.

The DCFR rests on three sets of interlinked rules as far as the buyer’s remedies for delivery of non-conforming goods is concerned. These foundations were obviously borrowed from Continental civilian systems and consist of the triumvirate of concepts made of rules on fundamental non-performance,\textsuperscript{167} conformity\textsuperscript{168} and the debtor’s right to cure non-conforming performance\textsuperscript{169} that is based on the German concept of “\textit{Nachfrist}.”\textsuperscript{170}

\textsuperscript{163} The counterpart provisions of the perfect tender rule are scattered in the DCFR – making orientation very problematic. Thus, \textbf{Book IV} (regulating specific nominated contracts) Part A on Sales in Subsection IV.A. – 2:301 defines what conformity with the contract means and contains the exceptions on the right of consumers to terminate sales contracts for lack of conformity. \textbf{Book III} devoted generally to obligations (i.e., not only contracts), contains the basic principle that is generally applicable – i.e., not only to consumer contracts; most importantly Section 2 on Cure by Debtor of Non-conforming Performance (i.e., articles III. -3.201 through III.-3:205).

\textsuperscript{164} The original meaning of the perfect tender rule – somewhat softened by the seller’s right to cure after rejection (the substantial-performance doctrine) – described by Chirelstein was: “At common law, a buyer of goods possessed a legal right to insist upon ‘perfect tender’ by the seller. If the goods failed to conform exactly to the description in the contract – whether as to quality, quantity or manner of delivery – the buyer could reject the goods and rescind the contract, which meant that the parties would be returned to the positions they occupied before the contract was entered into.” See Marvin A. Chirelstein, \textit{Concepts and Case Analysis in the Law of Contracts} 112 (1990).

The Comments to subsection IV.A. – 2:301 as well aptly express the essence of the perfect tender rule: “In England and Scotland, any failure to comply with the terms of a contract, whether express or implied, constitutes a breach of contract.” See DCFR Comments, at 1276.

\textsuperscript{165} As Kröll put it: “The CISG concept of conformity is […] not based on a perfect tender rule. [As a result] minor discrepancies are often within the tolerances allowed under the contract or in general practice. It is not uncommon that contracts provide that certain deviations as to quantity or quality are admissible and in certain sectors minor discrepancies in quantity or quality are considered to be permissible even without such explicit clauses. While such discrepancies, particularly in relation to quantity, may result in a reduction of price under the contract or trade usage, they do not constitute a breach of the obligation to deliver conforming goods.” Stefan Kröll, Comment to CISG Article 35, in: Kröll, Mistelis, Perales, Viscasillas (eds), UN Convention on Contracts for the International Sale of Goods (CISG), (Beck, Hart, Nomos – 2011), at 493.


\textsuperscript{167} DCFR Article III. -3:501: Termination for Fundamental Non-Performance.
The effect of the difference is as follows. While according to the perfect tender rule, in principle, any discrepancy, even a minor one, is deemed to constitute a breach of contract, the DCFR – subscribing to civil law standards – is more lenient and tries to keep the contract alive to the extent possible.\(^{171}\) The leniency is achieved through the joint effects of the three concepts mentioned. First of all, as the designation itself suggests, for the DCFR (and for European civil law systems) breach is justified only in case of *fundamental* non-performance, what – contrary to the perfect tender requirements – obviously does not include minor discrepancies. Yet, to determine whether there was a *fundamental* non-performance, resort must be made to the definition of conformity – something that could have, but has not been expressed with a mathematically precise formula in the DCFR. As a result, much of the job of determining whether conformity is existent or not is left to courts. This is also the solution opted for by the CISG\(^{172}\) according to which *non-conformity* is to be given content through the lens of the “*the terms regulating the obligation.*”\(^{173}\) Finally, the DCFR introduces as the basic rule that the debtor has the right to cure, except in some exceptional situations.\(^{174}\)

\(^{168}\) DCFR Article IV.A.-2:301: Conformity with the Contract.

\(^{169}\) DCFR Article III.-3:201: Cure by Debtor of Non-conforming Performance.

\(^{170}\) The complementarity of the three concepts could be illustrated easily. For example, for systems that attach crucial importance to the standards of ‘fundamental non-performance’ or ‘conformity’ – both inherently vague and susceptible to different interpretations by the parties – the mandatory Nachfrist rule might be the magical formula for getting out of the interpretative quagmire. The emphasis should be placed on vagueness which causes the problem. Namely, faced with non-conforming performance, yet not being certain whether that qualifies as fundamental – entitling the party to terminate with immediate effect – could be solved by giving a notice to cure within a specified time. If no performance ensues thereafter, the non-conforming performance morphs into ‘absolute non-performance’ with a right of immediate termination. See Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Elgar, 2006), at 615.


\(^{171}\) The Comments to DCFR Article III.-3:201, for example, read: “The allowance of a reasonable opportunity to cure is consistent with the notion of good faith and with the desire to uphold contractual relations where possible and appropriate.” See DCFR Comments, at 814.

\(^{172}\) See CISG Article 35.

\(^{173}\) DCFR Article III.-3:210: Scope in Section 2 entitled ‘Cure by Debtor of Non-conforming Performance.’

\(^{174}\) The cases when cure can be rejected by the creditor, according to DCFR Article III.-3:203 When Creditor Need not Allow Debtor an Opportunity to Cure, are: 1/ in case of fundamental non-performance; 2/ the debtor acted knowingly and contrary to good faith and fair dealing; 3/ the creditor has reasons to believe that the debtor will not be in the position to cure within the given additional time; and 4/ when “cure would be inappropriate in the circumstances.”
The perfect tender rule is quintessential for the sales laws of both England\textsuperscript{175} and the US.\textsuperscript{176} In fact, this was one of the main reasons because of why the UK has failed to ratify the CISG.\textsuperscript{177} In the US, the rule is not absolute anymore, at least, for two reasons. On the one hand, the perfect tender rule dominates the UCC sales and true lease provisions only\textsuperscript{178} – outside the ambit of these the ‘\textit{substantial performance rule}'\textsuperscript{179} is governing. On the other hand, the rule’s reach is limited even in the context of the UCC itself: viz., the rule is qualified by the buyer’s duty to inspect the goods and to give notice within a reasonable time in order not to lose the right to reject under the UCC Article 2 on Sales.\textsuperscript{180} Exceptions are imposed also by some other UCC sections\textsuperscript{181} and corrections based on equity exist as well. These divergences from the main rule made some authors claim that in reality the divergence between the systems on the two sides of the Atlantic is not insurmountable.\textsuperscript{182}

Irrespective that these rules are legitimately subject to judicial interpretation potentially leading to variations of outcomes, relatively precise conclusions could be forged based on the above, of use potentially also to arbitrators. Firstly, the difference between the two standards is that in the Anglo-Saxon systems in the context of sales law the basic rule is ‘the perfect tender rule.’ This, if expressed with numbers, no matter how imprecise and awkward that might be, aggregates in almost no excuses and a performance standard is reaching, or being almost equal


\textsuperscript{176} UCC s. 2-601.

\textsuperscript{177} Michael Bridge, A Law for International Sales, 37 H.K.L.J. 17, 40 (2007), at 22-23.

\textsuperscript{178} In the UCC, Article 2 governs sales law and Article 2A is on leases. Article 2A-509 on the Lessee’s Rights on Improper Delivery: Rightful Rejection contains the perfect tender rule. Historic reasons are attributable that the perfect tender rule became the governing for sales law. As Calamari & Perillo put it: “During the nineteenth century, the perfect tender rule developed with respect to contracts for the sale of goods. Under that rule the buyer was free to reject the goods unless the tender conformed in every respect to the contract. This includes not only quantity and quality, but also the details of shipment. In the words of Learned Hand, ‘There is no room in commercial contracts for the doctrine of substantial performance’ […]” See John D. Calamari & Joseph M. Perillo, Contracts (3d ed., 1987), at §11-18(b).

\textsuperscript{179} The Black’s Law Dictionary defines the doctrine of substantial-performance as “‘[t]he equitable rule that, if a good faith attempt to perform does not precisely meet the terms of the agreement, the agreement will still be considered complete if the essential purpose of the contract is accomplished. Courts may allow a remedy for minimal damages caused by the deviance.”

\textsuperscript{180} See UCC sections 2-602 and 2-603 respectively.

\textsuperscript{181} An example of an exception to the perfect tender rule would be UCC 2-612 regulating breach of installment sales contracts, according to which the performance of an installment may be rejected solely if the “non-conformity substantially impairs the value of that installment and cannot be cured.”

\textsuperscript{182} See Larry A. Di Matteo & Daniel T. Ostas, Comparative Efficiency in International Sales Law, 26 Am. U. Int'l L. Rev. 371 (201), at 432-33.
to 100%. The other side of the coin is that the exceptions are only supplementary and are applicable only if special circumstances amply justify that. In Continental Europe, a result that is normal in the US could be achieved solely if the full (or close to full) performance was specifically agreed upon and appropriately communicated to the contractual party. In common law systems such specific contract language and action is not needed as it is presumed by the law as the main rule. Consequently, Continental European systems – and the DCFR as well – tend to tolerate a much more significant discrepancy amounting to somewhere between 5%-10% compared to 100% representing perfect performance; to the extent these legal standards could be expressed by numbers at all.

Secondly, in Europe, non-conforming performance can be rejected only if the non-conformity is fundamental, otherwise time must be given for another attempt. Contrary to that, even though the US system also knows the ‘substantial performance rule,’ as per the perfect tender rule the right to reject is not dependent on such a hardly measurable standard. In other words, in addition to the conceptual differences, the two approaches presume different standards of proof. In the aggregate, the DCFR is suitable to help realize the exact dimensions of the laws of the two legal families to roam on basis of that into the uncharted territories of practical applications not necessarily visible from the cavalcade of underlying concepts; be it for educational purposes or pondering which law to agree upon.

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183 In the Texas Supreme Court case *Dallas Raceway, Inc., and Suretec Insurance Company v. Pavecon, Ltd.* [2012, No. 05-10-00712-CV] the substantial performance doctrine was satisfied in the context of construction industry when the contract was performed above 80%.

2. FRANCHISE LAW

2.1. THE STARTING POSITION: THE ECONOMIC IMPORTANCE OF FRANCHISE AND THE ARBITRABILITY OF FRANCHISE DISPUTES IN EUROPE

The justification for the inclusion of franchise\(^{185}\) – with focus on business franchise\(^{186}\) – into our discourse is to a great extent due to the economic role it has come to play during the last four decades or so. Undoubtedly, it has come of age: the popularity of this advanced contract, forming the basis of a distinct business model, in the US, Europe – including also many CEE post-socialist countries\(^{187}\) – and beyond is unprecedented. In CEE, this is

\(^{185}\) As most systems do not even have a definition of franchise, to have a solid foothold, let us cite the US FTC's position, which requests for a business relationship to qualify as ‘franchise’ three elements: “First, the franchisor must license a trade name and trademark that the franchisee operates under, or the franchisee must sell products or services identified by this trademark. Second, the franchisor must exert significant control over the operation of the franchise or provide significant assistance to the franchisee. Third, the franchisee must pay at least $500 to the franchisor at any time before or within the first six months of operation.” Francine Lafontaine & Roger D. Blair, the Evolution of Franchising and Franchise Contracts: Evidence from the United States 3 Entrepreneurial Bus. L.J. 381 (2009), at 383.

\(^{186}\) According to the definition of the US Department of Commerce business-format franchising “includes not only the product, service, and trademark, but the entire business format itself—a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication.” Andrew Kostecka, the United States Department of Commerce, Franchising in the Economy: 1986-1988 1 (1988), at 3; cited in Francine Lafontaine & Roger D. Blair, the Evolution of Franchising and Franchise Contracts: Evidence from the United States 3 Entrepreneurial Bus. L.J. 381 (2009), at 383. Contrary to that, traditional (or product) franchise “concentrate on one company's product line and to some extent identify their business with that company.” Id.

In this article the term ‘franchise’ will cover all forms of franchise, unless specifically indicated otherwise. In particular because, as the Unidroit Guide claims “the form of franchising known as business format franchising is increasingly coming to symbolize franchising as a whole.” See Unidroit, Guide to International Master Franchise Arrangements (2007 – hereinafter: Unidroit Franchise Guide), at 1. Business format franchises often expand cross-border by first finding a sub-franchisor in the foreign country which then grants sub-franchisees the right to open franchise outlets. This two-tier structure is based on the so-called master franchise agreements. When master franchise agreements are used, normally the franchisor and the sub-franchisees are not in directly legal relationship. Id. 2-3.

\(^{187}\) Even though the websites of franchise associations are created by the industry itself and hence might be a bit biased occasionally, they may be telling on the size of the franchise market. In Hungary, for example, 76 foreign franchise systems are active, most coming from the US, Germany and Italy. At the same time, indigenous Hungarian franchisors have already spread to Romania, Slovakia and Poland. See the website of the Association at <http://www.franchise.hu/>; last visited on 8 May 2013.

Franchise has become similarly popular in Ukraine though under the name of ‘commercial concession.’ The website of the Ukrainian Franchise Association would reveal similar developments at <http://www.franchising.org.ua/>; last visited on 8 May 2013. Here, franchise disputes have also already
attributable not only to the appearance of large international franchise systems in these markets, but also due to the gradual emergence of a wide variety of indigenous ones as well. This claim, however, does not apply to all states equally and exceptions could easily be found.\textsuperscript{188} In the capital-scarce markets of Europe, the primary reason for the widespread attraction seems to rest primarily with the relative ease with which one can launch a business based on a proven model and with a relatively low capital needed for doing that.

While no exact data exists on the number of franchise disputes resolved by arbitration in Europe, indicia exist that this particular ADR form is quite routinely opted for in case of international – but less so in case of indigenous – franchise contracts.\textsuperscript{189} As the International

\textsuperscript{188} Some of the war-torn ex-Yugoslav successor countries seem to be still at the beginning of the process and have very few (if any) foreign or indigenous franchise systems as of yet. In Montenegro, while McDonalds made an unsuccessful debut, the renovation and upgrading of the hotel Crna Gora in the capital of Podgorica has already begun by Hilton based on a franchise agreement (though very little is known about the details of the deal.) See \textless http://www.worldfranchiseassociates.com/franchise-news-article.php?nid=181\textgreater; last visited on 8 May 2013.

Even though the Unidroit Guide makes mention of Croatia having a definition of franchise (admittedly: only little more than that) and despite the resort to franchise by a number of prestigious indigenous brands – like the conditionery firm “Kraš,” or “Rubelj Grill” and “Elektromaterijal” – franchise has not set solid foothold in this country either yet. The findings of a rare brief article from 2003 correctly point to the fact that Croatian entrepreneurs know very little about the advantages of franchise and that Croatian entrepreneurs still cherish ownership of their businesses as only that ensures full freedom and control to them. These thoughts seem to have remained valid even in 2012. This notwithstanding the appearance of such foreign franchise systems as Subway, City Express or Body Creator. See Aleksandar Erceg, \textit{Franšiza u Hrvatskoj} (Franchise in Croatia), in the Croatian language review ‘\textit{Suvremeno poduzetništvo},’ No. 4-2003, at 120-22.

The Croatian Franchise Association came into being in 2002. For related info see their website at \textless http://www.fip.com.hr/fipHr/index.asp?lang=hr\textgreater; Croatia belongs – notwithstanding the statutory definition – to the legal systems in which the franchise relationship is primarily governed by contracts and the Code of Ethics employed by many other European systems. This country otherwise typically models itself after German and Austrian law.

\textsuperscript{189} A good yet indirect proof is that a number of European national franchise associations – to wit, Austrian, Belgian, British, French, German and Dutch associations – do offer to their members “\textit{assistance in mediation and/or arbitration}.” For the German Franchise Association’s mediation services see\textless http://www.franchiseverband.com/franchise-leistungen-vorteile0.html\textgreater; last visited on 8 May 2013. Mediation services are offered also in Italy. \textit{See} Unidroit Guide to International Master Franchise Arrangements (2\textsuperscript{nd} ed., 2007), note 151, page 306.

In the US, a National Franchise Mediation Program was introduced in 1993 by major industry participants, law firms and the CPR (Center for Public Resources) Institute for Dispute Resolution (website at \textless http://www.cpradr.org\textgreater;). The Program was endorsed by the International Franchise Association and the American Association of Franchisees and Dealers. The text of the program is available at \textless http://www.franchise.org/files/franbroc.pdf\textgreater; last visited on 8 May 2013.
Franchise Association (IFA) concludes: “it’s probably correct to say that the majority of franchise systems specify arbitration as the primary means for resolving those disputes.”¹⁹⁰ This is visible also from various IFA documents, which stress not just the importance of arbitration but also prevention of franchise disputes.¹⁹¹ The interesting point is that arbitration’s preeminence is neither affected by the number of franchise varieties,¹⁹² nor by national variations. These developments indirectly corroborate that it is legitimate to perceive franchise as a distinct business model that rests on a common core that allows for extrapolation of a common franchise law – and thus the approach of the DCFR is the right one. This commonality is one of the reasons that make the DCFR’s franchise model susceptible to exploitation by arbitrators as well.

In the lack of hard on the data little could be concluded on the relationship of arbitration and franchise specifically with respect to CEE, one of our target regions. At the moment nothing seems to suggest that arbitration of franchise disputes has become the rule of the day but in case of international franchises when the foreign franchisor dictates the terms and conditions. This is so because of a simple reason: as arbitration is generally less popular among local businessmen in this niche of Europe that cannot be much different in franchise context either. Even the first few franchise related court cases have reached the highest courts of the region’s countries only recently; a fact that might indirectly be of relevance also to the arbitration of such disputes. Indeed, in some CEE countries, no publicly available decision on franchise seems to exist at all. These facts should be taken as evidence of the embryonic stage of development. Yet, as this business form is new, still surrounded by many question marks, and consequently disputes are doomed to arise, it may be projected that resort to arbitration will increase over time in CEE as well. Moreover, the unfamiliarity of CEE judges with franchise may be a valid reason for channeling disputes instead of courts towards ADR.

¹⁹⁰ Id. at 14.

¹⁹¹ The catchwords of a recent publication might readily confirm that. It suffices to list these: “pro-active approach,” “face-to-face meeting with local regional manager,” “meeting with franchise review committee,” “third party assistance” in the form of “mentoring,” “peer-groups,” “franchisee advisory councils” or “ombudsman programs.” See IFA Franchise Relations Committee, A Dispute Resolution Handbook for Franchisors and Franchisees, available electronically at <http://www.franchise.org/files/FRC%20Dispute%20HandbookX1.pdf>; last visited on 8 May 2013.

¹⁹² As determined by IFA experts: “When we look at the way different franchise systems handle potential and actual disputes, we’re struck not so much by the differences in approach as the similarities. In spite of the fact that diverse industries, franchise structures, levels of investment and sophistication, and other factors are involved, the practical ways to manage disputes seem to remain constant throughout franchising, perhaps because the dynamics of human behavior remain the same everywhere.” Id. at 5.
2.2. THE DCFR AND CONTEMPORARY FRANCHISE LAW MODELS

Today, the approach of European municipal laws to franchise not only differs significantly but a number of them have even no sector-specific laws.\(^{193}\) To make things worse, the law applicable to franchise tends to be a mixture resting on diverse sources of law hectically developed in a relatively short period of time. This is partially so as there is no tested and more commonly subscribed to transplantable international model law to date. Such prohibitive variation of European franchise laws is what requires us to set out by forging of a matrix of contemporary franchise law models to make orientation and proper evaluation of the DCFR possible.\(^{194}\) The same reasons dictate focus also on US law, as the country of origin of modern business franchise and as the country possessing presumably the most diverse and tested set of franchise laws.

2.2.1. THE MATRIX OF CONTEMPORARY FRANCHISE LAWS

\(^{193}\) In jurisdictions without specific franchise law, disputes are resolved by exploiting general contract, tort and other non-sector-specific laws. This statement requests, however, two qualifications. On the one hand, even in the US, which is deemed to be the source country of modern business format franchise and which has one of the most developed, though quite convoluted multi-layer franchise law, general contract and other classical branches of law still play a supplementary role. On the other hand, the same applies to those countries that have no sector-specific franchise laws, but have franchise organizations (industry) that impose on their members industrial behavioral standards by way of codes of ethics.

The exact nature of these self-regulatory sources of law ranges from genuine soft laws to legal instruments that could be enforced in courts – obviously differing from country to country. In many, no such court judgment or arbitral award is available that would have applied the self-regulations of franchise associations. Hungary is a European country that has neither a lex specialis nor provisions on franchise in its Civil Code, what obviously leads to unpredictability.

The German Franchise Association’s Code of Ethics (“Ethikkodex”), for example, is at the core of its activities and is imposed on all members. It foresees that: “The quality standards and the compliance with these are the pillars of the DFV activities. The foundation of the association’s work is the code of ethics. This code is a binding definition of the professional interpretation of the franchising concept and facilitates a uniform portrayal of reputable franchising. The code of ethics also contains the guidelines for fair interaction between franchisee and franchisor.” See at <http://www.franchiseverband.com/franchisequalitaet0.html>; last visited on 8 May 2013.

In case of Germany, the Franchise Association relies on – though only applicable to those who would like to become full members (not applicable to associate members) – a so-called DFV check (i.e., German Franchise Association quality check) undertaken by the International Center for Franchising and Cooperation in Münster, Germany. See at <http://www.franchiseverband.com/franchise-systemcheck0.html>. For German language court decisions on franchise see <http://franchiseurteile.de>; both last visited on 8 May 2013.

\(^{194}\) See Appendix I.
Instead of a mechanical listing of the basic features of individual national systems, our classification is to rest on a two-pronged test: firstly, what the ranking order of the main policy goal(s) of the observed models are, and secondly, whether the tools of public or rather private law dominate the legal paraphernalia used to achieve those ends? The two prongs are obviously interlinked because the nature of the primary policy goal dictates also what legal tools the system entrusts with the enforcement of franchise laws. Such a combined classification is quintessential for our query on the arbitrability of franchise disputes and specifically the franchise model enshrined in DCFR. As we shall see, the basic features of each of the models a priori affect the relationship of franchise and arbitration. Most importantly, while in the US, as the paradigm regulatory model, regulatory interventions restraining arbitration of franchise disputes is something known, in jurisdictions where franchise is based on industrial self-regulations, instead of limitations, industry-driven arbitration thrives unhindered.

Now, more about the criteria of our test. As far as policy choices are concerned, developed systems share a common trait even if not clearly setting it as the primary goal sometimes: the protection of the presumptively weaker party, the franchisee. This being so as asymmetry is inherent to business franchise because of why the challenge is to find the proper balance between protection of the weaker party yet without “decapitating” the franchisor. This is easier said than done. As it will be shown, US laws, both State and federal, seem to have realized, expressed and reacted upon the gravity of the risks stemming from franchise asymmetry most unequivocally. Others hesitate, to say the least: either it is indeterminable whether asymmetry plays a role or the position is hidden in the provisions of the law. The protection of the franchisee is additionally often combined with other conflicting policy goals. Good examples are systems that try not just to fix the balance between the parties but also aim at attracting foreign franchisors. The result in such instances, especially where franchise has been subjected to some form of first generation regulation, could not be but a mixture of non-harmonized policy goals. More reasons could be listed for that, starting with incomprehension

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195 As it was done by the Unidroit Guide to International Master Franchise Arrangements (Unidroit, 2007).

196 Very telling is the preamble to the New York franchise law, which deserves quoting: “§ 680. Legislative findings and declaration of policy.

1. The legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems in New York. New York residents have suffered substantial losses where the franchisor or his representative has not provided full and complete information regarding the franchisor-franchisee relationship, the details of the contract between the franchisor and franchisee, the prior business experience of the franchisor, and other factors relevant to the franchise offered for sale.

2. It is hereby determined and declared that the offer and sale of franchises, as defined in this article, is a matter affected with a public interest and subject to the supervision of the state, for the purpose of providing prospective franchisees and potential franchise investors with material details of the franchise offering so that they may participate in the franchise system in a manner that may avoid detriment to the public interest and benefit the commerce and industry of the state. Furthermore, it is the intent of this law to prohibit the sale of franchises where such sale would lead to fraud or likelihood that the franchisor’s promises would not be fulfilled.” See 2006 New York Code – Laws: General Business: (680 – 695) Franchises, text available at <http://law.justia.com/codes/new-york/2006/general-business/idx_gbs0a33.html>; last visited on 8 May 2013.
of and lack of experiences with franchise, exacerbated by ad hoc, not fully prepared fragmented legislative or regulatory responses.\footnote{In this respect I cannot but agree with Spencer, who – referring to this concern as a ‘regulatory gap’ – stressed that any discussion on contemporary franchise laws cannot be but a discussion only on the outcomes without little chances of learning about the regulatory processes themselves. As she put it: “It does appear that many countries’ legislative regimes have adopted legislation without first engaging in a regulatory process that would comport with concepts of best practice, not only in the development and implementation phases, but in monitoring and revision [as well].” See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 313.}

Notwithstanding of these national deviations, for our test the primary criterion is the priority remedying of franchise asymmetry enjoys among the potentially competing policy goals. Based on this benchmark three main models should be distinguished: the \textbf{regulatory},\footnote{MacNeil explained the quintessential difference between the two models, though for the context of financial investment, as follows: “The term ‘regulation’ is nowadays understood more specifically to refer to rules and procedures created by statute and administered by agencies.” See Iain G MacNeil, the Law on Financial Investment (Hart Publishing, 2nd ed., Oxford), at 20.} the \textbf{industry-standards} (or self-rectoratory) and the \textbf{private law}-based models. In case of the first, the state interferes into business relationships and restricts the freedom of parties having the subscribed to policy choice(s) at sight; in case of franchise this is primarily the protection of the franchisee. In the US, for example, regulations were added as the third layer of law on top of industry-generated franchise laws (e.g., codes of ethics) as well as private law; a pattern getting replicated in Europe as well. At the opposite extreme are systems where industries – normally dominated by strategically powerful franchisors – set the rules of the game, obviously affording less importance (if any) to remedying franchise asymmetry.

The second criterion, the selection of legal \textbf{tools employed} to enforce franchise laws emanates from the position a legal system took related to the first priority policy choice – viz., remedying of franchise asymmetry. Where asymmetry has not become a major problem mobilizing lawmakers, or where it is presumed that it can be satisfactorily handled by the industry itself, the industry could be left to forge the franchise law. Industrial codes of ethics and similar sources of industry-drafted laws as forms of self-regulation, however, tend to set the rules of the game by general language and are less about giving specific tools into the hands of the strategically weaker franchisee. Likewise, they try to channel disputes towards amicable or resolution through arbitration under the aegis of the industrial umbrella organization. As opposed to that, the regulatory model exploits primarily the paraphernalia of administrative law for the protection of the franchisee – including engagement of powerful administrative agencies. The private law-based avenue comes somewhere in-between as it leaves enforcement to the parties themselves who could but must not make use of the traditional remedies offered by private laws (e.g., damages and injunctions).

Needless to say, in reality these distinguishable models rarely exist in isolation: while in the US all three segments play a role, in much of Europe the regulatory prong is lacking. Admittedly, this may cause some unease yet the separation of the three main models of franchise laws is the token of better orientation in the otherwise still developing area of law and for passing of a precise verdict on the DCFR. The value of the above tripartite classification...
should not be disparaged either by the fact that often more than a single reason or factor influences the franchise related policy choices and the chosen franchise law model. For example, present time US law and the widespread arbitration of franchise disputes in the US was presumably influenced not just by the gradual growth and strengthening of US franchise industries but also by the litigiousness of the American society as well as by the availability of such idiosyncratic US legal devices as the private cause of action. The same applies to herein only briefly mentioned two additional categories of franchise law models: mixed systems and the ones that deserve special attention because of some genuinely idiosyncratic solutions. These are especially characteristic of emerging markets which struggle to come forward with the right formula reconciling conflicting and elsewhere not necessarily faced policy goals. They deserve a place in this elaboration because their peculiar solutions, if not mistakes, do corroborate our postulate on the inevitability of clear formulation of and setting the priority among the competing policy goals as well as the necessity of choosing the synchronized enforcement tools. Scrolling through the franchise laws of some systems one gets the impression that the first pivotal phase was simply left out.

Contrasting the extremes might help realize how radically different the underlying philosophies, policy choices and the employed enforcement tools are on the two sides of the Atlantic. One of the most striking discrepancies relates to disclosure, which is a quintessential obligation of the franchisor figuring in some form virtually in all systems: while in Europe as a rule “only” private law tools stand ready for making the franchisor perform this duty of his properly, in the US disclosure is not a ‘private matter’ but the enforcement of what is entrusted to a dedicated agency (on State level where regulation exists) – on top of generally available contract and tort law. Moreover, the level of administrative review – as we shall see in more detail below – is substantial no matter which level and type of franchise regulation is being looked at in the US. On State level, obviously the so-called ‘merit review’ systems are stricter than their ‘notice-filing’ kin as the former require besides disclosure to the prospective franchisee also pre-sales registration with a State agency empowered to pass a decision on the financial viability of the offered franchise and to take certain measures to ensure appropriate results. On the other hand, notwithstanding whether a merit or a notice-filing system is at

199 For example, all what Croatia specifically has on franchise is hardly more than a first-generation definition of this sui generis advanced contract clearly being present in this country already. Namely, in 1999 Article 16(c) was added to the Law on Trade. See Unidroit Franchise Guide, at 286.

200 The pre-sale merit review States are California, Hawaii, Illinois, Maryland, Minnesota, New York, North Dakota, Rhode Island, Virginia and [the State of] Washington.

201 The key difference between a merit review and a notice-filing system is that in the formed the agency entrusted with the enforcement of the regulation has the right to pass a judgment on the viability of the franchise system to be offered. For example, the California Corporations Code Section 31111(b) foresees that to the application for registration “[a]n authorization for the commissioner to examine the registrant’s financial records of the sale of the franchise” is to be attached. If the commissioner finds that “it is necessary and appropriate for the protection of prospective franchisees or sub-franchisors because the applicant has failed to demonstrate that adequate financial arrangements have been made to fulfill the franchisor’s obligations to provide real estate, improvements, equipment, inventory, training, or other items included in the offering, the commissioner may by rule or order require the escrow or impound of franchisee fees and other funds paid by the franchisee or sub-franchisor until such obligations have been satisfied. At the option of the franchisor, the franchisor may furnish a surety bond as provided by rule of the commissioner.” Id., s.
stake, the remedies and tools available to the agencies to enforce the regulations are overwhelming if looked upon from the perspective of Europe, where it is left either entirely to the parties whether to launch a litigation or arbitration in case of franchisor’s failure to properly disclose or the panacea is found in the intermediation of the industry. Note here as well that the parties have another powerful tool at disposal in the US: private cause of action – something as a rule foreign to Europe. In pragmatic terms, therefore, albeit the Unidroit Guide and many scholars talk of disclosure as if the legal paraphernalia assigned for the enforcement of this specific franchisor obligation were the same in the three models, in reality disclosure denotes radically different level of burdens, risks and corollary costs for the franchisor. As a consequence, disclosure rules are as different on the two sides of the Atlantic as night and day. This is the main reason for basing our franchise-related discussion in this paper on the earlier canvassed classification of franchise laws.

2.2.2. FRANCHISE TERMINOLOGY CAVEATS

As it is fair to claim that comparative franchise law is still in its infancy and lacks a more widely subscribed to nomenclature, the connotation of key terms should be given heightened attention as they might be misleading. The gravity of terminology problems requires us to continue with a few related caveats. Again, for franchise law key term ‘disclosure’ might properly illustrate the various angles and dimensions of the problem. As hinted at above, one of the common mistakes is the disregard of the legal nature of the law from which the term is taken. One of the most venerable sources of international franchise law, the Unidroit Franchise...
Guide uses the term ‘disclosure,’ for example, both in the context of the Lithuanian Civil Code and the franchise regulations of the US States. Yet in addition to what has been said above related to the differing enforcement tools, the private law-regulation dichotomy has other repercussions as well. Most importantly, while franchise law of Lithuania and some other European civilian jurisdictions primarily is located in civil codes’ part on contracts – i.e., private law being based on the freedom of contract principle and being characterized by default (in Europe: dispositive) rules – the US regulation grew out and has borrowed many elements from capital market and securities regulation. As a consequence, ‘regulations’ are imposed and are dominated by mandatory (cogent) rules.

The other example of misunderstandings terminology may generate requires us to briefly return to the mentioned linkages of the two US regulatory fields – i.e., capital markets and franchise. Namely, the fact that the former was resorted to as a mature regulatory model should not lead to the simplistic conclusion that US federal franchise regulation is the mere replica of the former. Perusing again the key concept of ‘disclosure’ to exemplify the point just made would illuminate how radically differing the imposed obligations in the two fields are. Concretely, federal franchise ‘disclosure’ does not presuppose registration and filing of various documents with the FTC as opposed to its source of origin. The caveat is that the requirements of US federal franchise regulations are, however, not necessarily replicated on State level: those States that also have franchise disclosure laws as a rule require both registration and filing of documents. These State laws, in other words, are stricter than the federal one. Obviously, it is far from irrelevant to the parties what the concrete meaning of ‘disclosure’ they face is.

These two examples, being undoubtedly more than terminology issues, amply illustrate why should a discussion focused on a single franchise model – the one in the DCFR – be introduced and analyzed in the context of known municipal franchise law models. Now, a more detailed look at each of the models ensues.

### 2.2.3. CONTEMPORARY FRANCHISE LAW MODELS: A GLOBAL PERSPECTIVE

No generally accepted classification of franchise laws seems to exist. Yet to find the proper place of the DCFR’s franchise model, it is inevitable to conceive one to make comparisons and analysis more transparent. This is especially so as our central query is whether

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204 See the Unidroit Franchise Guide – Lithuania at page 291 and the US at page 299-300.

205 As put by Terry “California – the cradle of business format franchise – was the first jurisdiction to adopt franchise specific regulation. Its 1971 Franchise Investment Law, based on the securities law model, imposed franchisor disclosure and registration requirements and was followed at the end of that decade by a federal disclosure law.” See Andrew Terry, Foreword to Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at viii.

206 As per the Unidroit Guide, out of the fifteen States that have enacted legislation requiring disclosure, fourteen impose registration of the disclosure document before sale. See Unidroit Franchise Guide, at 300.
what the DCFR offers has advantages over known national regulatory patterns as that might make it attractive to arbitrators and parties to cross-border reaching contracts. The ensuing classification aims to serve that purpose primarily though one should not forget that the number of jurisdictions not having any sector-specific law on the global scene is far from being negligible.

2.2.3.1. THE REGULATIONS-BASED MODEL

The country of origin of modern business franchise, the US represents the first model given that a complex web of federal-cum-state supplementary regulations exist to prevent abuses by the franchisor – what seems to be the main tenet of both, federal and State-level (if any) laws. Or, in other words, if US franchise law is spoken of, that primarily means these sources of law. As sector-specific regulations, these are characterized by mandatory rules enforced by administrative agencies. The agencies, where established, act also as gatekeepers: prevent or otherwise care of who may enter the market – depending on what the enabling statute foresees. The main consequence of all these features is a system made of overwhelmingly ex ante protections of franchisees.

Admittedly, the private law model makes use as well of mandatory rules and also has some ex ante effects. Especially the latter, however, is contingent on how embedded the respect for law and contractual commitments in business people is, or what the level of the rule of law is, in a given jurisdiction. The crucial difference is, as stressed already above, that in the regulatory system a specialized governmental agency gives effect to the mandatory provisions in administrative proceedings; a task that is not left (only) to the private parties who may but must not opt to enforce the mandatory rules of a civil code or statute by litigation or arbitrating. Private parties may additionally also be prevented by objective factors from stepping on that path (e.g., lack of financial resources to litigate or arbitrate) what normally may not happen to agencies due to their budgetary financing. Last but not least, albeit idiosyncratic to the US, yet it ought to be mentioned that the FTC, as the enforcement agency on the federal level, may itself take actions resulting in financial recovery for purchasers of franchises; i.e., the taxpayers’ money could be used to compensate franchisees. That is also something foreign to Europe.

In the US, three main types of regulatory interventions are recognizable: pre-sale disclosure (both federal and State-level), the so-called ‘relationship laws’ (regulating primarily the termination of franchise agreements) and the imposition of a registration requirement – the last two being applicable only in a number of States.207 As far as pre-sale disclosure is concerned, the

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207 In the US, in the franchise context and contrary to the field of capital markets and securities industry, the franchise laws of the States and the States’ governmental agencies are the stronger. Three categories of State franchise disclosure regulations exist: 1/ franchise-registration States (15) (requiring registration and approval of franchise documents before selling – e.g., California, Illinois, New York, Virginia or Washington State); 2/ non-registration States (27) (requiring neither filing nor registration prior to sale of franchises but FTC Guidelines must be followed – e.g., Alaska, Delaware, or the District
solutions also differ. While the federal FTC Franchise Rule and the regulations of a number of States require “only” the filing of ‘disclosure documents’ containing certain financial and other information (filing systems), some other States introduced the so-called merit-based rule (franchise-registration States) where the local agencies also check the disclosed information for accuracy and completeness. Disclosure also includes provision of information on the litigation and arbitration-related record of the franchisor.208 Apart from that, the only other linkage of disclosure to litigation and arbitration is the franchisee’s private cause of action for fraudulent statements in the disclosure document. This right is recognized notwithstanding the described regulatory oversight – something that is still characteristic to the US primarily.209 The State relationship laws go beyond mere disclosure and regulate other aspects of ongoing

of Columbia); and 3/ filing States (9) (a mere filing and payment of a fee without submission of documents and approval by the agency suffices – e.g., Florida, Nebraska, Texas or Utah).

Additionally, twenty-three States and two possessions have so-called ‘relationship laws’ (some in combination with the disclosure laws). These regulate and impose limitations with respect to the franchise relationship, in particular the terms and conditions for termination.

On the federal level, two types of franchise laws should be distinguished: industry-specific legislation and the FTC Rule. The first deserve here mention – concretely the 1956 the Automobile Dealers Day in Court Act and the 1978 the Petroleum Marketing Practices Act because “[t]he legislative histories of both acts indicated that they were needed to remedy the disparity of power between the franchisor and the franchisee.” See FTC, Enforcement of the Franchise Rule (GAO-01-776, 2001), at 9.

The 1979 FTC Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (16 C.F.R. §436) imposes the duty to inform the franchisee prior to selling the franchise so that he could make a learned decision on whether to conclude the contract. It applies in all States as a form of minimum protection; hence it applies only if no stricter requirements are imposed by State law. (Business opportunity venture differs from franchise because no trademarked goods or services are involved). Item 17 Table, for example, requires disclosure information also about arbitration and mediation history of the franchisor. Text available at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=16:1.0.1.4.55&didno=16>; last visited on 8 May 2013.

208 See FTC Rule, Item 17 Table (u).

relationships, in particular termination and renewal. These may include protection of the franchisee by imposing restrictions on arbitration of franchise disputes as well.

For our purposes, two brief conclusions need to be drawn based on the above short overview of US regulatory systems. On the one hand, regulation in the sense spoken of above and ADR are not mutually exclusive. In other words, the fact that regulations — enforced by dedicated agencies empowered primarily with administrative law tools — are in place does not a priori exclude arbitration of disputes between franchisors and franchisees. On the other hand, if one wanted to locate which type of US laws is the closest to the DCFR, then one should point primarily to State contract and other general laws and to certain elements from the mentioned State relationship laws. The three regulatory models are additional layers of law in the US and are not the local substitutes of the DCFR. This is being so, to recapitalize, as the US model is primarily based on protections offered by regulations characterized by administrative law remedies, contrary to the industry and private law models of Europe with no, or little involvement of agencies.

2.2.3.2. THE PRIVATE LAW-BASED MODEL

The private law-based model presumes the existence of franchise-specific rules enshrined in civil (or commercial) codes or statutes of equal status and features, a model

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210 The Schlobohm v. Pepperidge Farm (806 F.2d 578 [1986]) case is illustrative of what is arbitrated connected to termination of franchises. In the case, the franchisor- Pepperidge Farm had a right to terminate the contract without cause upon written notice though subject to the condition that Pepperidge Farm would also pay to Schlobohm the fair market value of his franchise plus twenty-five percent. Arbitration was agreed upon to resort to were the parties unable to agree on the fair market value.

211 See, e.g., Article 7 on Arbitration of the California Franchise Relations Act (enacted in 1980) [Bus. & Professions Code (BPC), Chapter 5.5. on Franchise Relations] which reads: “Nothing contained in this chapter shall limit the right of a franchisor and franchisee to agree before or after a dispute has arisen to binding arbitration of claims under this chapter, provided that: (a) The standards applied in such arbitration are not less than the requirements specified in this chapter; and (b) The arbitrator or arbitrators employed in such arbitration are chosen from a list of impartial arbitrators supplied by the American Arbitration Association or other impartial person;”at <http://leginfo.legislature.ca.gov/faces/codes_displayexpandedbranch.xhtml>; last visited on 8 May 2013.

212 This would be the case, for example, with Lithuania, where franchise and sub-franchise agreements are regulated by Chapter XXXVII of the Civil Code enacted in July 2001. Here, the succinct definition of franchise does not contain anything that would hint at asymmetry; it rather reflects a concept that puts the licensing aspect in the limelight. Registration is foreseen only for three specific situations (i.e., 1/ if patent is licensed, 2/ if franchisor is registered in a foreign country, and 3/ if the contract is to be invoked against third persons), yet none of them seems to amount to (or it cannot be determined) a merit based review of the franchise system itself. None of these three registrations seem to serve the protection of the franchisee.
that is characteristic to a number of Continental European jurisdictions. Those civilian systems that have failed to include this specific contract to their codes or statutes could also be added to this group as they primarily also rely on private law remedies for enforcement of obligations from franchise contracts – even if only by analogous application of provisions of similar nominated contracts. As being based on private law, these systems proceed from the freedom of contract principle and yet recognize, directly or indirectly, that some level of franchisor-benefitting asymmetry is inherent to franchise contracts. To stress, not infrequently this is visible only indirectly: from the juxtaposition of the quantity and quality of obligations imposed on the franchisor versus the ones burdening the franchisee. It is fair to say, thus, that the aggregate of franchise rules is nothing else by an attempt to find a proper balance for the inherently contradicting interests of franchisors and franchisees. Here, the essential questions boil down thus in what level of asymmetry – or control by the franchisor – is to be tolerated by the system as well as how could law exploiting the tools of private law could materialize that?

As a European creature, the DCFR is a perfect illustration of this. As formally, content and method-wise being the close kin of Continental European civil codes, it does not aim to protect only one of the contractual parties – rather it strives to strike a balance though taking note of asymmetry. The formula of the balance could, however, only be extrapolated from the provisions rather than from the titles of sections or Articles, let alone explicit proclamations. On the one hand, this could be concluded from the disproportionately higher number of and the contents of articles on the franchisor’s obligations.214 On the other hand, through the

As disclosure is non-itemized, it seems that no adequate attention has been given to information asymmetry either. The language seems to rest on the presumption that by making the franchisor transfer the so-called ‘technical and commercial documentation’ as supplemented by other non-specified information, training as well as control, franchisee would be properly informed. Compared to developed franchise systems’ level of detail afforded to disclosure, the Lithuanian solution seems to be way too optimistic – though as the local franchise market is still fledgling, court (or especially arbitral) cases are lacking, only time will tell whether franchisors behave really differently in this country than elsewhere.

The rest of the provisions seem to be more or less standard; though one should not forget that they provide for ‘obligations’ which could be enforced in litigation or through ADR. Perhaps the franchisee’s protection is best expressed in the Code’s provisions on termination, in particular the six months termination notice requirement or the right to prolong the contract for the same duration and under the same terms if the franchisee has duly performed its obligations during the initial years. In case the franchisor refuses to conclude a new contract upon expiry, it can do that solely if for three years it will not conclude a similar contract for the same territory. See, e.g., Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 162-65.

213 That would be the case, for example, in Estonia, which has instead of a civil code a number of separate statutes. The Act on Obligations (2002) is concretely – with altogether three provisions – that regulates franchise. Id. at 286-87. Albeit no franchise regulation exists as of yet in most ex-Yugoslav successor countries (exception seems to be only Croatia at the moment), these countries have no civil codes either but a number of statutes instead.

214 Concretely, DCFR Chapter 4 on Franchise, of Part E (Commercial Agency, Franchise and Distributorship) of Book IV entitled ‘Specific Contracts and the Rights and Obligations Arising from them’ is made of altogether 14 articles out of which 8 imposes obligations on the franchisor (to wit, the full section on franchisor’s obligations plus the duties of providing information in the pre-contractual phase in s. IV.E. –
recognition – though stated only in the Comments – that “franchise networks are characterized by a much stronger uniformity than ordinary distribution networks,”215 which as such therefore deserved particular treatment by the drafters of the DCFR.

As stressed already, the crucial difference of the private law-based model vis-à-vis the regulatory one is that in case of the former the franchise-related provisions – including the mandatory ones – are to be enforced entirely by the parties to whom only traditional private law remedies are available. This per se presumes risks normally corollary to litigation and court enforcement, in particular loss of time, need to invest substantial efforts and expenditures, and often no prospects of collection. This is the explanation behind the claim that they protect the franchisee primarily ex post. In other words, the crucial feature of this model is, neither that it is enshrined into a civil code (or “only” in a statute), nor that it is “characterized by the complex business license” or ‘commercial concession agreement’ approach to legislation,”216 but that here the burden

4:102) compared to the 4 burdening the franchisee (one section is the definition of franchise and an obligation to cooperate in s. IV.E. – 4:103 addressed to both parties).

215 See point A of the DCFR Comments to Article IV.E.-4:101 at 2383.

Spencer suggests that this group is to be distinguished as a separate category, yet based on a vague justification. As she put it, this model is “characterized by the complex business licence” or ‘commercial concession agreement’ approach to legislation impacting the sector that is taken in Russia, Belarus, Georgia, Lithuania, Ukraine Kyrgyzstan, Estonia and Albania. Such legislation is usually part of a civil or commercial code rather than franchise-specific legislation. Kazakhstan has a dedicated franchise law, but otherwise seems to follow the complex business license model found in most of these jurisdictions. [This presumes] transfer of intellectual property and information ‘a franchisee needs to operate the business.’ Some form of registration is generally required. […]” See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 223.

To corroborate that the bases for the separate box of civil code-based systems of Spencer are unsubstantiated, the following should be listed. Firstly, in Russia and Ukraine franchise has not been named by taking the roots either of the French or the English term but a bit complicated designation was opted for. Hence, there is no justification to presume any ‘complexity’ or a special approach. This outcome is simply the result of the fiat of those who had christened the newcomer contract. Due to a similar coincidence, in the post-Yugoslav countries it was not the English, but the French version of the term that has been adopted by the local languages (i.e., not ‘frenčajz’ but the designation ‘franšiza’ became the subscribed to local version). Secondly, even though in Estonia (or, potentially in the Yugoslav successor countries) franchise law is not in a ‘code’ but only in a ‘statute,’ that hardly makes much of a difference with respect to the parties’ position or the remedies available to the franchisee. In brief, irrespective of the seemingly different content, these systems do have a common denominator: these franchise-specific laws are private law categories, behave like that and most importantly can be enforced by exploiting the available repository of private law remedies – which are radically different from the ones offered by regulatory (administrative) law.

As a brief gloss, the complexity of Ukrainian franchise law is to be ascribed to a great extent to the conflicts that exist between the franchise provisions of the civil versus the commercial code. For example, albeit both require registration, it seems to be unclear even today where the registration should occur. This is illustrated by the Pan-Pizza controversy (case starting in 2004), when the franchisee questioned the coming into being of the entire franchise agreement because of the franchisor’s failure to register it with the appropriate governmental agency. The problem was that apart from the requirement that registration is a must, no law specified registration is to be effectuated exactly with which governmental body. For a discussion with excerpts from the case see Leonila Guglya & Oleksiy Kononov, Enforcement of Contracts in
and risk of taking their fate into their own hands is entirely on franchisees and their counsel – and no administrative agency is available to assist in enforcing the law, be it ex ante or ex post. The existence of both in a legal system naturally is not unheard of: US law is again a perfect illustration. In Europe, nothing indicates redirection towards more reliance on regulatory tools in the franchise context at the moment.

It should not come as a surprise that the DCFR’s franchise Articles largely coincide with what Continental European traditions think of franchise: in a sense, it is a paradigm European model, what may justify its use as law applicable to the merits in Europe. Another reason for optimism is that it is superior to what many European systems possess at the moment as far as completeness, maturity and balance is concerned. Yet, as a typical European creature, the DCFR inherited also some of the paradigmatic Continental European dilemmas – viz., Europe’s obsession with codes and everything that is linked to codes; including the blind deference attributed to the task of finding of the proper place of franchises as newcomer hybrid contracts in the abstract system of legal categories (the ‘dogmatic trap’). While not disparaging the importance of these systemic expectations, it ought to be recognized that they are of little impact on the central challenge of franchise laws: the proper protection of the franchisees as weaker parties. In other words, the position taken here is that it is mistaken not to regulate franchise under the pretense of not finding its proper place in the abstract system of codes. Due to such myopia, jurisdictions without a special franchise law (i.e., where franchise has failed to become a nominated contract) thus risk that franchise asymmetry would not even be identified by courts as a source of major concern and the parties to franchise contracts would be treated as complete equals. This inevitably leads to the conclusion that the DCFR’s franchise law is a better alternative, at least, of what non-codified municipal systems offer.

2.2.3.3. THE INDUSTRIAL SELF-REGULATORY MODEL

In a significant number of countries the main source of franchise law is a form of industrial self-regulation – codes of conduct or codes of ethics – drafted and promulgated by the industry itself (i.e., trade associations). This is then supplemented by general private and commercial law, with or without an additional layer of lec specialis; given that industrial codes and franchise-specific laws are not per se mutually exclusive. Countries which have a developed franchise sector do have as a rule trade associations with codes binding on the members. In


Let us mention the 2004 Italian franchise specific law with eight provisions altogether – out of which the seventh article requires from the parties to attempt to resolve their dispute amicably before commencing arbitration or litigation.

According to Spencer, trade associations for franchising exist in about 45 countries, or roughly one third of all the countries with franchises. In Europe, she listed these countries as having such trade associations: Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece,
fact, regulation of franchise by industries seems to be the predominant model in Europe at the moment. Industries and their codes play an important role also in the US, yet there the industry-set standards are not the dominant paradigmatic source of franchise law. Herein lies the crucial distinction between the two sides of the Atlantic. Most importantly, in the US, federal and State regulatory agencies interfere, regulate and enforce franchise laws and regulatory (administrative) enforcement tools are available to protect the weaker party in addition to industrial self-regulation and general laws (in particular contract and tort law).

In the countries, which are members of the European Franchise Federation, the European Franchise Code of Ethics plays the key role. As the publicly available sources suggest, however, the codes have been tested and given green light only by courts in France, Germany and the UK; in addition to the EU Commission and the ECJ. The codes and the requirements imposed by the industry through them, however, may be quite demanding in these jurisdictions and under appropriate circumstances perhaps even sufficient for curbing franchise-related abuses; especially in the earlier phases of development of franchise industries. Even though data released by the trade associations themselves – which present obviously a somewhat distorted picture of reality – exists, very little is known about the problems plaguing franchise relationships in Europe. Data on arbitration of franchise disputes is even more veiled by secrecy.

Court cases though do reveal valuable information about the fate of such industrial codes of ethics and generally about the courts’ attitude to franchise in Europe. As exemplified by German developments, the duty to disclose in the pre-contractual phase, foreseen by the German Franchise Association’s code, was confirmed by a number of court cases. An author

To the list one should add also the Baltic Franchising Association which is active (as its designation suggests) in the Baltic States yet besides which additional associations have emerged in the region. See, for example, the website of the Lithuanian Franchise Center’s website at <http://www.fransizescentras.lt/user/about/>; last visited on 8 May 2013. For data on other East European countries see <http://www.easteuropefranchise.org/country-details.php?cid=23>; both last visited on 8 May 2013.


220 Id. at 3.

221 See, e.g., the quite detailed forms required by the British Franchise Association in Martin Mendelsohn, the Guide to Franchising, appendix B (Cengage, 7th ed., 2004), at 369.

222 In the UK, there is no plan whatsoever for passing franchise-specific legislation, though a modest number of court cases has emerged. See Martin Mendelsohn, the Law and Franchising in the United Kingdom, 3 Entrepreneurial Bus. L.J. 177 (2009), at 6.

223 See Jenny Buchan, Square Pegs in Round Holes: Franchisees of Insolvent Franchisors, 9 No. 2 Bus. L. Int'l 114 (2008), at 125.
has inferred that consequently “during the pre-contractual phase, the franchisor and franchisee have a relationship of fiduciaries in countries that adhere to the EFF Code of Ethics,” though without having clarified what that concretely entails and whether the implied fiduciary relationship is a foolproof guarantee against franchisor opportunistic behavior. The same concern could be raised also with respect to the BGB’s treatment of franchisees as consumers under some specific conditions. Although without having clarified what that concretely entails and whether the implied fiduciary relationship is a foolproof guarantee against franchisor opportunistic behavior. The same concern could be raised also with respect to the BGB’s treatment of franchisees as consumers under some specific conditions.225 In the UK, fraud could be said to have been primarily noted and reacted upon: a problem that was, however, handled not through passage of special regulations but by closing the doors to fraudsters in the industrial reaccreditation procedure and by the banks’ refusal to finance suspicious franchises.226 In any event, it is indicative that the number of reported franchise-related court cases was minimal in each of these European countries compared to that of the US, for example, in 2009227 - a year for which data is available. One conclusion lends itself to be formulated from this: litigation and arbitration of franchise disputes is in its infancy in the rest of Europe.

Three further points ought to be added on European industry-made franchise laws. First, the mentioned self-regulatory instruments tend to be inherently one-sided to certain extent as their drafting is dominated by the strongest players of the industry – thus it is legitimate to presume, or at least suspect, that they serve the interests of franchisors more than that would be the case under the private law model.228 Secondly, notwithstanding the proclamations of European franchise associations – attempting to canvass a rosy, problems-free industrial sector – nothing suggests that the Europe realities and the franchise-linked abuses are much different from the ones that generated such a multilayered developed regulatory system as that of the US. The agency oversight and remedies known today in the US have also developed gradually over time and thus it may be projected that Europe would follow the suit. Thirdly, as most European franchise laws are incomplete, underdeveloped and often misbalanced, it is highly questionable to what extent are contemporary European sources of franchise law appropriate for deciding court or arbitral cases. Most importantly, as very few codes of ethics-based cases have been

224 Id. at 126.

225 According to the somewhat convoluted section 507 of the German Civil Code, new business founders qualify as consumers if: 1/ for the creation of the new business a credit or a purchase contract is concluded, and 2/ the amount of credit or the price to be paid does not exceed €50,000.00. The heightened level of protection is provided in the form of franchisee-friendly withdrawal rights. Namely, the franchisor has the duty to provide the franchisee with a formal written warning that the franchisee has the entitlement to withdraw from the arrangement within two weeks from signing the contract. If the form has not been adhered to, the franchisee may withdraw any time during the validity of the contract. Id. at 126.

226 See Martin Mendelsohn, the Law and Franchising in the United Kingdom, 3 Entrepreneurial Bus. L.J. 177 (2009), at 6.

227 Id. at 9.

228 Presumably the same types of concerns led Spencer to conclude that “in many jurisdictions [there is] an unwarranted level of reliance on self-regulatory mechanisms and tools, despite overwhelming evidence that the parties lack the capacity to fulfill their roles as such measures require.” See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 319.
reported (in quite a number of jurisdictions no case whatsoever seems to have been reported) to date and as even the few reported ones do not allow for drawing firm conclusions, nothing suggests at present time that asymmetry has become a recognized problem on industry level. These concerns would, at any event, deserve closer scrutiny of lawmakers and yet might draw the attention more to the DCFR.

2.2.3.4. MIXED SYSTEMS AND SYSTEMS WITH IDIOSYNCRATIC SOLUTIONS

Presumably due to the degree of novelty, not fully crystallized policy goals and lack of experience, most post-socialist and non-European emerging systems have mixed solutions, not infrequently with idiosyncratic elements and tenets. What immediately strikes the eye, for example, is that some post-socialist CEE and non-European emerging systems quite often condition the appearance on the local market by licensing or some kind of registration with a governmental body – rather than only with the local franchise association. Sometimes the registration requirements had been imposed before a registry was physically erected; forcing the parties to resort to odd and legally questionable practices.

In these jurisdictions, the regulatory intervention typically stops there; the remainder of franchise-related laws is already the combination of private law and industrial self-regulation (if any). Disclosure – typically a mere obligation of providing certain information to the prospective franchisee foreseen by civil codes or by a lex specialis yet not necessarily designating an agency for overseeing that is typically only backed up by the franchisee’s right to make use of private law remedies. In the light of that, it remains an issue whether the inexperienced parties – typically local individuals appearing in the shoes of franchisees – to novel franchise contracts are in fact capable of giving teeth to the provisions of civil or industrial codes imposing obligations on strategically stronger franchisors. Here, we have no other choice but the bypass such other burning issues as corruption of the administrative bodies entrusted with enforcement of franchise laws; typical maladies of low rule of law countries. These come in addition to defects known also by developed systems.

229 In the Ukrainian “Pan-Pizza” controversy, starting in 2004 in finishing in 2008, for example, the inability to register the franchise agreement because of the failure of the competent governmental bodies to start function it was accepted as a valid excuse only by the highest court instance. For the description of the case, see, Leonila Guglya & Oleksiy Kononov, Enforcement of Contracts in Ukraine, in: Stefan Messmann & Tibor Tajti (eds.), the Case Law of CEE – Enforcement of Contracts (Eur. Univ. Press, Bochum – Germany, 2009), at 1056.

230 Moldova, for example, has both a lex specialis and franchise-provisions in its Civil Code. Article 9(4) of the former – Law No. 1335 of 1 January 1997 – prescribes the registration of the franchise agreement itself with the governmental Agency for the Protection of Industrial Property. See Unidroit Franchise Guide, at 293-94. Estonia has a Law on Obligations Act (2002) in lieu of a Civil Code with altogether three provisions. Id. at 286-87.
The peculiarities of the laws belonging to this group range from idiosyncratic naming of ‘franchisor’ to adding of such specific provisions the function of which is attraction of foreign franchisors. Similarly to Europe, they pay little attention (if any) to franchise asymmetry or to the implications of the legal nature of the franchise laws. As hinted at already – sadly and unfortunately – the Unidroit Franchise Guide found it unimportant to devote proper attention to this matter either; hence its use might not necessarily lead to the best solutions. Yet for a franchisor wanting to expand to emerging markets with underdeveloped and not fully charted franchise laws exactly these issues should matter the most. For example, whether licensing & registration is ‘merit-based’ or only paralleled by the simple obligation of filing some documents and information is crucial because in the case of the latter the agency’s powers are limited to the ministerial work of mechanical checking of whether all the required items of information are being disclosed without the right of entering and passing a value-judgment on the economics (substance) of the transaction itself.231

China is a good example of an economy where franchise has made a triumphant entry and is awaiting a bright future because of the growing middle class and the increasing openness of young people to products of western franchisors. The newest generation of Chinese franchise laws – making China a typical mixed system – is not just more foreign franchisor-friendly compared to the earlier variants but it is as well more sophisticated. The main law – the Franchise Measures232 – is supplemented by general contract law and thus not only administrative fines but also private law remedies (i.e., damages known to civilian systems as China is also a civil law system) are available to the parties. Furthermore, entry of a foreign franchisor to China is subject to registration and to some peculiar conditions that had initially made the entry of foreign franchisors problematic; later this was changed for the better.233 The gradual yet swift increase of the general importance of law and the institutions of the legal system in China during the last decade or so has led to increased trust in courts and the booming of arbitration – instead of handling disputes by physical force as it used to be earlier.234

231 For the context of securities regulation, ‘merit regulation’ means that “the pertinent state securities administrator can prevent an offering from going forward because it is not ‘fair, just and equitable.’ Under merit regulation, therefore, adequate disclosure is not the only criterion. The substantive fairness of the offering may also be scrutinized.” Quoted from Marc I. Steinberg, Securities Regulation (Matthew Bender, 3rd ed., 1998), at 217.


233 As per the 2004 Franchise Measures, namely, the commencement of operations in China were conditioned on having two directly operated franchise outlets in operation for, at least, one year. After intensive international lobbying, this was changed for the better by a 2007 Regulation, which done away with the first of the requirements. For a succinct overview see Philip F. Zeidman, China: 2010 and Beyond, vol. 42, No. 1 Franchising World, 15244814 (Jan 2010).

234 Let us refer to some more exact indicia of the changes as it was reported by the Financial Times recently. For example, while the caseloads handled by courts grew tremendously, in 2012 up by about 25% (376,000 case annually), disputes settled by arbitration have reached the value of Rmb 113bn (also up by 22% compared to 2011). Another prove equally well showing the increased importance of law in
These developments have reached franchising as well: China has already reported cases involving indigenous franchise partners.\textsuperscript{235} From the comparative perspective of this paper, however, it is of interest not just that arbitration of franchise disputes is increasingly popular in China,\textsuperscript{236} but that due to the reservations made by China to the New York Convention, enforcement of awards against government-owned entities is still problematic.\textsuperscript{237}

2.3. IS THE DCFR THE LONG-AWAITED GAP-FILLER FOR EUROPE?

Franchise is such a newcomer advanced hybrid contract that has not really found its proper place in the European legal stratosphere yet; the extreme diversity of (directly or by analogy) applicable laws are to a great extent ascribable to that. Quintessential policy issues have remained unresolved, starting – as propounded herein – with whether the franchisee needs special protection and, if yes, in what form? Or, would private law instruments suffice or US-type regulatory mechanisms ought to be resorted to additionally? Europe is not alone in that respect: globally more than a handful of varying justifications could be gathered for a legislative or regulatory response.\textsuperscript{238} Based on the worldwide experiences with franchise from the last four decades, it seems that a healthy combination of these would be ideal in Europe.

commercial matters (though primarily in the wealthier coastal regions) is the availability of provisional and preliminary measures – like freezing of assets. In a case, the judge was innovative enough and issued an injunction whereby prohibited a debtor company legal representative from flying – an order that was enforced by refusing him to board and causing the company to pay the next day. \textit{See} Simon Rabinovitch, \textit{China Groups Turn to Courts to Settle Wrangles over Business}, Financial Times, issue of 14 Aug. 2012, at 2.

\textsuperscript{235} \textit{See} Huan Haijan v. Beijing Hansen Cosmetology Ltd., Co. (decided in Beijing on 16 Nov. 2005), where the franchisor was sued for damages because of a failure to disclosure before the sale of the franchise that the trademark was not registered and that no international brand was transferred. The court rescinded the contract and ordered the franchisor return all what was received. Cited in Paul Jones, \textit{the Regulation of Franchising in China and the Development of a Civil Law Legal System}, 2 Chinese L. & Pol'y Rev. 78 (2006), at 82.

\textsuperscript{236} Kui Hua Wang in his book \textit{Chinese Commercial Law} (Oxford, 2000), note 56, at 293, claimed that the frequency of arbitration in commercial cases was higher than resolution through litigation – taking into account and basing his claim on the number of court cases which grew out or were linked to arbitration. Generally on Chinese dispute resolution, problems and vistas see Randall Peerenboom & Xin He, \textit{Dispute Resolution in China: Patterns, Causes and Prognosis}, 19 Am. U. Int'l L. Rev. 949 (2004), at 965.


\textsuperscript{238} Just in case of the eight countries dealt with, more than seventeen “different purposes for the statutory regulation of the franchising sector” were identified by Spencer. \textit{See} Elizabeth Crawford Spencer, \textit{the Regulation of Franchising in the New Global Economy} (Edward Elgar, 2010), at 117.
Numerous problems prevent the formulation of a common European answer to the raised dilemmas. *Pro primo*, the attitude of various national laws of the Old Continent is far from being harmonious: the differences are meaningful and obviously negatively affect not just cross-border movement of franchise systems but also rapprochement of laws.239 *Secondly*, EU law has a very limited reach extending only to some competition law aspects of franchising240 and nothing suggests that such stance of this supranational organization will change significantly soon – as a consequence of what it should be expected that franchise will remain in the bailiwick of the Member States. The reluctance of Brussels to step on the regulatory path is, however, surprising given that a debate generally on the relationship of regulation and contract (or private law) is ongoing related to other fields of economy in Europe these days.241 *Thirdly*, hardly could one claim that there is at least a movement away from the dominant industry-regulatory model or that there are voices requesting such a change. *Fourthly*, partly as a result of these factors, Europe has no commonly subscribed to unambiguous answers even to such pertaining, for continental Europe typical legal puzzles, as whether franchise should become a nominated contract – a code or statutory category? If the answer would be yes, the next stumbling block, capable of even blocking reform efforts, would be with what constitutive elements should franchise be morphed into a nominated contract?242 Similar indeterminacy

239 In CEE, a number of franchise-specific laws after 1990 have been enacted and it could be expected that this will continue with the spreading and growth of franchise industries in the region. Contrary to that, the industrial-law-based jurisdictions with mature and thus powerful franchise industries – e.g., England, Germany and the Netherlands – will hardly change their stance in the foreseeable future unless the EU takes things into its hands. See also Elizabeth Crawford Spencer, *the Regulation of Franchising in the New Global Economy* (Edward Elgar, 2010), at 216.

240 The ball was set into rolling by the *Promptia* case (Case 161/84 of 29 Jan. 1986), which concerned the application of the competition law articles in the Rome Treaty to certain types of exclusive dealing agreements. For example, price determination (price fixing) clauses were proclaimed anti-competitive by the ECJ. In the aftermath, a number of Block Exemption Regulations were adopted, the function of which was to exempt some franchises from competition restrictions. See, e.g., Unidroit Franchise Guide, at 301-304. For a discussion on the relationship of EU competition law and franchise as a business model and an advanced contract see Dieter A. Schmitz & Alain van Hamme, *Franchising in Europe—the First Practical EEC Guidelines* 22 Int'l Law. 717 (Fall 1998).

241 For an insightful analysis of identical and similar dilemmas in the context of the energy sector – to wit, the role of private law in the ‘regulatory state’ – see Bellantuono Giuseppe, *the Limits of Contract Law in Regulatory State*, vol. 6, No. 2. Eur. Rev. of Contract L. 115-142 (June 2010). Bellantuono is strongly in favor of a regulatory response in the energy sector, as a consequence of what “contract law [would] transform itself in a tool whose main goal is to fix the inevitable deficiencies of sector regulation, [*...]” and what would allow the regulators to strongly curb contractual freedom. Id. conclusions at 33.

242 The Drafting Committee of the new Hungarian Civil Code (to step into force in March 2014) was, for example, of the opinion in 2001 that due to the unexceptional complexity of the nature of franchise – contrary to leasing and factoring which are similar newcomer contracts – it should not be added to the new code as a novel type of nominated contract. See the document ‘the Concept of the New Civil Code’ (“Az új polgári törvénykönyv konceptója”), at 169, downloadable at <http://www.jogalkotas.hu/files/ptk_kotemli_jog.pdf>; last visited on 8 May 2013. It is doubtful whether this reasoning – obviously reflecting the drafters’ preference for systemic (dogmatic) considerations at the disregard of business needs in a country where franchise has become one of the
surrounds the basic dilemma of whether the weaker party – the franchisee – is to be shielded through mandatory rules in the context of civil codes otherwise dominated by default (dispositive) rules?

To summarize, contrary to sales law, thus, in most European states there is no specific law on franchise, in some others by-the-industry-developed legal instruments are employed to tackle a fraction of concomitant legal dilemmas. Only in a minority of them are there (typically first generation) hard laws – some not even applicable specifically only to franchise. Franchise laws, in other words, are immature and for that reason one may legitimately question whether they are capable of properly fulfilling the expectations. The more precise determination of the impact of such extra-legal factors as education on the proper operation of franchise systems is obscure and desires in-depth analysis but undoubtedly cannot be a substitute of good laws.

most popular contracts in the post-1990 period – is appropriate for the realities of the 21st century. Eventually six short articles were added to the new Civil Code enacted in 2013.

For a synopsis of hard, industrial and soft franchise laws see the Unidroit Guide to International Master Franchise Arrangements (2nd ed., 2007 – hereinafter: Unidroit Franchise Guide), Annex 3. The European countries having franchise-specific laws are the following: Albania (Chapter XX of the Civil Code of 1994 as amended in 2001); Belarus (separate chapter in the 1998 Civil Code with 2004 amendments); Belgium (2005 Law Relative to Pre-Contractual Information in the Framework of commercial Partnership Agreements); Croatia (1999 article 16c added to the Law Amending the Law on Trade); Estonia (chapter 19 of the Law of Obligations of 2002); France (the 1989 Loi Doubin – codified in Art. L.330-3 of the Code du Commerce & Government Decree No. 91-337 of 1991); Italy (Law No.129/2004 and the Decree No. 204 of 2005); Lithuania (chapter 37 of the Civil Code of 2000); Moldova (Chapter 21 of the Civil Code and the Law of the Republic of Modova on Franchising of 1997); Romania (Decree No. 52-1997 as amended by Decree No. 79-1998plus the new Civil Code of 2011); the Russian Federation (chapter 54 of teh Civil Code of 1996 – referring to franchise as 'commercial concessions'); Spain (section 62 of the Retail Trade Act – with implementing decrees from 1998 and 2006); Sweden (Law No. 2006:484 of 24 May 2006 on the Duty of Franchisor to Provide Information); and Ukraine (chapter 76 of the 2004 Civil Code – referring to franchise as 'commercial concession').

The EU has not passed as of yet a franchise-specific law and deals only with some competition law-related aspects of the transaction – a process that began with the Pronuptia de Paris GmbH case (Case 161/84 of 28 January 1986) ending with the Block Exemption Regulation on Franchise Agreements (Commission Regulation EEC No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to Categories of Franchise Agreements OJ ECC L 359/46).

Besides the above mentioned post-socialist countries, the following have passed laws related to franchise as well: Georgia (chapter seven, title one, or book three of the 1997 Civil Code deal with franchise specifically); and Kazakhstan (2002 non-disclosure act).

In the US, while most states have no legislation on franchise and only fifteen has adopted disclosure-requiring laws, on the federal level there is the 1979 Federal Trade Commission (FTC) Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (as amended – last in 2007, effective as of 1 July 2008 – Title 16 – Commercial Practics, Chapter I, FTC, Subchapter D – Trade Regulation Rules, Part 430).

In the words of Andrew Terry: “Regulation cannot remove all commercial risk and it cannot guarantee business success. Education, conscientious due diligence and informed advice – legal, financial, commercial – are also integral elements of the protectionary matrix.” Quoted in Elizabeth Crawford Spencer, the Regulation of Franchising in the

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Indeed, the prohibitive variation, fragmentation and the general underdeveloped nature of European franchise laws is that makes the DCFR not just a good model for legislators wishing to modernize their national laws, but also a viable competitor of municipal laws as a law applicable to the substance. The DCFR is in fact the first European coherent, systematized and sufficiently detailed franchise law with rules tailor-made for this peculiar hybrid transaction. As such, it makes dispute resolution based on a single set of systematized rules possible – instead of eclectic resort to kin nominated contracts. It is also the merit of the DCFR that it managed to morph franchise into a nominated contract by allocating a designated place to it – what might be a clear message not just to reformers of national laws, but also to arbitrators who should hereinafter more cautiously resort to borrowing of rules of resembling nominated contracts.

The other lesson to be learned is that asymmetry – or power imbalance – has indirectly been proclaimed an inherent feature of franchise to be tolerated in Europe by the DCFR as well. The DCFR’s franchise model is also suitable as a benchmark for measuring asymmetry, a tool unknown in contemporary Europe. In the lack of such a benchmark, one may speculate, whether now it could be determined at all what level of asymmetry is to be tolerated by the law chosen to govern a franchise contract? Consequently, the arbitrator has no other option in such instances but to give unreserved deference to the pacta sunt servanda principle – obviously normally favoring the strategically superior franchisor dictating the terms of the contract. Even if a judge or arbitrator would found it justified tilting the balance somewhat in the favor of the franchisee, only equity, good faith or similar exceptionally applicable doctrines could be resorted to. If a substantive law with such a lacuna is to be applied by industry-linked arbitral tribunals, the chances of the franchisee as the weaker party to prevail would be brought to the

New Global Economy (Edward Elgar, 2010), at 317 (document not available via the website address in note 1 on the same page).

245 Di Matteo superbly described the essence of the asymmetry dilemma: “The franchisee invests substantial amounts of capital, owns most of the assets, and is liable for the debts of the franchise. However, control over the use of those assets is contractually given to the franchisor. This allows the franchisor to act opportunistically through actions including franchise encroachment, franchise nonrenewal, using performance and termination rights to recapture prematurely the franchise, and manipulating the supply, advertising, and transfer clauses to capture more of the operational surplus.” See Larry A. Di Matteo, Strategic Contracting: Contract Law as a Source of Competitive Advantage, 47 Am. Bus. L.J. 727 (Winter, 2010), at 744.

Yet, after canvassing the problem, he ends with quite idealistic recommendations, condemning the otherwise widely used standard franchise contracts (presumably also manuals and the other documents that ought to be delivered to the franchisee as part of the pre-sale disclosure in the US) to the dustbin of scholarly whim without putting forward a more concrete formula for appropriate balancing of the conflicting interests. He remains satisfied with a toothless suggestion that “strategic contract terms need to be carefully calibrated to provide incentives for expansion, but not to the point of oversaturation. The terms should aim for the creation of maximum value or revenue streams for the franchisor, but not at the cost of diminished value creation of individual franchisees. A properly drafted franchise contract should lead to the maximization of value for both the franchisor and its franchisees. This strategic calibration of terms leads to a second recommendation. Such calibration is unlikely to be ensured through the use of a standard or uniform franchise agreement, even one carefully drafted by the franchisor. […]” Id. at 747.

246 Dispute resolution procedure is prescribed in Australia, China, Indonesia, Moldova and Vietnam. See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at 310. For example, by Part 4 of the Australian Trade Practices (industry codes
minimum. What the DCFR offers is a remedy against such unfairness: a systematized and complete set of rules that take account more of asymmetry than the non-existent or imperfect national laws, in conjunction with industrial self-regulations (if any). This may be an important advantage for parties pondering which law to choose to govern their international contract.

2.4. WHY SHOULD FRANCHISE BECOME A NOMINATED CONTRACT IN EUROPE?

Admittedly, the dilemma whether franchise should be elevated to the pedestal of nominated contracts is primarily plaguing civil law systems for two main reasons. Firstly, in these systems private law is enshrined in codes that are deemed to be gap-less and which are based on an abstract system of legal categories, rules and principles — called as ‘legal dogmatism’ in Germany and in systems being inspired by it. ‘System thinking’ might equally be appropriate to apostrophize such approach to law. Secondly, due to this, it is presumed that there must be a rule for each and every legal issue that might arise in the domains covered by a code. Put simply, if a franchise-related dispute arises in such a code-country in which franchise specifically is not made part of the code (i.e., it is ‘innominate’), courts or arbitrators would have to resort to provisions on, in their opinion similar, nominated contracts. Notwithstanding the weight of these determinants, however, the approaches not just differ but often it is hard even to find out what led lawmakers towards this or that solution. For example, Hungary and Lithuania — two post-socialist CEE civilian systems — could be a good example: while Lithuania opted for inclusion of franchise into its civil code, Hungarians vouched exactly for the opposite for quite a number of years — the inclusion of a few short provisions ensued in the very last minute before the Code’s enactment in 2013.

Consequently, in a recent Hungarian case,247 for example, the court could have chosen from the rules applicable even to four nominated types of contracts: ‘sales’ (“adás vétele”), licensing (“licencszerződés”), ‘commission’ (“meghízásis szerződés”) or undertaking contract (“vállalkozási szerződés”).248 Such welter of potentially exploitable rules obviously creates a false impression of the existence of the right formula for resolution of franchise disputes. In fact, quite to the contrary, this exaggerated flexibility seriously undermines one of the fundamental expectations of contemporary business – predictability. This being so notwithstanding that a franchising) Regulations 1998 – Statutory Rules 1998 No. 162 as amended, a compulsory internal complaint handling procedure and mediation is foreseen. Text available at <http://www.comlaw.gov.au/Details/F2010C00457/Download>; last visited on 8 May 2013.


248 Licensing was at the time of deciding the case also innominate in Hungary, though it might have come up as the fourth potential contestant-contract given that it was a simpler and a more widely known type of contract.
rule – as pointed at above – was (and is) at place for such limbo situations: courts are expected to resort to that nominated contract the elements of which dominate the concrete franchise transaction.\(^{249}\) In the concrete case, the answer to the pivotal question what standards of performance were expected from the franchisee depended on which rules had to be applied: if the ones on commission contract, then due diligence would be required, but the franchisee would not be bound to achieve a particular result. As opposed to that, deciding on the basis of the rules on undertaking contracts, mere due diligence would be insufficient and a particular result must have been achieved (e.g., establishing a clientele of a certain level). The case is instructive and reaches wider than what geography would suggest as such indeterminacy heavily damaging predictability is not something peculiar to Hungary.\(^{250}\) Hence, the lessons of the case should be instructive especially to other systems where franchise is likewise innominate.

By making a nominated contract out of franchise, the DCFR offers now a panacea against the type of maladies illustrated by the Hungarian case.\(^{251}\) Given that codes (if any) in common law systems operate differently and are not presumed to be gap-less,\(^{252}\) the dilemmas of this sort either do not exist, or are left to detailed contract drafting, equity and to venerable principles of contract law. This systemic peculiarity of European common laws is also remedied

\(^{249}\) Id. at 289.

\(^{250}\) Belgium has no specific franchise law either, hence, contract, competition and some special agency and distributorship-related laws may govern franchises. As for the last category, the Law of 27 July 1961 on the Unilateral Termination of certain Categories of Distributorship Agreements (as modified on 1 April 1971) is to be mentioned, that may come into picture notwithstanding that strictly speaking ‘distributorship’ is even in theory something different from ‘franchise’. As a result, cases are known (Comm. Charleroi, J.L.M.B. 1997, 1668) where contracts named as ‘franchise’ have been recharacterized by courts either as an ‘exclusive distributorship agreement’ because “the franchise contract did not include a close and ongoing cooperation [obligation] between the parties.” See Van Bael & Bellis, Business Law Guide to Belgium (Kluwer, 2003), sections 1964-66, at 472.

In another case (Cass. 10 Nov. 1984, J.T. 1985, 244), the court has concluded that the relationship is in fact ‘employment’ because of the heavy controls of the franchisor and the lack of independence; leading to application of not just of labor laws but also the duty to pay social security contributions. Id. section 1966, at 472.

\(^{251}\) The dilemmas generated by letting the concept of franchise “float” in the legal hemisphere are numerous. In another Hungarian court case (High Court of Szeged, No. Gf. II.30.226/2011/2.sz. of 28 Sept. 2012), for example, even though franchise is not defined in the civil code, the court talked of it as if the definition of franchise was part of common knowledge. As it formulated: “The contract named as ‘partnership agreement’ by the parties to the case […] – was in fact based on its contents a franchise contracts […]” Needless to say, the court then adjudicated the case based on such a presumption. The referred to franchise system was a shop rented by the plaintiff and made available to the defendant for the exclusive sale of shoes of a given brand supplied by the franchisor/plaintiff. A selection of Hungarian language cases are available in Hungarian language at <http://birosag.hu>.

\(^{252}\) The US Uniform Commercial Code – in the version enacted by the various States – is the best example: it is a ‘code’ yet it does not cover important fields of commercial law, like agency. The reason is simple: it was more important to harmonize the laws of the States in fields for which it was thought that consensus could be reached by most of the States, rather than prolong or threaten the success of the project.

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by the DCFR as its systematized franchise law, mirroring also common laws, could be an appropriate substitute. Eventually, the DCFR might in that respect be looked upon as the next logical step in the organic growth of franchise law in Europe; a process similar to the evolution of this contract in the US.

Summarizing and giving a pragmatic twist to this train of thought, then one may wonder whether the DCFR or rather a civil code similar to the Hungarian one should be chosen as the law applicable to the substance in case of a transnational franchise contract? Undoubtedly each of the avenues has its positive and negative sides, yet the DCFR – with a full and coherent system of franchise rules – might trump a national law not recognizing franchise as a nominated contract exactly because of the enhanced predictability inherent to the former.

2.5. HANDLING FRANCHISE ASYMMETRY

As stressed herein, the set of issues that arises from the many-faced power imbalance intrinsic to most business franchises – typically working to the detriment of the franchisee – is undoubtedly one of the central legal dilemmas of the domain. While to the industry franchise would not be what it is without asymmetry, it is a fact that the very same feature might very easily lead to opportunistic behavior of the franchisor. In low rule of law countries especially, however, it might be exactly the franchisee who could easily abuse the deficiencies of the local court system and the general legal environment. Yet the problems with the rule of law should not be mixed up with asymmetry as a franchise-specific problem given that the latter is an

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253 A very apt description was given by the Australian Parliamentary Joint Committee on Corporations and Financial Services in the report (released December 2008) entitled Opportunity Not Opportunism: Improving Conduct in Australian Franchising, which noted that “the inherent and necessary imbalance of power in franchise agreement … can lead to opportunistic practices.” Referred to by Andrew Terry, Foreword to Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at ix.

It is interesting that the parliamentary inquiries ensued even though the initially voluntary Code of Conduct was transformed into a mandatory one in 1998 (with parallel modification to the Trade Practices Act 1974, effective as of 1 July 1998). The 1998 changes introduced mandatory disclosure and began regulating also the relationship of the parties (i.e., their other duties). See Unidroit Guide to International Master Franchise Arrangements (2nd ed., 2007), note 151, at 283.

254 In countries where the rule of law is sub-standard, like where law is not (or significantly less) embedded in business people, where courts are biased towards the local businesses (to wit, siding with indigenous franchisees of foreign franchisors) or simply the court proceedings are protracted (e.g., no preliminary measures, ex parte or not – e.g., a freezing order – are available), it is the foreign franchisors that would easily suffer. For instance, the misfortunes of Kentucky Fried Chicken in Armenia are quite well-known by the industry even though the whole case is virtually undокументed, especially in English language literature. There, shortly after having found indigenous franchisees and having more or less successfully launched the business, unannounced one day all the indicia and equipment of Kentucky Fried Chicken were arbitrarily replaced by the local operators, who then continued the business under a
issue even in the jurisdictions with the highest rule of law standards. If adjudged based on what developed economies do on that front, it may be claimed that some form of legislative or regulatory response seems to have become a global trend: i.e., asymmetry is noted and somehow reacted upon.\textsuperscript{255} The emergence of the DCFR with its franchise law might be listed as an eloquent example of that.\textsuperscript{256} The different level of the rule of law, the national discrepancies in the maturity of local franchise industries and laws, as well as numerous other factors are attributable that significant differences exist with respect even to the very basic objectives and policy choices of the legislative or regulatory reactions. What is symptomatic is that only a few of the known franchise laws specifically and unequivocally set as their objective the protection of franchisees’ interests. The good in the bad is that the countries which have given high priority to the problems created by franchise asymmetry are exactly those high rule of law jurisdictions which also possess the most developed franchise industries and laws.\textsuperscript{257}

To corroborate this claim, it ought to be recalled that the US law, the cradle of business franchise, proceeds from the premise that franchise is tainted with asymmetry – information and power imbalance – that requests regulatory intervention. For example, the fact that

different name. Eventually, the American company lost also in court following what it withdrew from Armenia.

In brief, as noted by the 2008 Australian Opportunity not Opportunism Report “franchisee opportunism may take the form of free riding, unauthorized use of franchisors’ intellectual property rights, underperformance, or failure to accurately disclose income.” See Andrew Terry & Cary di Lernia, Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?, 33 Melbourne Univ. L. Rev. 542 (2009), at 545.

\textsuperscript{255} See also Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 212. The growth of regulation in the sector is quite forceful, especially since the 1990s, reaching the number of thirty countries with franchise-specific regulation; plus New Zealand and the Canadian Province of Manitoba pondering to encroach on this path as well. Id.

\textsuperscript{256} As put it by Terry: “While there is increasing recognition of the ‘relational’ character of franchising, the extra-legal norms which explain relational contracting in the context of contracting equals are less compelling in the context of the typical business format franchise which is characterised by both an information imbalance and a power imbalance. Legislative responses have been increasingly sought. Yet, while the case for remedying the information imbalance by mandatory prior disclosure is widely accepted today – and is indeed the rationale for UNIDTROIT’s Model Franchise Disclosure Law – the power imbalance raises more sensitive issues and remains a difficult, and a controversial, issue.” See Andrew Terry, Foreword to Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at ix.

\textsuperscript{257} Spencer talks about these as ‘social welfare objectives,’ which “are generally about protecting the interests of participants, particularly franchisees.” (Not really clear why these should be designated this way?). Many systems seem to give priority to economic objectives (i.e., promoting growth of business or increasing competition in the sector), yet others try to protect both parties. Albeit there is lots of overlap among systems and often the objectives are not stated explicitly, as a consequence of what hardly could classifications be crystal clear, yet it seems that unequivocal preponderance is given to the protection of the interests of franchisees against the information and power imbalance of the franchisor only in Australia and the US. See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at 117-119.
franchisors can and often abuse arbitration has already triggered the most far reaching known regulatory responses (e.g., California). In fact, it seems, no other jurisdiction went that far as most franchise-specific laws contain no specific provisions on dispute resolution.\footnote{Spencer classified them as follows: 1/ five laws require inclusion into the contract; 2/ two adds information as a disclosure item; 3/ seven foresee some minimal requirements as to the process itself (e.g., Australia, Alberta, and Korea foresee that mediation must be available if the parties require that); and 4/ two US States prescribe arbitration or litigation outside the State. See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar Publ., 2010), at 281. In Australia, for example, the franchise agreement must foresee the complaint handling procedure, in the lack of what the parties may opt for mediation. \textit{Id.} at 283.} Franchise law, however, is far from being stable even in the US itself, where a wide-ranging discourse is still ongoing for example, on whether State relationship laws are needed at all.\footnote{Needless to say, industry advocates represent the view that franchisees today are sophisticated enough and have access to appropriate sources of information to make informed decisions. \textit{See, e.g.,} William L. Killion, \textit{The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship}, 28 Franchise L.J. 23, 29, 31 (2008). Empirical studies and renowned experts, however, claim that franchisees are typically inexperienced. \textit{See, e.g.,} Gillian K. Hadfield, \textit{Problematic Relations: Franchising and the Law of Incomplete Contracts}, 42 Stan. L. Rev. 927, 961–62 (1990);} This is a valid proof of not just how far reaching franchise asymmetry-linked problems are but also how different the opinions are. As opposed to the US, in Europe, one could hardly speak of a discourse. It should rather be presumed that the heterogeneous regulatory environment is here to stay for quite some time. It seems that it is of little, if any, relevance that a quest for answers to franchise problems and for a formula ensuring a balanced symbiosis between asymmetry and the countervailing franchisee protection is ongoing also on global level.\footnote{Terry succinctly highlighted the dilemmas surrounding contemporary franchise regulation: “Judicial developments have not progressed to the stage where the general underlying law provides adequate protection for franchisees. Legislative solutions have been increasingly sought. Yet, while the case of remedying the information imbalance by mandatory prior disclosure is widely accepted today – and is indeed the rationale for Unidroit’s Model Franchise Disclosure Law – the power imbalance raises more sensitive issues and remains a difficult and a controversial, issue.” \textit{See Andrew Terry, Foreword to Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy} (Edward Elgar Publ., 2010), at ix.}

The indeterminacy as to what level of asymmetry is to be tolerated should also be attributed to the\textbf{ prohibitive variety of franchise systems} and the concomitant differing strategic positions of the parties. These make finding of a common test for all franchise types hard yet not impossible given that the parties may always adjust their contracts to the concrete needs of their business. In case of emerging markets, additional conflicting factors plague the field from lack of experience, and thus some level of fear from such newcomer advanced contracts, versus the wish to attract foreign investment.\footnote{A good example is Kazakhstan’s Law on Franchising enacted on 24 June 2002 that not only programmatically mandates the development and promotion of franchising, but even lists some measures that governmental bodies are to take to achieve those ends, like preparation and effectuation of related programs and provision of franchise-related consulting services. More interesting is that the act even foresees that compensation is to be paid for damages suffered by franchise parties caused by illegal acts or omissions of state organs. \textit{See Unidroit Franchise Guide}, at 290-91.}
The DCFR now contains an answer to most of these issues and it puts forward one mature model that could be taken to represent the common European position, which especially vis-à-vis those European jurisdictions that lack sector-specific laws is to a great extent programmatic (or aspirational); representing not what law is (lege lata), but what it should be (lege ferenda). Here, it ought to be noted that it is surprising why the problem of asymmetry in contract law has largely escaped attention given that asymmetry is, neither a specificity characteristic only to franchise contracts, nor an issue that is susceptible to resolution by resort to classic rules on adhesion contracts.262

Contrary to the US FTC’s definition of franchise,263 the quintessential role asymmetry plays in the franchise context is not specifically postulated as the main goal by European acts targeting franchise. The one in the DCFR is not an exception in that respect,264 yet even a cursory review of the titles and the many ‘musts’265 in the franchise-related provisions would easily reveal that indirectly asymmetry was, indeed, presumed as a sine qua non feature of franchise. The franchise provisions of the DCFR on the aggregate are nothing else, indeed, but a series of provisions aimed at straight jacketing the franchisor’s powers – but only to the extent that would not constrict the business itself. The Comments cautiously add that compared to distributorship – as the closest kin contract – “franchise networks are characterized by a much stronger

262 Roppo claims outright that the “European legislator is more and more focusing on asymmetric contracts rather than consumer contracts, whereby asymmetric contracts are all contract relationships between a dominant business and another market player (be be a consumer or a non-consumer) who suffers inequality of bargaining power depending on his objective market position.” See Vincenzo Roppo, From Consumer Contracts to Asymmetric Contracts: A Trend in European Contract Law?, 3 Eur. Rev. of Contract L. 304 (2009), quoted from the abstract.

263 As per the second prong of the FTC definition a business to qualify as franchise “the franchisor must exert significant control over the operation of the franchisee or provide significant assistance to the franchisee.” See note 210 supra.

264 See, e.g., the US case Tickner v. Choice Hotels, Inc., 265 F3d 931 (9th Cir., 2001) for an asymmetric arbitration agreement in a franchise contract. Here, the 9th Circuit affirmed the Montana Court judgment that found the said clause unenforceable as unconscionable under “general Montana law.” See American Bar Association Section of Antitrust Law, the Franchise and Dealership Termination Handbook (2004), at 120.

265 The section containing the definition reads: “IV.E. – 4:101: Scope This Chapter applies to contracts under which one party (the franchisor) grants the other party (the franchisee), in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor’s network for the purposes of supplying certain products on the franchisee’s behalf and in the franchisee’s name, and under which the franchisee has the right and the obligation to use the franchisor’s trade-name or trademark or other intellectual property rights, know-how and business method.”

266 For example, Article IV.E. – 4:201 (1) reads that “[t]he franchisor must grant the franchisee a right to use the intellectual property rights to the extent necessary to operate the franchise business,” moreover – as paragraph (2) of this provisions continues – “[t]he franchisor must make reasonable efforts to ensure the undisturbed and continuous use of the intellectual property rights.” Or, as per provision IV.E. – 4:203(1) “[t]he franchisor must provide the franchisee with assistance in the form of training courses, guidance and advice, in so far as necessary for the operation of the franchise business;” moreover, “the franchisor must provide further assistance, in so far as reasonably requested by the franchise,” though only at a reasonable cost.
uniformity than ordinary distribution networks\footnote{267} – uniformity that cannot be achieved without giving strong powers to the franchisor to efficiently protect his business model along with his intellectual property rights, if necessary even by swift termination of the contract.

Having the above in sight, the DCFR’s franchise model is undoubtedly a step ahead in Europe. It should be useful to arbitrators for, at least, two reasons. Firstly, it makes available a complete and mature system instead of the industry-forged codes of ethics (or similar soft law or soft-law bordering instruments) or fragmented, incomplete and underdeveloped European national laws. Perhaps it is even more important that the DCFR model gives an answer to the very pragmatic question of whether asymmetry is a natural corollary of franchise. Its provisions represent a common European standard that could be exploited by arbitrators as a benchmark for determining what is tolerable in Europe and what is not. These traits give the franchise provisions of the DCFR a fair chance to serve as the law applicable to the merits of cross-border franchise contracts.


In the lack of published CEE franchise-related arbitral awards, the very few court decisions on the subject might be helpful to get an insight into these genuinely novel developments. The Polish Family Frost case might be illustrative exactly of the perception of whether and to what level is asymmetry in franchise tolerable. Even though it is a court case, one may raise the question whether the outcome of the case would have been any different had franchise-expert arbitrators and not generalist judges passed their decision; especially as arbitral proceedings are commonly known to be more flexible compared to litigation.

The facts of the case are simple: in 1993, the Polish franchisor and two businessmen have concluded a franchise agreement for sale of ice cream by way of mobile sales points, which were with franchisor’s logo tailor-designed vehicles leased by the franchisees from the franchisor. As usual, the franchisor was also obliged to advise and provide the know-how to the franchisees. The consideration payable by the franchisee consisted of two elements: an initial fee (about 50,000 German Marks\footnote{268} and regular subsequent franchise fees. Further, the income of the franchisees was foreseen to be applied first for the costs and expenditures arising connected to distribution, then for all the payments due to the franchisor (i.e., rental, royalties and the


\footnote{268} The German Mark (“Deutschmark”), was the official currency of West Germany (19481990) and of the unified Germany (1990-2002) until the introduction of the Euro. The exchange rate was 1.95583 = €1. See, e.g., Wikipedia.
price of the products supplied by the franchisor): the franchisees were to make their own income from the remainder.

The dispute arose out of the failure of the scheme. After the accumulated unpaid debt had reached almost half a million German Marks, the franchisor terminated the contract in March 1995 demanding the payment of all the outstanding debts. Instead of paying, franchisees sued the franchisor and asked the court to declare the contract null and void because the contract, due to its terms and conditions, could have never ever turned profitable, for allocating all risks and responsibilities only to the franchisees and for violating good morals. Similarly to the DCFR, the appeal court departed from the realization that subordination (asymmetry) is essential for franchise and as such it is not something per se illegal. It added that franchisors as well take risks not just by sharing their know-how, but also allowing the use of their trademark or brand, which in case of franchisees’ failure “cannot remain without any impact on the general image of the franchisor on the market, its commercial standing, competitiveness, etc.”269 Most importantly the court declared that the franchisor normally cannot be held liable for the business failure of his franchisee – notwithstanding the obvious dominance of the franchisor. The court also stressed how important such rights of the franchisor are for ensuring the desired level of uniformity in franchise context: something without what franchise would not be franchise.270

The case illustrates as well that a DCFR-like detailed law on franchise should be welcome in Poland and in other jurisdictions having nothing specific or underdeveloped franchise laws. That would have not just empowered the court in the case to adjudicate based on explicit rules, but that would have made the rules of the game for industry participants as well more predictable. The indeterminacy plaguing the legal stratosphere is visible also from this case: while the appeal court had understood how essential asymmetry for franchise is, the first instance’s reaction was exactly the opposite – though both courts were forced to extrapolate the applicable rules from the very same vague set of general principles of contract law. Eventually albeit it may only be speculated yet it is telling that the application of the DCFR in the case would not lead to a different outcome and reasons than what is in the decision of the second instance Polish court.

2.6. THE FAILED US FAIR ARBITRATION ACT BILL AND THE QUESTIONS TO BE ASKED IN EUROPE


270 The court’s formulation deserves quoting: “We have difficulty with sharing the plaintiff’s view that the analyzed agreement violated the nature of franchise contracts, since its provisions are typical when it comes to the nature of commercial franchise. [The franchisee’s] challenges essentially boil down to the fact that they have failed to achieve the anticipated commercial benefits, and have rather fallen into indebtedness instead. That is not the idea underlying […] the civil Code. The plaintiffs confuse financial consequences with the content of legal relationship and associate the negative economic effects of [their] undertaking with violation of the nature of the legal relationship. Should we share the plaintiff’s views, then each commercial contract resulting in financial loss would be null and void. For obvious reasons this position cannot be accepted.” Id. at 658.
In the US, the many variations whereby the strategically more powerful franchisors can behave opportunistically have been noted quite early right after the business format franchise had begun spreading somewhere in the early 1970s. The panacea ensued in the form of non-uniform State legislation passed at different points in time and on the federal level through the FTC Franchise Rule. Somewhat later it caught attention that imposition of arbitration for resolving franchise disputes was resorted to by franchisors en masse as a way of gaining strategic advantages. The practice brought to the surface two problems: on the one hand, as a rule the arbitral institutions agreed upon were linked to the industry, and on the other hand, the franchisees often were not in the position to understand what arbitration concretely entailed. As a result, now according to the FTC Rule, information on both the franchisor’s litigation and arbitration-history must be disclosed. Some States added further restrictions specifically related to arbitrability. The story does not end, however, there, nor with the meaningful case-load that has dealt with the problem: the federal Arbitration Fairness Act bill of 2007 that died in Committees of the Congress requests a brief reflection. The bill proposed the complete ban of pre-dispute arbitration agreements in employment, consumer, civil rights and franchise disputes.

From this side of the Atlantic and with the DCFR in sight, the following needs to be noted. On the one hand, the birth of the bill itself is a proof not only of epidemic dimensions arbitration clauses had been added to franchise contracts, but also of the fact that this specific form of opportunistic behavior of franchisors is a genuine threat. Although it may be tempting to claim that industry practices are inherently different in Europe, or that litigiousness is not the feature of Europeans, and hence Europe should not pay attention to these unhappy American developments, one should not forget, at least, that the number of US franchisors being present in Europe is significant. Furthermore, admittedly the dimensions of the problem may be different in those countries where arbitration is less often resorted to in general. The lack of any mention of arbitration in the DCFR’s franchise or other rules imposing the duty of informing may be the proof that in Europe nobody thought of this specific subject matter.

271 The first Arbitration Fairness Act bill of 2007 (S. 1782, H.R. 3010) provided that “No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of— (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.” [Emphasis added.] The text of the bill is available at <http://www.govtrack.us/congress/bills/110/s1782/text>; last visited on 8 May 2013. The 2009 version of the bill added the category of ‘investors.’

Note that after the US Supreme Court decision in AT&T Mobility v. Concepcion (563 US of 27 April 2011) a few Senators of the US Congress reintroduced the bill – the second Arbitration Fairness Act – though this time leaving franchise out. In the case, a class action was launched against AT&T for false advertising. To block the lawsuit, AT&T asked for arbitration based on the mandatory arbitration clause in the service contracts. Because the arbitration clause invalidated class actions (i.e., only individual arbitration was stipulated) – what was prohibited by the applicable State law – the lower courts invalidated the arbitration clause. However, the US Supreme court, at a 5-4 margin, overruled the lower court decisions. The position of the US Supreme Court is, thus, that exclusion of class action arbitration and making individual (i.e., forcing each consumer sue separately) arbitration mandatory is allowed.

272 The generally applicable Article IV.E. – 2:101 Pre-contractual Information Duty makes no specific mention either of litigation or arbitration-related information, though the general language – “such
Still, nothing suggests either that – similarly to the US FTC Rule – the requirement of disclosing the litigation and arbitration history of the franchisor should be less important to European franchisees as it is to their kin in the US.

\[\text{information as is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration}^*\] – might presume, though very remotely, also these two items.

The franchise-specific version of this, Article IV.E.- 4:102 Pre-contractual Information fails likewise to mention either litigation or arbitration. Paragraph (2) of the same, however, explicitly spells out the franchisee’s right to recover damages for loss under certain conditions.
3. SECURED TRANSACTIONS LAW (PROPRIETARY SECURITY IN MOVABLE ASSETS)

3.1. IS ARBITRATION INCOMPATIBLE WITH SECURED TRANSACTIONS LAW?

While it is commonly known that sales-related disputes are regularly arbitrated and generally no obstacles stand on the way of doing that, it is far from easy to qualify the relationship of arbitration and secured transactions law – or arbitration and Book IX of the DCFR. The main reason is that secured transactions law is based on a number of significantly differing transactions that could be brought under the same roof only because they all share one quintessential feature: they all are used to secure credits (i.e., performance and payment) by way of a proprietary (in rem) right in a personal property (i.e., movables and intangibles). True, sales law knows also variations, yet those remain only sub-types of sales law. As opposed to that, secured transactions law is made of such differing transactions as conditional sales, leasing, receivables financing (in the US, including also sales of receivables or factoring), consignment, chattel mortgage or even trust exploited to serve as security. This is possible not just according to the DCFR, but also in the US and other Unitary Systems because of the functional approach looking at the substance (economy) of these transactions rather than at their designations. These transactions are especially in system-thinking laws (e.g., German law) looked upon as distinct species of law.

Pondering on how realistic it is to expect that arbitrators will resort to Book IX of the DCFR this or that way, a few general points are worth putting down on paper. Firstly, Book IX represents the first European comprehensive secured transactions law that is additionally filled with major novelties of genuinely revolutionary nature for virtually all European legal systems. So much so that one may suspect that exactly the prohibitive level of novelty is what might make the DCFR unacceptable to many jurisdictions or to arbitrators; it is the strange twist of fate that in particular those countries will be foreseeably the most hesitant to profit from it that otherwise by many would deserve urgent upgrading.²⁷⁵

²⁷³ See Article IX. – 1:101(2)(a) which extends the rules of DCFR Book IX – though with ‘appropriate adaptations’ to trust for security purposes.

²⁷⁴ As Article IX. – 1:102 of the DCFR canvassing the outer limits of the system formulates: “The term security right includes [not just known in rem security devices but also] limited proprietary rights, however named, that are based upon a contract for proprietary security and that are either intended by the parties to entitle the secured creditor to preferential satisfaction of the secured right from the encumbered asset or have this effect under the contract […].” [Emphasis added].

²⁷⁵ More reasons would dictate an EU-level action, amounting to much more than a soft-law DCFR. Bourbon-Seclet quite idealistically vouched for a common ‘European interest’ subject to common European rules because “[t]he European interest would not only do away with the problem of recognition of security interests over assets moving across borders [but it] would provide companies of all Member States with new secured financing tools which were previously rejected by their national systems (such as the floating or enterprise charge or the extended
The main systemic innovation of the DCFR, a feature common with the American UCC Article 9 or the most recent Australian Personal Property Securities Act (2009), is that it is based on the so-called ‘functional approach’ resulting in the unitary concept of security interests (in the DCFR named as ‘security rights’). This in simple terms means that one and the same single lien (in rem right) encumbers all types of secured transactions on personal property notwithstanding the designations of the covered transactions listed earlier. This is a radical novelty not just to lawyers of system-thinking Continental Europe, but also to the compartmentalized English system still dividing ‘grant’ of security interests from ‘retention’ of title with a legal firewall. Yet, the commonalities of the DCFR and the US system do not end there: essentially the two have roughly identical building blocks and share most of the basic policy choices. From among these, of importance to this paper and the ensuing brief discourse on the arbitrability of private debt collection and self-help repossession generated disputes, is that both leave the overwhelming part of consumer protection to lex specialis. Depending on the background of the arbitrators wishing to make use of DCFR Book IX, it should also be of importance that the drafting styles of UCC Article 9 and the DCFR are significantly different:


277 The concept of ‘personal property’ is the category known to Anglo-Saxon laws, which together with ‘real property’ encompasses all types of assets. They are also known as ‘personalties’ and ‘realties’ though in their more archaic forms. The civil law equivalent – what sometimes causes unease if not confusion – is the pair of ‘movables’ and ‘intangibles.’

Confusion may arise also because the local language equivalents resembling ‘personal property’ are limited in civil enforcement laws to those items of assets that are needed for bare survival of a debt and upon which no enforcement can be effectuated according to statutory exemption laws.

278 This includes, in particular, the bipartite rules on the creation and perfection of security interests, the complex web of priority rules – including the rules on superpriority (the US equivalent of which are known as ‘purchase-money security’), and similarly liberal approach to enforcement opening widely the doors not only to out-of-court enforcement, but also to ‘strict foreclosure’ (see DCFR Article IX.-7:216: Appropriation of the Encumbered Asset by Secured Creditor).

For a chart with the building blocks that make UCC Article 9 work in the opinion of this author see Tibor Tajti, Comparative Secured Transactions Law (Akadémiai könykiadó, 2002), Appendix VIII, at 400. From this list of building blocks, it seems, the DCFR has failed to properly regulate the so-called ‘floating security.’ The supplementarity of secured transactions and bankruptcy law is also crucial, but the high priority to be given in the context of bankruptcy to security interests is even in the US the task of bankruptcy law. Thus, the strength given to security interest in the DCFR will have to be affirmed also by adjusting national bankruptcy laws to make the system equally attractive to financiers and businessmen.
needless to say, the European instrument follows European traditions and is much less technical and casuistic – in direct contrast with the very burdensome style of the other.

3.1.1. MONOLITHIC VERSUS POLYLITHIC TRANSACTIONS

Some of the secured transactions form the basis of distinct business models from which distinct industries live though primarily in developed economies. In case of such monolithic transactions – for example, leasing or factoring – the distinctive business model is built upon and is limited to the exploitation of one sort of personal property (i.e., movable or intangible assets) as collateral. These, in other words, make one particular identifiable type of financing. Consequently, it is easier to pass a judgment on their arbitrability exactly because the industry behaves as a single stakeholder and thus its position could realistically be articulated. Bearing that in mind, opting for arbitration of all or an identifiable portion of specific types of leasing contracts is not unheard of – let us point to concrete data from Hungary in that respect.

The picture cannot be but blurred when secured transactions are only one the constitutive, yet interlinked contracts of polylithic, multi-contract transactions like that is the case in the context of project finance, joint ventures or construction contracts – involving potentially more types of credits and a wide variety of contracts that are backed up by a combination of security devices and enhancers of the creditor(s) position, from real property mortgages, subordination or comfort letters to secured transactions. Here, if arbitration is resorted to, then it is not necessarily solely because of and related solely to one of the transactions “in the bundle.” In such situations, as the involved secured transaction plays only

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279 Without the pretense of completeness the following known financing models could be linked to secured transactions law: title finance, receivables financing, floorplan financing, field warehousing- or chattel-paper financing. A more encompassing term is asset-based financing.

280 After the amendments of the Hungarian Civil Procedure Act in 2009 (§41(6) of Law No. L of year 2009), which excluded the possibility of agreeing on the jurisdiction of Budapest high courts instead of county courts or first instance Budapest courts, for example, two leasing companies belonging to the same group – i.e., “IKB Pénzügyi Lízing Zrt” and “IKB Leasing Hungária Kft” – have changed their general terms and conditions of doing business and have instead of courts foreseen that all disputes concerning their leasing contracts (operational or financial) are to be resolved by the Permanent Financial and Capital Market Tribunal – i.e., by arbitration. The related public advertisements in Hungarian are available at <http://www.ikb-leasing.de/hu/informationen/bekanntmachung/Birosagi_kikotes.pdf>; last visited on 8 May 2013.

281 Examples may be found elsewhere, too. Floating charge may be employed also in the context of construction contracts as a protection against the insolvency of the contractor, though not necessarily a perfect one. See, e.g., Ellis D. Baker, Worst Case Scenario: Anticipating Contractor Insolvency, Construction Law Journal (March 2004); available electronically at <http://www.whitecase.com/articles_03012004/>; last visited on 8 May 2013.
an ancillary role and follows the fate of the entire project, or a self-standing divisible segment thereof,\textsuperscript{282} arbitrability would depend on the fate of the project or the divisible unit. Put simply, although carve out of a specific transaction for resolution by arbitration is not unimaginable in such cases, the verdict on the arbitrability of monolithic secured transactions and the ones being merely one of the many must be distinguished.\textsuperscript{283}

\textsuperscript{282} Such may be the case if a syndicated loan agreement is concluded with the participation of more banks. In such cases, a floating security (e.g., a floating charge known to English law or a floating lien as per the US law) may be constituted for the benefit of the financing banks including the right to take over control over the entire project in predefined cases. In common law systems, such a floating security may be the way to take over the control over the project in case of default by way of appointing a receiver who will continue to manage the business. \textit{See} Philip R Wood, \textit{Project Finance, Subordinated Debt and State Loans} (Sweet & Maxwell, 1995), at 30 \textit{et seq}.

In many civil law and emerging legal systems, such all-encumbering security devices or the institute of a private receiver (or both) are unknown and hence taking over control over the entire project is not that simple or is something completely impossible. Pledging the project company’s shares may be an alternative, however, only if in the host country enforcement of a security interest does not mandatorily require disposition (sale). Yet, in many European civilian systems \textit{lex commissoria} is part of the law and thus taking over control over the project company by enforcing on the pledged shares is not possible (or the legal position is unclear); or as Americans would say – strict foreclosure is unknown in these systems. Sometimes the expression \textit{lex commissoria} is unknown to the local law (and lawyers) under such designation though the rule itself may be present under different or no specific name; in the latter case one may only point to the rules that lead to the same result. In ancient Rome, “by the \textit{lex commissoria} at Rome, the debtor and creditor might agree that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of Constantine abolished this power, as unjust and oppressive, and having a growing asperity in practice.”\textsuperscript{2} James Kent, \textit{Commentaries on American Law} 583 (George Comstock ed., 11\textsuperscript{th} ed. 1866), quoted by the Black’s Law Dictionary (De Luxe ed. 2009).

In Central and Eastern Europe, as part of the many post-1990 secured transactions law reforms, the \textit{lex commissoria} rules might have been modified though not necessarily in each and every jurisdiction of the region. The caveat is therefore that the existence of \textit{lex commissoria} and whether they apply with full force in the context of the new secured transactions laws should be carefully scrutinized. The same applies to such other similar fields of law that had in essence not existed during socialism prior to 1990 and hence the lawyers were forced to restart studying them de novo after setting onto the transitory path towards market economy. No better example could be served than the field of corporate finance and the intricate questions that surround various securities that companies may issue.

One recent case decided upon by the Lithuanian Supreme Court in 2004 is very illustrative in that respect. In the case, the secured creditor had a security interests on the shares of the debtor, which after having defaulted, had transferred the shares to the former. Yet, the secured creditor – who thought that it had acquired ownership on the shares by the transfer – was refused to vote at the general meeting of shareholders of the debtor company. As the secured creditor has filed a suit to annul the decisions passed without his vote, the case reached the Supreme Court, which ruled that “the collateral does not pass into the ownership of the creditor, but the creditor acquires only a right to sell the collateral [...] unless the creditor has agreed with the provider of collateral than in case of default the collateral will be transferred into [his] ownership. [...]” \textit{See} Lina Aleknaite, \textit{Enforcement of Contracts in Lithuania, in:} Stefan Messmann & Tibor Tajti (eds.), \textit{the Case Law of Central and Eastern Europe – Enforcement of Contracts} (European University Press, Bochum, Germany, 2009), at 376 \textit{et seq}.

\textsuperscript{283} Note that as our inquiry here is limited to the simple question of whether secured transactions are arbitrated, and if yes in what contexts, the aim is not to deal with the many dilemmas that are corollary to
Take project finance, for example, which is characterized, indeed, by a multitude of parties and transactions linked into a web.\(^{284}\) On the one hand, the exploitation of the most important asset – the receivables to be generated by the completed project – is already based on secured transactions law. On the other hand, arbitration undeniably plays an important role especially in international context as it offers a neutral forum – crucial especially when a dispute with the host government (or its agency) is something to be reckoned with. The list of other advantages of arbitration making it more suitable compared to litigation in such structured transactions includes in particular its flexibility with respect to multi-party arbitration:\(^{285}\) experts agree that it is the most suitable method for resolution of disputes featured by multitude of parties and transactions.\(^{286}\) Put simply, in case of polylithic transactions secured transactions law would come up only as one element of the bundle being often overshadowed by the project or its dominant segment; a feature that cannot but affect the verdict on arbitrability of secured transactions disputes.

3.1.2. WHAT THE DOYENS OF FINANCIAL AND ARBITRAL LAW SUGGEST

Jumping right in the middle of the issue, Philip R Wood, one of the doyens of English commercial and financial law, posits that arbitration is the antithesis of financial contracts: they are two irreconcilable creatures of law. Yet, having the above points on monolithic versus polylithic transactions in sight, it seems that his claim is limited and takes only the latter category arbitration of project finance. Let us mention thus just a few. For example, in some civilian legal systems project contracts are deemed to be of administrative nature and as such the related disputes must be settled either before the local courts (or administrative courts) of the host country rather than by ADR. See UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects (2001), point 8 at 175.

\(^{284}\) Philip R Wood states that one of the main duties of lawyers in the context of project finance to do ‘due diligence’ of all contracts and to report on them to banks. Such contracts would include construction and equipment contracts, purchase and supply agreements, forward purchase agreements plus various financial contracts. Additionally, as there are numerous creditors to a project, inter-creditor agreements with varying content are also used. See Philip R Wood, Project Finance, Subordinated Debt and State Loans (Sweet & Maxwell, 1995), at 12 et seq.

\(^{285}\) A host of problems may arise in such cases, when “if a dispute arises between only two of the parties, arbitration can proceed in the classic pattern. But what if more than two parties are involved in the dispute and two (or more) of them have some convergent and some divergent interests? For example, suppose a project owner brings a claim against two co-contractors. The two contracts have a joint interest in proving that the work was done properly and, at the same time, in showing that if there were any inadequacy in the work it was the fault of the other co-contractor.” Quoted from Tibor Várady, John J. Barceló III, Arthur T. von Mehren, International Commercial Arbitration – A Transnational Perspective (West, 4th ed., 2009), at 441.

\(^{286}\) See, e.g., Christophe Dugué, Dispute Resolution in International Project Finance Transactions, 24 Fordham Int’l L.J. 1064 (2001), at 1074.
of transactions into account when claiming that: "Unlike ordinary commercial contracts, arbitration is almost never used in financial contracts, especially bank loan agreements or bond issues. The main objections are: having nothing to arbitrate; very limited appeals; time and delays involved in setting up the arbitration tribunal; not necessarily less expensive; looser procedures, and sometimes decisions are made on the merits otherwise than in accordance with the strict principles of law." [Emphasis added].

An arbitral law expert, William W. Park’s initial opinion, was already much more nuanced; while he also admitted that “bankers have traditionally preferred judges over arbitrators [given that a] debtor’s default usually results from simple inability or unwillingness to pay, rather than any honest divergence in the interpretation of complex or ambiguous contract terms. Arbitration, therefore, may appear as an unnecessary invitation to a ‘split the difference’ award, reminiscent of King Solomon’s famous threat to cut the baby in two.”

Or, if a security interest has been created, “financial institutions […] will usually find it easiest to bring a court action where the pledged property is located” in lieu of arbitrating; what is a correct statement if assuming that modern collateral laws are at place and enforcement of security interests is efficient in the jurisdiction spoken of. Interestingly, somewhat later in another article of his from 1998 he already admitted that arbitration had become increasingly favored by the financial community, among others, in consumer loans and especially in some specific types of cross-border loan contracts.

Put simply, the position of industries to various financial contracts changes from time to time including their attitude to arbitration – a claim obviously applicable also to secured transactions law as one peculiar form of financial contracts.


289 Id. at 217.

290 Noting that “no dispute resolution clause will satisfy every segment of the financial services industry [and that] rather, the interaction of all elements of a given financial transaction will determine when and how arbitration may (or may not) be appropriate to the resolution of banking and securities controversies […]”, he mentioned arbitration as being increasingly opted for in case of securities transactions, guarantees, documentary credits and public sector lending – in addition to consumer loans. Id.

291 In his article, Park essentially tried to substantiate that arbitration may be the better option in the following international financial transactions: 1/ when there is no treaty on mutual recognition of judgments between the country where the debtor’s assets are located in the litigation forum; 2/ where such exchange controls is in place that could be exploited as a defense to loan recovery; 3/ where punitive damages or ‘lender liability’ actions are realistically available to the debtor; and 4/ when special expertise is needed (mentioning documentary credits-linked disputes subject to the Uniform Customs and Practices of the International Chamber of Commerce). See Id.

292 For example, the number of covenants normally added to financial contracts was radically different before and after the 2007 Credit Crunch. As one source noted “Before the subprime loan meltdown in 2007, private equity sponsors saw a rise in ‘covenant-lite’ (or ‘cov-lite’) loans – which, as the name suggests, had substantially fewer covenants than most commercial loans – jumping from four in 2005 to over 100 in 2007.” See Whitehead, the Evolution of Debt: Covenants, the Credit Market, and Corporate Governance, 34 J. Corp. L. 641 (2009), at 662.

Investopedia defines covenant-lite loans as “A type of loan whereby financing is given with limited restrictions on the debt-service capabilities of the borrower. The issuance of covenant-lite
For these reasons, it is more than mere speculation to claim that arbitration is not something inherently inacceptable to the world of finance and something inherently incompatible with secured transactions law as suggested by Wood. Thus, arbitration of secured transactions-linked disputes – as it will be shown below – is not a phantasmagoria. Apart from the obvious fact that the significant differences that subsist among national secured transactions laws undoubtedly make the picture opaque, of utmost importance is that this branch of law – or what is now enshrined in Book IX of the DCFR – is not the exclusive bailiwick of banks. In fact, a large portion of secured transactions law is linked to sale-credits of suppliers or of non-banking financial institutions; though, admittedly the former is not necessarily viewed as being part of secured transactions law in many jurisdictions (including England that served to Wood as the benchmark). It is also of relevance that one of the often bypassed distinctions between developed and underdeveloped economies is that in the former the economic role of non-banking institutions is much more important.

Consequently, the right approach is not to talk of the arbitrability of secured transactions disputes holistically but rather to canvass a more nuanced picture by breaking down secured transactions law to its constituent financing models as exploited by various industries. One should reformulate the initial query and ask what the approach of leasing, factoring, field warehousing or other secured transactions-linked industries is as far as arbitration of disputes is concerned. Having that in mind, two such topics will be taken a look at from the realms of secured transactions law herein: firstly, the pivotal role out-of-court enforcement plays in the life of efficient secured transactions laws together with the arbitrability of private collection generated disputes, and secondly, the arbitrability of retention of title (ROT)-based contracts (e.g., leasing or consignment). These make two such readily identifiable segments of secured loans means that debt is being issued, both personally and commercially, to borrowers with less restrictions on collateral, payment terms, and level of income.” See at <http://www.investopedia.com>; last visited on 8 May 2013. The evolution of covenant-lite loans can generally be traced to the historical buyout power of private equity groups performing highly leveraged buyouts. The power of these buyout groups led to the relaxation of loan restrictions, and arguably providing increased flexibility for repayment.

According to CEAL (Center for Economic Analysis of Law) – though not pointing to the source of data – while in the US about 60% of the credit extended is linked to nonbank private lenders, that is in systems without developed secured transactions law less than 5%. See Heywood Fleisig, Mehrnaz Safavian and Nuria de la Peña, Reforming Collateral Laws to Expand Access to Financing (World Bank Publication, 2006), at 16; available electronically at <http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/BEE+Collateral+Access+to+Finance/$FILE/Reforming_Collateral.pdf>; last visited on 8 May 2013.

As this document was drafted in 2006, prior to the Credit Crunch and the concomitant distrust in ‘securitization’ as the financing technique that made raising of finances on the capital markets and not from commercial banks and other deposit-taking financial institutions, it is questionable whether securitization is still such a stable source of financing for nonbanks as it was claimed in the said CEAL document. Namely, the document listed as one of the advantages exactly this feature: “A sound legal framework for secured lending encourages the development of nonbank financial intermediaries that can finance their activities through securitization rather than by taking deposits, reducing the share of total credit allocated by banks.” Id.

As the term ‘consignment’ has two equally widely used meanings, for the purposes of secured transactions consignment means a transaction where goods are given by the consignor to the consignee
transactions law – and that of DCFR Book IX – the related disputes of which have in some jurisdictions been quite often arbitrated and are thus appropriate objects for testing our theses; notwithstanding that each of them could be broken down to further constituent elements.

3.1.3. WHAT EMPIRICAL DATA SHOW

The incompatibility of arbitration and finance suggested by Wood seems to be defied in some countries; concrete data could be found to show that. On the level of the EU, it is sufficient to point to the Financial Dispute Resolution Network (FIN-NET) launched by the EU Commission in 2001 specifically to handle disputes between consumers and financial service providers in cross-border cases. Developments on national level, perhaps of more organic nature, are known as well. In Hungary, for example, a Permanent Financial and Capital Market Arbitral Tribunal (“Pénz és Tőkepiaci Állandó Választottbíróság”) was established in 2002 for arbitrating both investment and retail banking disputes (i.e., potentially involving secured transactions law as well). Irrespective that the institution was established by statutory law and was not entirely the product of autonomous choices of the affected industries, one can find indica on its gradual acceptance by banks and other providers of financial services; though this development has largely bypassed the attention of legal scholars.

Indirect evidences on the increased resort to arbitration (or mediation) by financial institutions could also be tracked down. For example, even the few publicly available texts of Hungarian high court cases may show that courts do not necessarily look unfavorably on to sell them and to pay for them from the proceeds of sale. Note that UCC Article 9 has a more complex definition (UCC s. 9-102(a)(13)). The other meaning, i.e., consignment of a shipment of goods to a carrier is not a secured transactions law category. See Tibor Tajti, Consignments and the DCFR, Pravni Zapisi (Union Law School, Belgrade, Serbia), vol. II, No. 2, at 358-397 (2011); available also at the SSRN page of the author.


296 The Tribunal was established by the Hungarian Banking Association, the Budapest Stock Exchange and the Hungarian Commodities Exchange based on §376, Chapter LII of the Act on Capital Markets No. CXX of year 2001. Interestingly and unfortunately the Tribunal’s webpage contains only Hungarian language materials (<http://www.valasztottbirosag.hu/>); last visited on 8 May 2013. Irrespective of the fact that the Tribunal has been in existence for ten years, very little is known about its activities. For example, neither on the Tribunal’s webpage, nor in law reviews (or even by a simple Google research) could one find information about decided cases – even within the limits tolerated by confidentiality. Hence, it is legitimate to presume that the Tribunal is still in its embryonic stage of development.

297 The case was decided by the Cassation Court (“Itélőtábla”) of the Capital Budapest (5.Pf.21.364/2010/2 of 5 October 2010) and concerned a typical free use consumer credit secured also by a so-called independent charge. The independent charge, is a new security device on movables introduced by the 1996 reform of the secured transactions provisions of the Hungarian Civil Code following its
lender-imposed arbitration agreements; including the ones unilaterally included by lenders into their general terms and conditions of crediting. Based on this it may be inferred that resort to arbitration by financial organizations is far from being unheard of. Furthermore, it may be presumed that it is not only confidentiality inherent to arbitration that is behind the slowly growing popularity of the Hungarian Tribunal, but its presumed expertise in financial law and generally finance. Similar examples could be found in other countries as well.

3.2. CAPITAL SELECTA ON THE THEME OF ARBITRABILITY OF SECURED TRANSACTIONS LAW-BASED DISPUTES

The next two subsections are devoted to the question of the relationship of arbitration and two of the most revolutionary fields of DCFR Book IX: out-of-court enforcement and German kin. The main issue, however, was related to the enforceability of the “arbitration clause” based on which all disputes arising out of the said underlying transaction were foreseen to go for arbitration.

As it is usual in Hungary – and in those European countries where consumer protection laws do not provide otherwise – the contracts signed by the consumer debtors did not contain anything about arbitration, but have only referred to the General Terms and Conditions of Crediting drafted unilaterally by the financier. Moreover, as it was determined by the court, the consumer debtors were not specifically explained what arbitration is about. While the first instance court enforced the arbitration agreement, the Cassation Court, however, quashed it exactly pointing to these deficiencies. It declared, among others, all provisions in General Terms and Conditions that were imposed unilaterally, without having been individually negotiated, as null and void. In other words, an arbitration clause added to general terms and conditions of doing business unilaterally by the financier would be enforceable solely if that would be separately discussed during negotiations with every consumer-client. The scanned text of the decision in Hungarian is available at <https://docs.google.com/file/d/0B1StoqQPRaLAZjE0OTgxZTYtYmU2Zi00NDJmLWJmM2YtZGVlOTkyZmNlY2I5/edit?hl=en_US&pli=1>; last visited on 8 May 2013.

298 See note 283 supra on the already mentioned case of Hungarian leasing companies – i.e., “IKB Pénzügyi Lízing Zrt” and “IKB Leasing Hungária Kft” – that have opted for arbitration.

299 In Poland, another CEE country, two bodies were established for dispute resolution in the banking sphere. Firstly, in 1992, an Arbitration Tribunal was established by the Polish Banking Association, yet not only for banking disputes and not only for handling consumer disputes with banks. Secondly, in 2002 a National Banking Ombudsman was created by the same association though only for disputes between banks and their consumer customers. Besides the problem that the two compete, the Polish Financial Supervisory Commission finds the Ombudsman’s impartiality questionable. See Consumer ADR in Europe (Hart Publ., 2012), at 185 et seq.

See also the New York Auto Leasing Excess Wear and Damage Arbitration Program established by the Attorney General's office at <http://www.ag.ny.gov/consumer-frauds/leasing-arbitration-program>; last visited on 8 May 2013. Article 68 of the Model Inter-American Law on Secured Transactions also foresees that “any controversy arising out of the interpretation and fulfillment of a security interest” may be brought before arbitration if “acting by mutual agreement” and if the applicable law allows that. (text at <http://www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf>; last visited on 8 May 2013).
acquisition finance contracts (or retention of ownership devices). These were chosen also because they rest on common foundations with UCC Article 9, or any of the unitary models, and thus make comparison with the DCFR possible. Such juxtaposition makes answering our basic puzzle easier given that arbitration of self-help repossession-related disputes is a routine practice in the US and the US law is rich as well with cases on various contracts involving ROT. Given the commonalities, it is legitimate to speculate whether arbitrators potentially utilizing DCFR Book IX should expect facing similar issues as the ones that had already surfaced in the Unitary Systems – especially in the US as presumably being the most litigious from all common laws.

The ensuing elaboration will therefore be an attempt to make some predictions on what types of disputes and with kinds of challenges may emerge from the perusal of the DCFR – based on the experiences of other jurisdictions. The utility of the resulting findings is in Europe obviously contingent on the degree to which the DCFR will be given a chance to bed in: admittedly there is no guarantee for a more widespread acceptance of the DCFT by arbitral or industrial circles at the moment. Likewise, as it is well-known, Europe has idiosyncratic traits that could easily thwart the reemergence of issues that had been witnessed by the mentioned other Unitary Systems on European soil. Yet, combing through the cases of other jurisdictions might help Europeans not just drive off the mist that now surrounds the DCFR, but might also help them react ex ante to prevent things go sour. What matters the most is that – at least as the relevant US experiences suggest – arbitration of secured transactions-related disputes is not unheard of; notwithstanding the scarcity of empirical data.

3.2.1. ARBITRABILITY OF SELF-HELP REPOSSESSION AND PRIVATE DEBT COLLECTION-RELATED DISPUTES

One of the most contentious novelties of the DCFR is the recognition that increased reliance on out-of-court enforcement of security interests is one of the key tokens for creating efficient secured transactions systems in Europe – to enhance access to financing and through that to spur economic growth. This prompts taking a look at the experiences of the US, the country which has presumably most widely opened the doors to private enforcement including self-help repossession. This came, however, at the price of introduction of regulations that had created multi-layer defensive shields for the protection of consumer-debtors against the abuses
of private debt collectors. The most important sector-specific federal legislation is the Fair Debt Collection Practices Act (FDCPA) of 1977.

While this act itself would require separate analysis, for the purposes of this paper the following ought to be stressed. Firstly, the not necessarily salutary corollary effects of the FDCPA ranged from generating massive litigation to the need for constant upgrading of the regulatory oversight system. In other words, in systems where DCFR Book IX’s out-of-court enforcement prong would materialize, there would be a need also for sector-specific regulation against abuses of the private industries offering such services – what eventually foreseeably would generate additional waves of litigation or arbitration. Secondly, although the FDCPA’s primary function is protection of consumers, indirectly it is also entrusted with creating a level playing field for good faith debt collectors. Thirdly, due to the wide-reaching definition of ‘debt collector’ in the FDCPA and the supporting case law, the Act covers a wide range of debt collection-aimed activities, from collection of bounced checks, purchase of debts, related services of attorneys and – most importantly – ‘enforcers of security interests.’

The list should start with the federal Fair Debt Collection Practices Act which was enacted in 1978 as a reaction to nation-wide concerns over “the use of abusive, deceptive, and unfair debt collection practices by many debt collectors” with the aim “to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.” See West v. Costen, US Dict. Court, Western District of Virginia, 558 F. Supp 564 (1983) and 15 U.S.C. § 1692l. The important corollaries are the availability of both public and private enforcement; the first via the Federal Trade Commission and the latter by empowering individual consumers to sue for actual damages and for civil penalty.

The FDCPA spells this explicitly out in § 802(c): “It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged […].”


See the case Heintz v. Jenkins 115 S. Ct. 1489 (1993) decided by the US Supreme Court holding that “the [FDCPA] applies to attorneys who ‘regularly’ engage in consumer-debt-collection activity, even when that activity consists of litigation.”

See § 803 (15 USC s. 1692(a)(6) stating that “The term ‘debt collector’ means any person […] who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. […]”
simply, the ensuing discussion should be of relevance also to those European countries in which private repossession is unknown (or survives unnoticed) but where services designated as ‘incasso,’307 ‘factoring’ or simply ‘debt-collection-related services’ provided by such European multinationals as ‘EOS-Group’308 or ‘Intrum Justitia’309 are practiced.

3.2.1.1. ARBITRATION OF SELF-HELP REPOSSESSION-GENERATED DISPUTES IN THE UNITED STATES: LESSONS FOR EUROPE?

While the strong role self-help enforcement plays in the context of secured transactions is emblematic to the US, it is less known that this country is also that jurisdiction in which presumably the most self-help repossession-linked disputes have been subjected to arbitration310 and where arbitration was abused on a mass scale by the private collection industry. So much so that in 2010 the FTC was forced to focus on the “Protection of Consumers in Debt Collection Litigation and Arbitration.”311 Still, arbitration has, neither ceased to be an important avenue for resolving consumer versus debt collector disputes, nor has a major legislative change ensued.

Additionally, some provisions specifically extend to self-help repossession. E.g., § 808 (15 USC s. 1692(f)) on ‘unfair practices’ – stating that it will qualify as unfair practice: “Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if -- (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement.”

307 Note that the term ‘incasso’ is foreign to English; its equivalent is simply ‘collection.’ It is of Italian origin and as such it has been taken over by many European languages. Yet, occasionally it could be encountered also in English. The firm name of one of the UK debt collection agencies is, indeed, ‘Incasso.’ See at <http://www.incasso.co.uk/about>; last visited on 8 May 2013.


310 See, e.g., Alabama Title Loans, Inc. v. White, 80 So.3d 887(Ala. 2011). The clause in a car loan agreement provided that the arbitration clause (agreement) “shall survive the repayment of all amounts owed” and that it extended to all claims, including tort claims, that “relate[d] to this Agreement or the Vehicle,” (i.e., not only those arising directly from the loan agreement). Based on such formulation of the arbitration clause, the court ordered arbitration of the debtor’s claims against the repossession agency that had repossessed after the loan had already been paid.

311 See the FTC document Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration (2010); available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>; last visited on 8 May 2013. The document concludes that “[…] the current [US] system for resolving consumer debts is broken, […] because consumers are not adequately protected in either debt collection litigation or arbitration.”Id. Executive Summary, at i.
The FTC has rather issued a brief document entitled **Debt Collection Arbitration: the Who, What, Why and How**\(^{312}\) in which, among others, it advised consumers – if they have the possibility to choose between more arbitral institutions – to opt for the one “not sharing any financial interest with the debt collector.” It is highly questionable whether it can be realistically presumed that consumers are normally capable to adjudge that or whether they normally have the means to discover the problematic ties. As a result, it is fair to conclude that the strong pro-arbitration stance of the US federal law and of the US courts – including the US Supreme Court – had, similarly to franchise, prevented tilting the balance more towards consumers;\(^{313}\) though restrictions generally applicable to business-to-consumer (B2C) disputes are available.\(^{314}\)

The American Arbitration Association reacted by way of a soft law instrument ‘Consumer Due Process Protocol’ as well.\(^{315}\) Before formulating precipitous conclusions on US law, however, one should not forget that many European jurisdictions are devoid even of such limited but occasionally powerful protections.

Admittedly, Europe seems to be devoid at this time of pathology known to the US; or at least no pertaining data has seen the daylight yet. The extended jurisdiction of the UK Financial Ombudsman Service inaugurated by the 2006 Consumer Credit Act, however, might be a proof to the contrary. Namely, under this new UK regime, consumers may opt out from the agreed upon dispute resolution method and bring their case before the Office even if the lender – including also private collection businesses\(^{316}\) – disagrees.\(^{317}\) In other words, the threat

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\(^{312}\) The document was issued in October 2010 and is available electronically at [http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre44.pdf]; last visited on 8 May 2013.

\(^{313}\) In the Allied-Bruce Terminix Cox. V. Dobson 513 U.S. 265 (1995) the US Supreme Court wrote that “[…] Congress, when enacting [the federal Arbitration Act 1925] had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding ‘the delay and expense of litigation,’ will appeal ‘to big business and little business alike, . . . corporate interests (and) . . . individuals’). Indeed, arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. […]”

\(^{314}\) For example, a ‘cost test’ is available to determine whether an arbitration clause is invalid in a case involving an adhesion contract (i.e., consumer had no right but to take it or leave it) because of the disproportionate costs imposed on the consumer. See Alexander J. Bělohlávek, Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate?, in: Alexander J. Bělohlávek & Nadežda Rozěhnalová, Czech (& Central European) Yearbook of Arbitration, vol. II (Juris Publishing, 2012), at 35-36.


\(^{316}\) See section 59 of the Consumer Credit Act 2006 that added the new section of 226A to the 1974 Act point (f) of sub-section (3) of which extends also to “a business so far as it comprises or relates to debt-collecting.”

\(^{317}\) The FOS was established in 2001 ([http://www.financial-ombudsman.org.uk/]) based on the Financial Services and Markets Act 2000 for disputes between consumers and various UK-based financial service companies (i.e., banks, building societies, insurance and investment companies, financial advisers and finance companies). Its official website is at [http://www.financial-ombudsman.org.uk/]; both last visited on 8 May 2013.
of abuses through industry-imposed arbitration was known by the drafters of the act. In the lack of appropriate quantitative data, however, it is hard to draw firm conclusions in this respect in Europe, where most of the legal systems seem to ignore the increased presence of private businesses offering the services of out-of-court debt collection.\(^{318}\)

### 3.2.1.2. PRIVATE DEBT COLLECTION IN EUROPE: REGULATIONS, GAPS AND DILEMMAS

It should go uncontested that the fragmentation and the divergent level to which private enforcement has become a problem in various EU Member States prevent passage of a common EU lex specialis on debt collection in the near future. This notwithstanding that – besides Ireland and the UK, two common law countries that have always been indulgent to and reckoned with self-help enforcement in commercial law \(^{319}\) considerable changes have occurred in many civil law countries as well, where both international and indigenous private collection companies have appeared during the last few decades (in CEE, after 1990 only). Regulators and the academia tend to ignore them as often private collection is disguised as ‘factoring’ \(^{320}\) or is being introduced as a regular business activity that easily passes unnoticed the scrutiny of generalist company registers. As a result, the activities of these newfangled businesses survive little researched and unregulated. Ad absurdum, such private services are confused with “mafia,” something preferably not to be dealt with by legal scholars. At the same

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\(^{318}\) While, for example, in Lithuania private collection industry is in existence, it cannot be determined whether consumer complaints against them have been heard at all by the State Consumer Rights Protection Authority. The same applies to financial service sector-related disputes, which until January 2012 were decided upon in ADR proceedings by the said Authority; starting from 2012, however, separate ADR dispute resolutions schemes are run by the Bank of Lithuania for banking, insurance and securities disputes. See Christopher Hodges, *Lithuania, in:* Christopher JS Hodges, Iris Benohr & Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart, 2012), at 123.

\(^{319}\) Goode placed the ‘encouragement of self-help’ among the eight principles that make the philosophy of commercial law – though obviously only in its Anglo-Saxon variant. As he excellently summarized the position of common laws vis-à-vis business – but not consumer finance – “There seems no pressure to modify this approach in relation to commercial transactions, nor, with the enormous pressure of work on courts all over the world, does a change seem predictably necessary or desirable. Civilized self-help has the advantages of speed, efficiency, flexibility and cheapness upon which the smooth functioning of business life so much depends.” See Roy Goode, *The Codification of Commercial Law*, 14 Monash L. Rev. 136-153 (Sept. 1988), at 151. Notwithstanding that this article of the doyen of English commercial law was written in 1988, the claim still holds; though note that in the context of consumer finance, consumer protection is already at work in the United Kingdom.

\(^{320}\) See, for example, the website of the pan-European collection firm ‘Intrum Justitia’ and the list of the services it provides – from factoring to debt collection – at <http://www.intrum.com/Services/>; last visited on 8 May 2013.
time, however, private enforcement, sometimes amounting even to outright self-help repossession, has been ongoing for years in many civil law countries now.

Part of the story is that in this context the terminology employed by various laws is a separate cause of misunderstandings as the identical or resembling designations often cover fundamentally differing notions. That is the case with the key category of ‘self help,’ for example, with respect to which Continental European and common laws radically differ given that the former group’s concept is very limited. The difference, in a nutshell, stems from the fact that civil laws prohibit all forms of self-help but the very restricted right of protecting one’s property or body from imminent threats with proportional means. Contrary to what blackletter law suggests, however, empirical data show exactly the opposite: even the most advanced continental Europe countries – i.e., the countries with the highest levels of the rule of law – have already faced problems generated by private collectors including self-help repossession.

321 Very telling – and unfortunately misleading – is a recent otherwise valuable publication entitled *Cases, Materials and Text on Property Law*, edited by Sjef van Erp and Bram Akkermans (Hart Publ., 2012). Apart from formally writing about the ‘common law of Europe’ yet not really taking a look at any other jurisdiction besides the traditional model laws of England, France and Germany plus the Benelux countries (from which the authors come), the picture created on self-help is simply distorted. This is so, first, because they equate and narrow the concept of self-help to the one known to German law to which the concept is nothing more than a “specific form of self-defense” (“Besitzwehr” in §859(1) of BGB) and the right to recover (repossess) “the object from the dispossessor immediately after the interfering act” (“Besitzkehr” in §859(2)) – none of which gets even close to self-help repossession done by professional repo-agencies in the US or other common law systems. Id. at 115. Furthermore, even though the book has a separate Chapter Five devoted to security interests, self-help is not even discussed there either. The cases chosen by the editors properly illustrate that none of them is about repossession of a car under a leasing contract but about “fight for a parking place” or “towing away a vehicle four hours after it has been unlawfully parked on another’s parking space [which qualifies as] an act of immediate self-help.” Id. 115 and 118.

The position of Austrian law, for example, is basically the same. Moreover, even this limited version of self-help is available to defend possession only as a last resort, “if judicial help is not available.” Id. at 129.

The same book, in the very same Chapter II, in the section devoted to common law (primarily English law), does mention self-help, neither as some kind of possession or security interests-protecting tool, nor as an efficient enforcement tool of creditors. It lists rather tort law – conversion, trespass to goods and negligence (including the right to claim for an injunction) – as the primary means for protection of property rights. As a consequence, the reader, having read the book, could not but presume that in Europe self-help is generally existent. Yet it could only be hoped that the reader will also note that in civilian systems it is limited essentially to what we described briefly about German and Austrian law.

To give weight to our claim that there is a discrepancy between what scholarship suggests and reality suffice to mention the following living developments. Scandinavian states, for example, have already enacted specific laws regulating private collection obviously because they were forced to do that because of the abuses of private debt collection businesses. Germany is following the suit as it visible from the post-2008 developments hinted at in this paper. And eventually one should not forget that self-help – in its broader variant – is still widely practiced legally both in Ireland and the UK, especially in business finance. The crème on top of such myopia is the gradually burgeoning private collection that seems to have already transgressed the borders between legality and criminal activities in quite a number of European countries.
In other words, notwithstanding the very narrow definition of self-help in civil codes, some businesses quite widely practice forms of out-of-court enforcement in European civil law countries as well.

Based on such dichotomy of written and living law, it could be validly claimed that in civilian jurisdictions a company duly registered for private debt collection (even if registered only with a generalist company register and not a specialized regulatory agency), can assist creditors in their debt collection efforts until the point where, either repossession – employment of physical acts and force – or court involvement is already a must. In reality, however, in many countries there is no specific agency entrusted with monitoring of these activities. Company registries, on the other hand, typically do only a one-off entry check and are not equipped to follow and react on the questionable practices of private debt collection companies thereafter. To show that there is a considerable level of truth in this statement, it suffices to point to the category of ‘grey market debt collection’ known even in high rule of law countries of Western Europe.

Notwithstanding the omnipresence of the new challenge, neither the EU, nor the Member States have enacted – with the notable exception of the UK – a sector-specific equivalent of the US Fair Debt Collection Act (FDCPA). This is so as private debt collection was obviously not at sight when drafting EU consumer acquis or most of national consumer protection laws. Consequently, consumer debtors are hardly protected against overreaches in the private collection processes. Though, it must be admitted that in those Member States where some form of sector-specific regulation is at place, the presence of some level of protection must not be denied, yet in none of them seems to exist the equivalent of the US FDCPA. Such state of affairs is in particular problematic when the most violent form of all out-of-court enforcement methods – self-help repossession – is practiced in a country. As shown below, notwithstanding the disinterest of regulators and scholars, empirical evidences could be found that even though self-help repossession is prohibited by law, businesses offering these services and banks making use of them is not something unknown on the Continent. Needless to say, while the American FDCPA extends also to repossession (which is a paradigm collection form in the US), in Europe hardly could one found a sufficiently detailed act specifically targeting self-help repossession – again save the European common laws.

Exceptions of limited reach and of recent origin, however, do exist also among civilian legal systems. Besides Denmark (1997) and Norway (1988) having passed special Debt

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322 As Werlauf put it “[court reforms in Denmark ensued in 2007/08, among others, because] the judicial system was often not used in debt collection cases because, rightly or wrongly, it was thought to be slow and expensive; debt collection agencies or the ’grey market’ are used instead.” See Erik Werlauf, Civil Procedure in Denmark (Kluwer, 2nd ed., 2010), at 12. The German jargon ‘Moscow-type collection’ is mentioned in the commentary of the 2008 Act on Out-of-Court Collection Services Act. See Michael Kleine-Cosack, Rechtsdienstleistungsgesetz – RDG – Kommentar (C.F. MüllerVerlag, Heidelberg, 2008), note 57, at 191.

323 The Debt Collection Act (“Inkassoloven”) does not apply to collection by public authorities, but only to private collection on behalf of others. For example, while lawyers are automatically entitled to get engaged in such activities, others must get special authorization. There is a general prohibition to use “methods which subject a person to unreasonable pressure, injury or nuisance.” See Erik Werlauf, Civil Procedure in Denmark (Kluwer, 2nd ed., 2010), at 38-9.
Collection Acts, one of the most influential civilian legal systems – Germany – has also taken legislative steps to face the new challenges. Time will tell when, but it could be projected that these will be followed by some others modeling themselves after German law.\(^{325}\) This includes, for example, Hungary, in which at the moment, similarly to most (if not all) post-socialist CEE countries, primarily only general private and criminal laws could be resorted to against the problematic activities of private collection agencies. National consumer protection agencies tend not to be prepared to live up to these challenges either. As hardly could one point to such a watershed court decision that would demonstrate that citizens can successfully turn to courts to combat the strategically stronger private debt collection companies, it may be validly assumed that these are obviously ill-suited to the peculiar problems generated by private debt collectors. Unfortunately, very little is known about the experiences of the mentioned Scandinavian countries with the mentioned acts.

As already hinted at, most of the collection companies are typically registered also for factoring or provision of some other financial services and thus are theoretically subject to oversight by the Financial Supervisory Authorities of the Member States.\(^{326}\) If a properly equipped expert agency is available for that purpose, then even the presently known consumer protection rules might be sufficient for the agency to step in and react if needed. It is doubtful, however, whether and when would the agency be willing to more freely interpret the rules that have been initially drafted for more traditional types of abuses of consumers’ rights – like hamburgers containing horsemeat or misleading commercials. Again resorting to examples from Hungary, while large European private debt collection companies have been present in the country at least since 2002, the infliction of the first major fine on one of them for “unfair

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324 For a brief synopsis of the Norwegian law see, e.g., the website of the webpage of the European Debt Collection Alliance at <http://www.edca.com/premises_norway>; last visited on 8 May 2013.

325 The increased role of collection agencies is attributable not just to the inefficiency and other problems of court enforcement, but goes much deeper. Namely, in Germany, since 2003 a genuine industry specialized to acquisition of non-performing loans (NPL) has appeared; led by the US and other Anglo-Saxon investment companies as the most active investors in NPL portfolios. This was driven by the changed stance of German universal banks that used to be the major shareholders of German corporations. Namely, these banks began selling not just their equity stakes in large corporations, but also to remove NPLs from their balance sheets, first to compete on the global scene and then – after the Credit Crunch – to protect themselves.. With Basel III this process will undoubtedly continue. See Torsten Schwarze & Jürgen Storjohann, the Sale and Acquisition of Non-Performing Loans under German Law, J. Int'l Banking L. & Reg. 2006, 21(2), 77-89.

326 Hungary has one agency for the supervision of banking, insurance and capital markets, the Financial Supervision Authority (website with English language pages at <https://www.pszaf.hu/en/>).
business practices” dates back only to November 2012.\textsuperscript{327} As sector-specific regulation was still non-existent at the time of the passage of this decision of the Hungarian Financial Supervisory Authority and the fined company announced that it will appeal it, one could hardly talk of a happy ending. Furthermore, if one could learn from the US experiences, then it should be clear unfortunately that enactment of a detailed law on what private debt collection companies may do will not necessarily lead to Canaan; rather it may be a catalyst for a flood of a new type of litigation or arbitration.

The point to be stressed is that there is no proper solution without a sector-specific regulatory response. The systemic gaps abound starting with the fact that private debt collection companies may escape regulatory oversight by getting registered only as a general commercial business with the Company Registry. As in civilian systems, courts do not make, but only apply and interpret law, in the lack of explicit rules, judges, especially those of lower courts, are hardly willing to decide anything but what is clearly and unequivocally mandated by the language of the law – even if facing an obviously problematic practice. One may presume as well that in the lack of adequate regulatory oversight private collection agencies are incentivized to further expand their markets and employ increasingly questionable tactics to the detriment of consumer debtors unrestrictedly. Given that lawmakers and scholars alike tend to ignore the problem in much of Continental Europe, in countries like Hungary which closely follows German developments, changes could be expected only after ample information on the German experiences with the new laws will reach Hungary. No wonder then that at present, in Hungary – and other countries lacking sector-specific regulation – the excesses could be heard of only in the few reports of pragmatic journalists.\textsuperscript{328} To cast away doubts, this is the characteristics hardly only of Hungary:
closer scrutiny of data on other CEE countries reveals similar phenomena and resembling responses though always paralleled with some local idiosyncrasies.329

Given that private collection is a burgeoning business today, becoming regulated even in some civil law countries that used to be hostile to the idea (e.g., Germany),330 the volte-face

The case of one such unregulated private repossession-business was described by one such “unorthodox” source of law – article by Agnes Gyenis, Illegal Car-Repossessions – in the quite renowned Hungarian language weekly business magazine “HV/G", 26 March 2011 issue, at 97-98.According to the description of fact by the journalist, the practice was no different from a routine repossession by a US private repossession agency, except that in Hungary, neither the ‘without of breach of peace’ standard, nor a FDCPA local equivalent protects debtors.

329 In Lithuania, a meaningful private collection business sector has emerged after 1990. Yet these businesses are registered only with the Company Registry according to generally applicable company law rules. However, besides telephone calls to the debtor, reminding the debtor personally or through registered mails, they have resorted also to the practice of exposing debtors (in case of legal entities: directors) to shame by placing their names on ‘boards of shame.’ For an account of the Lithuanian private collection industry and its relation to the bailiff and court system see Lina Aleknaite, Enforcement of Contracts in Lithuania, in: Stefan Messmann & Tibor Tajti, the Case Law of Central and Eastern Europe – Enforcement of Contracts, vol. I (Eur. Univ. Press, Bochum, Germany, 2009), at 351 et seq.

330 If one would ask the question whether self-help is allowed in Germany, the conventional answer would be similar to the following: “Self-help is not permitted in Germany for the enforcement of the rights of a mortgagee. Where an aircraft lease provides for the taking of possession of the aircraft, for example, in the event of default, court proceedings will be necessary if the lessee does not cooperate. Depending on the circumstances, self-help can be punishable under criminal law.” Even though limited to aircraft finance, the quotation is representative of what most German – and other Central European – lawyers would claim. Quoted from P. Nikolai Ehlers, Chapter on Germany, in: Ravi Nath & Berend Crans (eds.) Aircraft Repossession and Enforcement: Practical Aspects (Kluwer, volume II, 2010), at 67.

The matter of fact is, however, that a number of private collection companies are already active in Germany. True, they do not advertise the provision of ‘self-help’ services (and presumably they are not engaged yet in self-help repossession of movables, including aircraft), but they do offer creditors ‘collection services’ – ranging from contacting debtors through in and out of court assistance in collection of debts. Factoring may also be added to their services, with or without recourse. In the lack of empirical evidences, however, one may only speculate whether some of these private businesses have already transgressed the thin blue line and have engaged in activities that could comfortably amount to what in the US could be designated as ’self-help repossession.’

The discord between reality and what legal scholars say is attributable to the fact that the world of academia lags behind developments. Furthermore, due to the strict dogmatic (system-centered) legal thinking characteristic of Germany, for example, self-help and factoring belong to two different worlds, irrespective that they may overlap if perceived from consumer protection perspectives. That these claims are meritorious are best visible from the recent reforms of the Law on Provision of Out-of-Court Legal Services (“Gesetz über aussergerichtliche Rechtsdienstleistungen” – hereinafter RDG) of 2008. As one of the few commentaries proclaimed, one of the goals of the act was to protect consumers in case of collection (“Inkasso”) naturally not only “from incompetent legal advising, but also from untrustworthy debt collectors.” See Michael Kleine-Cosack, Rechtsdienstleistungsgesetz – RDG – Kommentar (C.F. MüllerVerlag, Heidelberg, 2008), at 143. According to §2(2) of this new law, the debt collection services qualify as ‘out-of-court legal services’ and are caught by the law. The tools of the law include licensing (§12) and registration in a
of the DCFR in the form of giving green light to out-of-court enforcement could not be but an unexpected, yet foreseeable and sensible approach if realities and needs of the 21st century are given due recognition. Obviously, this innovation ought to be new, if not shocking, to many generations of Continental European lawyers who were trained that self-help is, if not completely prohibited, than at least frowned at, with the exception of repelling imminent and direct threat to one’s property, health or life. To stress again, the DCFR's daring step ahead is, however, an incomplete achievement: parallel detailed regulation of the US FDCPA-type would be a must. If these projections of the DCFR on the increased role of out-of-court enforcement materialize in the future, Europe will presumably see not just more connected litigation, but also – similarly to the US – arbitration of B2C disputes in increasing number of cases. In the context of business financing (i.e., B2B) – as equally sophisticated merchants are parties to such contracts – imposition of restrictions on arbitration of private collection-linked disputes could be justified by inherently fewer reasons. Given the increased interest of Brussels in the special position and vulnerability of SMEs, meaningful changes might ensue with respect to arbitration of private collection disputes with these entities in the not that distant future as well.

As far as further projections are concerned, there is an inversely proportional relation between self-help and court enforcement. As the experiences of the US States show, the basic logic seems to be that in the States where efficient out-of-court enforcement is widely available, or where court enforcement is considerably quicker than the average duration of arbitral proceedings, private enforcement has gained little foothold; and vice versa.131 With the exception of some niches of Europe, nothing seems to suggest that this could be much different in Europe. In fact, the already hinted at experiences of Germany and Hungary – a regulated versus a non-regulated system – corroborate such speculations.

However, the relationship of private enforcement and arbitration is multi-dimensional and reaches well beyond consumer protection. Again referring to US experiences, in the special register (RDG §10) subject to the threat of withdrawal (§14). Additionally, fines may be imposed based on the law (§18). Yet, the law does not prohibit altogether private collection, rather aims to protect consumers from – using the telling German jargon – ‘Moscow-type collection’ (“Moskau-Inkasso”). For the designation see Id. note 57, at 191.

A separate homepage was launched with access to information on legal service providers at <http://www.rechtsdienstleistungsregister.de/en/index.php?button=>; last visited on 8 May 2013.

As put by Freyermuth: "Where non-judicial foreclosure is permitted, a mortgage lender can complete a foreclosure within a relatively short period of time (in some states, as little as thirty to forty-five days) and without incurring the expense associated with adjudication." In these states, arbitration could not occur any faster than non-judicial foreclosure and would require the parties to incur the additional expense of adjudication.14 As a result, a mortgagee in a power-of-sale foreclosure state has no real incentive to offer or accept an agreement to privatize the foreclosure process through arbitration.

The incentives are different, however, in states that require foreclosure through judicial process and thus already require the parties to incur the expenses of adjudication […], especially if such a clause could permit a mortgagee to complete a foreclosure more quickly than would be possible in the public courts (where the pace of foreclosure litigation may be influenced by exogenous factors such as time periods dictated by rules of civil procedure and delays dictated by state court docket congestion).” R. Wilson Freyermuth, Foreclosure by Arbitration†, 37 Pepperdine L. Rev. 459 (2010), at 462; available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1043&context=plr>; last visited on 8 May 2013.

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aftermath of the 2007 Credit Crunch arbitration was, indeed, proposed as one of the methods to somehow ease the pressure mounted on mortgagor-home owners and prevent mass scale evictions. Instead of enforcement – often eviction by private businesses – arbitration was promoted. Admittedly, it would be far-fetched to go as far as suggesting that the same formula might be employed also somewhere in Europe. However, this example also properly illustrates that the uncharted territory of the relationship of private enforcement and arbitration is not a subject-matter that should be a priori cast aside, but that offers numerous genuinely realistic research issues for the benefit of the Old Continent and for clearer projections on the future of the DCFR.

3.2.1.3. ARBITRATION OF PRIVATE DEBT COLLECTION DISPUTES: IS THE GENERALLY APPLICABLE CONSUMER PROTECTION LAW SUFFICIENT AGAINST ABUSES

Given that sensitivity and complexity of the issue – viz., private debt collection and in particular self-help repossession – the quintessential question one should raise in Europe is whether the presently known limitations on arbitrability of B2C disputes are sufficient in this specific segment. Reference is here primarily made to point (1) (q) in Annex I to Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (5 Apr. 1993).\(^{332}\) The qualification one has to add is that in the overwhelming part of Europe private debt collection as such and the abuses by way of imposing resolution of private debt collection-related disputes by industry-linked arbitral bodies seem to have surfaced as a major problem. As opposed to that and as shown above, in the US, arbitration of such disputes is not only routine, but has become pathologic by 2010. Still, in Europe, no specific position could be articulated specifically on the arbitrability of private debt collection-related disputes. In other words, if consumers are protected against abuses committed through imposition of arbitration, then that occurs by way of general consumer protection and other generally applicable laws. In the aggregate, then – apart from the earlier mentioned Directive and its specific reference to arbitration – the otherwise normally more paternalistic Europe lags behind US developments in particular because of the FDCPA.

In the US, as mentioned above, the concerns over abuses by way of imposed arbitration – be it in the context of franchise or private debt collection – have became major source of concern, yet they have not been followed by adequate legislative responses as the Arbitration Fairness bills have failed. One could claim that the strong pro-arbitration stance characteristic of US courts and law has remained intact. It was of little, if any, relevance that franchise is looked upon as a B2B contract and, as opposed to that, the overwhelming part of problematic private debt collection cases is of B2C nature. Such policy is then appropriately

\(^{332}\) Point (1)(q) of Annex I, referring to Article 3(3) of the Directive adds as unfair terms that have the effect of: “excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should like with another party to the contract.” [Emphasis added].
reflected in the concomitant rules. For example, as far as the burden of proof is concerned, US law departs from the presupposition that “consumer arbitration is instituted mostly through binding pre-dispute arbitration clauses and the burden rests on consumers to demonstrate a recognized ground for non-enforcement of the agreement or award.”

EU law looks more suspiciously on such practices irrespective that one may hardly speak of a common position on the relationship of arbitration and consumer protection; let alone arbitration of collection-related disputes in Europe. Thus, Bělohlávek is right stressing that while “all EU Member States generally recognize the need for protection of the weaker party, [...] their understanding of the interplay between arbitration and consumer protection is highly diverse.” For example, while Austrian and Estonian law allow conclusion of an arbitration agreement only for already pending B2C disputes and subject to some further criteria, German courts took a more arbitration favoring position. In the UK, on the other hand, as per the Unfair Contract Terms Guideline issued by the Office of Fair Trading, arbitration of disputes below the GBP 5,000 threshold value is deemed to be per se unfair.

Given that the relationship of arbitration and consumer protection is still largely unclear in Europe, notwithstanding the importance attributed by Brussels to the latter and the

333 Although EU consumer laws have evolved since 2003 – when the article from which the quotation was taken had been published – the claims seem to remain valid. Dona M. Bates, A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?, 27 Fordham Int’l L.J. 822-898 (2003), at 842-43.

334 Two giant US corporations have, indeed, felt the teeth of EU consumer protection laws, when French and the UK courts (applying national consumer protection laws that are, however, based on EU law) sent out the message that “even contractual boilerplate localized for European markets may be invalid in European consumer transactions.” See Jane K. Winn & Mark Webber, the Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Merchants, 62 Bus. Lawyer 209-228 (Nov. 2006), quoted from the abstract. Concretely it is point (q) of section (1) in the Annex to Council Directive 93/13/EEC, 1993 O.J. (L95) 29, as amended by Directive 2002/995/EC, OJ L 353 (30 Dec. 2002) that prohibits the practice of “requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.”


336 Similarly to the Austrian position, as per §104 (3) 1) of the Estonian Code of Civil Procedure, the agreement on arbitration or jurisdiction in B2C contracts is valid only if concluded after the dispute has already arisen. See Karin Sein, Protection of Consumers against Unfair Jurisdiction and Arbitration Clauses in Jurisprudence of the European Court of Justice, XVIII Juridica International 53 – 62 (2011), available electronically at <http://www.juridicainternational.eu/index.php? id=14840>; last visited on 8 May 2013.

337 Id. Reference is made to Article 617 of the Austrian Code of Civil Procedure (ZPO).

338 For a list of German court decisions spelling out that arbitration is, neither surprising to consumers, nor that it is inherently incompatible with consumer laws see note 24 Id. at 30.

339 Id. 33-34.
few relevant decisions of the ECJ, it is fair to claim that this subject matter is obscure. At this point in time, therefore, it is hard even to determine the frequency with which collection-related disputes are arbitrated because private collection is a new phenomenon in much of the EU, the related information is scarce and anyhow arbitration typically is confidential. Making firm conclusions is consequently hard and risky. One should forget, however, neither that private debt collection is only partially a consumer protection issue, nor that collection from business debtors is subject to even less regulatory restrictions – if any. This concerns primarily the position of SME-debtors.

Still, the above reasons amply justify dealing with the relationship of arbitrability of out-of-court enforcement of security rights, the latter promulgated by the DCFR, already at this stage. The rich experiences of the US with private collection and the growing presence of these businesses in Europe would require clearly sector-specific regulation; desirably as soon as possible. This notwithstanding that the available information on the activities ECC-NET (resolution of cross-border and on-line sales disputes) are encouraging and the fact that potentially exploitable EU generalist legislation – yet perceiving arbitration of consumer disputes holistically and not targeting collection specifically – is already at place. At any event, gathering and analysis of data, especially on the frequency and on the problems corollary to


341 The EU Commission has created a special database – the so-called CLAB database – for collecting information on the application of the Directive 93/133/EEC at <http://europa.eu.int/clab/index.htm>. At the time of writing of this article the database was undergoing a major restructuring and data were not available.

342 The European Consumer Centres Network was established in 2006 and it is made of 29 national centers (27 EU Member States plus Norway and Iceland) – it is co-sponsored by the EU Commission. The home page of the network assisting consumers in cross-border cases and offering ADR services is at <http://ec.europa.eu/consumers/ecc/index_en.htm>. For basic info on the network see <http://ec.europa.eu/consumers/publications/factsheet-ECC-Net_en.pdf>; last visited on 8 May 2013.


As the 2012 Report of the ECC-NET claims the possibilities offered by the so-called ‘small-claims proceedings’ based on Regulation (EC) No 861/2007 are also not exploited by consumers – both judges and consumer are unaware of the possibility. The envisaged special forms aimed to help consumers by simplifying and standardizing the proceedings are often simply unavailable to consumers. Report available at <http://ec.europa.eu/consumers/ecc/docs/small_claims_210992012_en.pdf>; last visited on 8 May 2013.
arbitration of private debt collection-related disputes would deserve the support of Brussels already now.

3.2.2. ARBITRATION OF CONTRACTS CONTAINING RETAINED OWNERSHIP

Another far-reaching novelty of DCFR Book IX is related to the treatment of contracts containing retained title clauses, or as known by civilian systems and by the DCFR: retained ownership (ROT) clauses. Namely, contrary to the mainstream position of European laws, the DCFR has embraced the solution of the unitary model – i.e., UCC Article 9 – in this respect as well: it made out of ROTs security interests. This metamorphosis occurred in the context of the so-called acquisition financing devices. As a result, highly standardized contracts like financial leasing, consignment or hire-purchase are subject to the rules of Book IX, in particular registration, the priority rules and the secured creditors’ right to employ out-of-court enforcement. For our purposes this development is crucial because it allows us to show that, indeed, secured transactions-linked disputes are being arbitrated – besides the earlier discussed field of private enforcement also in the context of various contracts containing ROTs.

What may blur the picture and cause misunderstandings is that the status and the role of ROT as a security device differ depending on the context in which they are employed. Two of these ought to be mentioned. On the one hand, ROT may “only” be added to standard sales contracts of suppliers as an ancillary yet important element, when its presence may go unnoticed as the main contract – the sales contract – would dominate the transaction. Suppliers of goods or services may come virtually from any area of the economy. On the other hand, the role of ROT is much more determinative in case of the mentioned acquisition financing devices, i.e., specific types of contracts, typically of more recent vintage, which form the basis of pretty homogenous distinct industries. Distinguishing the category of such ‘industrial ROT’ is primarily justified because due to their exploitation by a professional industry focused on a specific, or a limited number of activities, the organized industry may be strategically powerful enough to channel dispute resolution towards arbitration of its choice. Further, in such cases, arbitration would be about arbitrating leasing or consignment disputes specifically – and not arbitration of sales contracts “merely” containing a ROT clause. There are two main lessons to be learned on the basis of the above. On the one hand, there is more than a single catchword in the quest for arbitral cases involving ROT clauses. On the other hand, the fact that contracts

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344 For the purposes of secured transactions law, the difference between ‘title’ and ‘ownership’ is of little (if any) relevance. Outside this context, the lack of the concept of ‘ownership’ is said to be a distinguishing feature of English law, something that is deemed to be the remnant of the feudal system. As far as land is concerned, according to the doctrine of ‘estates,’ “English law uses a system of property rights in which a person holds various property rights in respect of land, but never owns it.” Even though no doctrine of estates exists with respect to movables, the same is true in this context as well. See Sjef van Erp and Bram Akkermans, Cases, Materials and Text on Property Law (Hart, 2012), at 362. As civilian lawyers normally put it, “instead of ownership, English lawyers speak of ‘title,’ though the word simply means ‘an entitlement’ […]” Id. at 307.
containing ROTs – which rank as secured transactions in quite a number of systems – are being arbitrated is often not visible because of the sales, leasing, consignment or conditional sales façade.

3.2.2.1. ANCILLARY RETAINED TITLE AND ARBITRATION

As hinted at earlier, often suppliers’ contracts are christened and are dominated by sales features and yet contain a ROT. Such cases are then arbitrated as ‘sales’ contract disputes.\(^{345}\) This claim equally applies to all European laws because in none of them – including English law\(^{346}\) – would such an ancillary ROT clause be treated as having anything meaningful in common with liens (i.e., pledge, mortgage). Notwithstanding the national variations, such a ROT – typically named as a simple ROT – would be, however, treated as possessing entitlements normally attributed by property law to civilian ‘ownership.’ Albeit the related law is complex, it may be stated that most importantly this would entail the right of separation of the asset covered by the ROT from the bankruptcy estate in insolvency proceedings.\(^{347}\)

\(^{345}\) See, e.g., the CISG-related Award No. 53/1998 of 5 October 1998 of the Arbitration Tribunal of the Chamber of Commerce and Industry of the Russian Federation (CLOUT abstract No. 468) between a Russian seller-consignor and a Mexican buyer-consignee. The consignment in the case was specific, because it also provided that if the Mexican buyer-consignee failed to sell the consigned goods within two years, he would become automatically the owner of the goods and would have to pay the purchase price, too. The Tribunal ruled that upon the expiry of the two years the contract became a full-fledged sales contract, subject to the CISG, based on which the claim of the Russian party to avoid the underlying contract due to a fundamental breach by the buyer is substantiated. Consequently, the seller had the right to recover the price for the transferred but unsold goods. Case abstract available at <http://cisgw3.law.pace.edu/cases/981005r1.html>; last visited on 8 May 2013.

\(^{346}\) It has to be added though that the position of English law is peculiar because – just like all common law systems – it knows for a distinct contract type named as ‘conditional sales.’ As a rule, civilian systems are devoid of this category of nominated contracts and their codes do not use this designation for sales contracts containing ROT. For a lawyer trained in the Continental European tradition such contracts would be merely sales contracts to which ROT clauses have been added.

Notwithstanding of this idiosyncrasy, English law does not treat conditional sales contracts as secured transactions – the same applies to other contracts relying on ROT (i.e., hire-purchase, leasing and consignment): they are rather treated as ‘quasi-securities’ yet which live a life distiner from personal property securities. See, e.g., Gerard McCormack, Pressured by the Paradigm – the Law Commission and Company Security Interests, in: John de Lacy (ed.), Personal Property Security Law – Comparative Perspectives 83 (Routledge-Cavendish, 2010), at 103 et seq.

\(^{347}\) German law of credit securities (“Kreditsicherheiten”) resting on court-made law and industrial practices rather than on code provisions, allows for separation of assets from the insolvent’s estate only in case of simple ROTs. In case of expanded and extended forms of ROT – which per the underlying agreement extend also to proceeds or products of the asset subject to ROT – the creditor does not have the right of separation but only the right of preferential satisfaction. I.e., the proceeds and products become part of
Contrary to that, all the jurisdictions that have embraced the unitary security interest model of the US UCC Article 9 treat not just supplier contracts containing ROTs but also the common law peculiar contract of conditional sales in most cases as a form of secured transaction. Consequently, these contracts are caught by UCC Article 9 – otherwise dominated by mandatory provisions. To avoid doubts: as the below Hong Kong and Shanghai Banking Corp., Ltd. v. HFH USA Corporation US case suggests, supplier sales contracts containing ROT clauses do not escape this fate either – even if the agreed upon law applicable to the contract is one of the Continental European laws. As civilian systems typically do not know for the self-standing nominated contract named ‘conditional sales,’ in their understanding these are either “mere” sales contracts with a ROT clause or are subsumed under the generic newcomer designation of ‘leasing’ – also attributing pivotal role to ROT.

What is little known – and what further justifies our focus here on the arbitrability of ROT – is that the different treatment afforded to ROT by US law and the other unitary models as opposed to Europe may have radically different practical outcomes for parties to such international contracts – best illustrated by the Hong Kong and Shanghai Banking Corp., Ltd. v. HFH USA Corporation. In the case, the contract between a German supplier and a US buyer contained not just a ROT clause, but also an agreement that the contract will be governed by German law. From the perspective of German law, thus, the ROT was validly constituted given that in Germany registration with a public registry is not a legal requirement in such cases. The dispute arose, because the property of the US debtor was encumbered by a floating lien for the benefit of the Hong Kong and Shanghai Banking Corp., which had satisfied all the statutory requirements of US secured transactions law and consequently had a security interest with a superior priority position. Such floating liens (or floating securities) otherwise extend, subject to contractual variation, to all present and future after-acquired property of a debtor without the need of taking any further acts by the secured creditor. Thus, in the concrete situation the insolvent debtor’s estate and “the secured creditor [would be] only entitled to preferred satisfaction.” See Ulrich Drobnig, Basic Issues of European Rules on Security in Movables, in: John de Lacy (ed.), Personal Property Security Law – Comparative Perspectives (Routledge-Cavendish, 2010), at 449.

The position of English law is similar. As McCormack put it “a retention-of-title is only likely to be valid insofar as it applies to goods in their original unprocessed state and, to the extent that it secured the unpaid purchase price of those goods, and, perhaps, other obligations owing by the buyer to the seller: […] Yet [a] claim by a seller to resale proceeds and to products manufactured out of the goods supplied is likely to be held to constitute a registrable security interest. […]” See Gerard McCormack, Pressured by the Paradigm – the Law Commission and Company Security Interests, in: John de Lacy (ed.), Personal Property Security Law – Comparative Perspectives 83 (Routledge-Cavendish, 2010), note 87, at 201.

348 This includes besides all the US States, also Australia, the Canadian common law provinces and New Zealand.


350 The DCFR Comments talk of this as a ‘technique,’ which “although imprecise, is known and used in some jurisdictions. This technique implies that the buyer nominally obtains ownership already upon delivery of the sold goods; however, that ownership is merely conditional – it turns into full ownership only upon payment of the full purchase price for the bought assets.” See DCFR Comments to Article IX.-1:103 Retention of Ownership Devices: Scope, at 5399.
Bank’s security interest has automatically extended also onto all the goods delivered to the US debtor essentially upon touching American soil: including those shipped by the German party.

As it could be predicted, the issue turned on who has priority over the delivered goods to the US party: the German supplier under the unregistered ROT granting priority to it under German law or the Bank based on the properly perfected security interest having priority based on US law. The US court deciding the case – applying US secured transactions law – found that provision of public notice by one of the four recognized perfection methods to other participants of the market is such a fundamental requirement of US law that qualifies as public policy (ordre public). In other words, it is of such an importance to US law that it cannot be given up notwithstanding the properly agreed upon applicable law (i.e., German law). As a result, it adjudicated that the – non-American – Bank had priority to the assets as the party that had first perfected its security interest.

While until the appearance of the DCFR one might have doubted whether that was the right and just solution, now having the DCFR and its requirements on perfection at sight\textsuperscript{351} – which are in essence identical with the American one – the outcome should be less debatable. Put simply, the DCFR attempts to realign Europe with the secured transactions laws of the Unitary Group, including in particular US law. This, in other words, would mean that, should the DCFR be applied either as lex mercatoria or as a set of rules chosen by the parties to govern their contracts in cases with identical or similar fact patterns, the result that arbitrators would reach foreseeably should resemble the one of the US court.

3.2.2.2. ACQUISITION FINANCING DEVICES AND ARBITRATION

As stated above, apart from ancillary ROTs, in fact, a number of specific contract types and industries are based on ROT\textsuperscript{352}. Book IX of the DCFR now, similarly to the Unitary Models, directly recognizes these as a separate class of proprietary securities in movables –

\textsuperscript{351} The DCFR has introduced, as the basic principle of perfection of security rights, registration – applicable also to contracts with ROT. As a result, perfection under the DCFR has the same effects as under UCC article 9: it makes the security right effective against third persons. The other two recognized methods of perfection are ‘holding possession’ of the collateral or – in case of certain intangible assets (like securities accounts), by the secured creditor exercising ‘control.’ As the DCFR Comments to Article IX.-3:101: Effectiveness as against Third Persons at 5474 read: “According to the general idea on which these [rules of the DCFR] are based, there is a basic distinction between the creation of a security right on the one hand [...], and its effectiveness as against third persons on the other hand [...]. The distinction between creation and effectiveness – in Anglo-American law [attachment and] ‘perfection’ – is shared by all modern legislation the world over. The DCFR has adopted it. They also strengthen it by the introduction of a modern and sophisticated registration system for all types of proprietary security, especially non-possessory ones.” [Emphasis added.]

\textsuperscript{352} See point A of the DCFR Comments to Article IX.-1:103: Retention of Ownership Devices: Scope, at 5397, which reads: “This technique of retention of ownership is widely accepted and practiced in Europe [...] [and extends] – beyond retention of ownership in sales contracts – to three related transactions: [i.e., hire-purchase, financial leasing and consignment].” [Emphasis added.]
under the designation of ‘acquisition financing devices.’ These include not just such transactions as hire-purchase, financial leasing or consignment, but also the peculiar contract-based security devices of German law (“kautelarische Sicherheiten”), in particular the extended and expanded retention of title (“Eigentumsvorbehalt”) and security transfers (“Sicherungsübereignung”). All these, in other words, have been brought under the same roof by the DCFR and therefore the same legal regime applies to all of them – including their subjection to registration in a public register.

Interestingly, the DCFR went even further than UCC Article 9 because it proceeded from the position that acquisition finance creditors deserve heightened protection because of the enormous economic importance these devices play in economy. Consequently, the DCFR not only grants superpriority to ‘acquisition finance’ devices, but prohibits parties to such contracts from excluding extra-judicial enforcement and allows the secured creditor simply ‘take back’ (i.e., repossess) the collateral. In respect of this specific facet of secured transactions law the DCFR has even more widely opened the doors to out-of-court enforcement than that is the case on the other side of the Atlantic. Namely, contrary to UCC Article 9 – especially with its 60% rule and the precedents recognizing the ‘equity’ (i.e., putative ownership) of consumer debtors that gradually increases with every installment dully paid by the debtor, the DCFR – obviously uncritically transposing the position of English law – fails to do that.

353 For a discussion on these German security devices see, e.g., Tibor Tajti, Comparative Secured Transactions Law (Akadémiai könyvkiadó, Budapest, 2002), chapter on Germany.

354 See DCFR Comments to Article IX.-4:102: Superpriority, at 5555, which reads: “The superpriority rule is based on the following policy. Security for the financing of acquisitions (here, credit is typically given by sellers) deserves higher protection than security for general non-acquisition financing because acquisitions are particularly useful for the economy. Moreover, there is a specific reason for the protection of credit extended by sellers. Banks as financiers that are typically in a long-standing relationship with the debtor are better placed to secured encumbrances over the debtor’s future property for themselves […]. Sellers, on the other hand, normally do not have such a possibility. If their security rights in assets sold to the buyer enjoyed only normal priority, they would presumably be only second-ranking creditors with a low likelihood of obtaining satisfaction from the enforcement of their security rights […].”

355 See DCFR paragraph (1) of Article IX.-4:102: Superpriority, which reads: “An acquisition finance device that is effective against third persons according to the rules of Chapter 3 takes priority over any security right or other limited proprietary right created by the security provider.” [Emphasis added.]

356 See DCFR Article IX. – 7:103: Extra-judicial and Judicial Enforcement, the Comments to which proclaim that “[…] the holder of a retention of ownership device does not have to realize the collateral by sale or any other method; instead it is sufficient that the holder of a retention of ownership device terminates the legal relationship resulting from the underlying contract of sale, hire-purchase, financial leasing or consignment with security purposes and takes back possession of the supplied goods. The holder of the retention of ownership device may, however, ask for the assistance of the court in obtaining possession of the supplied goods […].” See DCFR Comments, at 5620.

357 See UCC Revised Version s. 9-620(e),(f) and (g). Two main consequences follow from the rule in consumer cases: firstly, the secured creditor cannot enforce the security interest upon default by strict foreclosure (i.e., acceptance of the collateral in lieu of payment); and secondly, if the secured party who has repossessed the collateral he must dispose of it within 90 days (or within any longer period if so agreed upon with the debtor and some other parties).
As the various forms of acquisition finance make the bases of distinct industries, nothing suggests that these industries would not opt for arbitration as the dispute resolution method for the otherwise normally highly standardized contracts used by them. Unfortunately, hardly could one point to statistical data concerning with what frequency (if at all) the varying industries make resort to arbitration in Europe (or beyond). It is legitimate to speculate, however, that the powerful position attributed to acquisition finance creditors by the DCFR could turn out to be the very reason because of why arbitration – with the DCFR as the law applicable to the merits – would be resorted to by the respective industries. Until the first results of research of these unexplored territories become available, one may wonder whether the Hong Kong Shanghai Banking Corp. v. HFH case would have reached a different ending had the case been adjudicated by arbitrators – with or without applying the DCFR.
D. THE SCOREBOARD

Regrettfully, notwithstanding that the instruments making the DCFR are available for a number of years now, they have had little impact and it is still questionable whether they will make a dent outside of academic circles in the future including arbitral law. Except for the opinions of Mme Trstenjak, former EU Advocate General, no court decision or arbitral award seems to be available publicly with, at least, references to the DCFR. Yet, as we are still at the very beginning of a process, one should not easily turn a blind eye on those reasons and advantages that might give more than a flickering sign of hope for the DCFR breaking through the walls. The main findings from the above discussion – some more, others less corroborating the modestly optimistic projections exuding from the pages of this paper – would revolve around the following.

1. THE REPERCUSSIONS OF THE DCFR AS A UNIQUE FORM OF CODIFIED AND SYSTEMATIZED LEX MERCATORIA

The codified and systematized nature of the DCFR gives it a considerable competitive edge, not just over fluid a-national law, but also over national systems; in particular those lacking codified or any law on a given subject. Compared to un-codified lex mercatoria (a-national law), in case of which legal rules are to be extrapolated from a fluid pool of rules the contents of which additionally may vary depending on the background of the arbitrator or other factors, the portfolio offered by the DCFR to arbitrators is stable, pretty exact and through the Comments quite richly backed up by comparisons from European national and other venerable sources of law. While in the 1980s it was the International Encyclopedia of Comparative Law that was resorted to by arbitrators wherefrom to deduce general principles of law, now, the DCFR is also

358 Lehmann rightly listed as potential advantages of the DCFR, among others, over the Unidroit Principles or the PECL, the following: 1/ being a synthesis of the laws of twenty-seven European jurisdictions (“Destillat der übereinstimenden Prinzipien 27 Rechtsordnungen”); 2/ being in line with and applying modern tendencies (e.g., consumer protection or protection of the weaker party); 3/ international character and international applicability; 4/ neutrality (i.e., not serving the interests of any states); 5/ its capability to dispose of national idiosyncratic legal categories, principles or rules; and 6/ comprehensiveness. See Matthias Lehman, Anwendung des CFR in Schiedsverfahren: in: Martin Schmidt-Kessel (ed.), Der Gemeinsame Referenzrahmen (Sellier, München, 2009), at 453-55.

359 It ought to be noted that he horizons opened by the DCFR reach wider because it provides, unlike most of its predecessors, some attention also to the laws of but the few major European jurisdictions – what is praiseworthy even though sometimes the reference is symbolic, no more than a few over-concise sentences in the Comments.

360 See Ole Lando, the Lex Mercatoria in International Commercial Arbitration, 34 Int’l & Comm. L. Quart. 747-768 (1985), at 750.
available as far as European private law is concerned. Juxtaposed to UCP or INCOTERMS, as the most popular codified species of a-national law known today, it is the breadth of coverage and the richness of underlying bases and back up material that brings the DCFR into prominence. Admittedly, these features may at the same time be looked upon as their drawbacks.

The comparative advantages of a codified and systematized instrument like the DCFR vis-à-vis national laws are multidimensional. Myriad examples could be found starting from the above discourse contrasting the DCFR’s coherent franchise rules with the embryonic franchise laws of many European states: illustrating the detrimental effects of the latter on predictability. Another classic might be Swedish contract law that is made of, not only eight layers of ‘various sources of law-cum-peculiar interpretation methods,’ but on top of that the pertaining legislation is incomplete and fragmented (obviously being at the same time one of the main causes of such multi-layeredness). Such structure inevitably elevates case law to a pedestal higher than what conventional wisdom on the hierarchy of sources of law in civil law systems would suggest, yet which case law is otherwise largely unavailable in foreign languages. The outcome of such posture is a law that hardly could be “known” but by local lawyers: such national monopoly could be broken by the DCFR.

Another point to boot is that the otherwise scarce English (or other foreign) language sources tend not to be of a critical but rather of descriptive nature in Europe; this is equally characteristic outside Scandinavia among the civilian systems. As a consequence, in particular little could be learned about the weaknesses of various national laws. That may be an impediment manageable by local lawyers accustomed to the prevailing conditions, yet it is obviously less salutary for counsel from other countries. In the end, the contraposition of the DCFR – with its coherent sales law being enshrined in a single document – to such fragmented systems as the Swedish one should readily speak for itself. Naturally, the list of commonalities and divergences or touching points of national laws and the DCFR do not end here. For instance, in the quest for the meaning of a specific rule of a national (municipal) law, the DCFR

[361] The Swedish “hierarchy of rules and methods used to create rules for adjudication in individual cases” – some obviously present also in other jurisdictions – is: first, mandatory legislation, second, interpretation of the contract based on the parties’ intentions, the language of the contract and the parties impressions, third, the so-called ‘individual constructive interpretation, fourth, supplementary legislation and “supplementary rules applicable to the specific type of contract,” fifth, “analogies from supplementary legislation for similar types of contracts,” sixth, general supplementary rules from other areas of law; seventh, general legal considerations and finally, discretionary considerations. For a more detailed explanation of these items see Ewoud Hondius and Hans Christoph Grigoleit, Part II Overview of the Scandinavian systems at 99-100 in: Ewoud Hondius and Hans Christoph Grigoleit, Unexpected Circumstances in European Contract Law (Cambridge Univ. Press, 2011).

[362] Sweden has no general civil code but a Sales Act from 1990 and a Contracts Act from 1915; neither of which is comprehensive. As a result, statutory law is available only for a limited number of contract types. For the others (i.e., innominate contracts), courts resort to analogy. Id. at 99-101.

[363] As the lack of quality English language publications is typical also to other civilian systems, these claims also apply to a large extent outside Scandinavia. In other words, examples of the sort could be easily found elsewhere in Europe as well.
might serve as a launch pad with the aid of which one may leapfrog some of the steps along to route.

Perhaps, however, it is the changing perspectives of arbitration and other forms of ADR that might offer a brighter future for the DCFR. To the extent that Martin Hunter’s predictions on the gradual forging ahead of dispute management – at the detriment of arbitration – will materialize, might the cause of the DCFR likewise stand to gain. As he predicted recently, “the next few years we shall experience a proportionate decline in the engagement of third parties for assistance in resolving mature international trade disputes [as a consequence of what] the current level of expansion of work for arbitrators and mediators will decline” though “there will be an increased demand for dispute management specialists”[emphasis added]. As what disputes management specifically is about is still largely veiled by ignorance, it is only by hypothesis, yet the DCFR with the supplementary Comments seem to be such a toolbox that could serve as a compass to European law necessary both for strengthening one’s own and decoding the strategic position of the opponents.

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364 See Martin Hunter, International Commercial Dispute Resolution in the 21st Century: Changes and Challenges; available at <http://www.e-arbitration-t.com/papersadr/paper_international.pdf>; last visited on 26 Apr. 2013. Hunter inaugurated a bipartite definition of ‘dispute management’ made of, on the one hand, ‘dispute avoidance,’ and a “structured direct negotiation process designed to limit the instances in which they will need to involve a third party to the barest possible minimum,” on the other. Id. at 1.
2. THE SYSTEMIC MAP: THE REPERCUSSIONS OF THE DIFFERENT NATURE OF THE LEGAL FIELDS COVERED BY THE DCFR

The analysis of the three broader fields of law – to wit: sales, franchise and secured transactions laws – justifies drawing of, at least, the following conclusions. As virtually there is no empirical data whatsoever on the use of the DCFR in arbitration so far, these cannot be but tentative speculations plagued by many ‘known’ and ‘unknown unknowns.’ Moreover, in case of franchise and secured transactions law (or the latter’s narrower segments) admittedly the projections are made to a great extent based on the related experiences of the US.

The first, quite self-explanatory finding is that the various parts of the DCFR seem not to be equally appropriate to serve as boxes from which rules of law for the merits of the case could be deduced by arbitrators. Nor can they equally readily serve as tools which could be otherwise exploited in the arbitral process. This is so because of differences in the nature, underlying policy choices and the degree of commonality that subsist among European national laws with respect to the focused upon fields of law. Of heightened importance in that respect is the relative maturity of the industries that “live from” and thus implement these laws. True, myriad factors may influence channeling dispute resolution towards arbitration, yet, especially in case of franchise and some segments of secured transactions, arbitration is typically employed at the initiative, or sometimes pressure, of a powerful industry – no matter SMEs or consumers were on the other side of the negotiating table.

Sales law is featured by the fact that it often cannot be linked to a single, or few specific industries; notwithstanding that idiosyncratic variations obviously make sales law likewise colorful. Hence, whether the DCFR sales law provisions will be made use of at all does not necessarily depend on the stance of a single industry made of a high number of professional businesses. Furthermore, as sales law is that venerable paradigm contract that is presumably most widely known and exploited in practice, arbitrability of sales-related disputes is normally not an issue anymore. One of the most successful international conventions ever – the CISG – has additionally managed to harmonize international sales law giving an additional leg on. Thus, in case of this field of law ignorance, fear from the unknown, or radically differing laws is less of an obstacle for perusal of the DCFR’s sales law provisions by arbitrators. Here, the dilemmas are rather caused by the multitude of competing sources of law. It is yet to be seen how the DCFR could co-exist (if at all) with the CISG and tested national sales laws. This is a legitimate question even though the foundations of the two instruments are largely the same. Further, some of the DCFR’s solutions represent upgrades that were forged by exploiting the experiences with the CISG.

In case of secured transactions law, or rather in case of its segments from leasing, consignment to private (out-of-court) enforcement and so on, arbitration does not seem to have become the dominant dispute resolution method in Europe as of yet. Though in the lack of empirical data, the multitude of industries that live from this branch of law, the significant variations from jurisdiction to jurisdiction, and the often hard isolation of secured transactions from complex (i.e., polylithic) financial transactions, few conclusions could be firmly formulated. Wood is right that banks have traditionally disliked ADR, however, a more segmented (i.e., dissected) analysis would bring to the surface proofs to the contrary. It is not just the context of project finance but the recent experiences of individual countries that defy
the sweeping too general claim of Wood. To the extent Hungary is representative of the developments in the region (or Europe), here it is not just leasing companies, but also commercial banks that have switched to contract for arbitration during the last few years.

While these Hungarian developments are already reality, one may just speculate what is going to happen with another industry thriving from secured transactions law: private collection. It is a fact that at present time banks and other financial institutions quite readily make use of the services of these businesses. This applies to the increasing extent also to Continental European systems that have traditionally been hostile to the idea of extra-judicial enforcement. The growing number of regulations trying to coral private enforcement in Europe is the proof of the recognition that things have radically changed by the 21st century. At the present stage of development, Wood’s claim stands: where private collection is readily available, protracted dispute resolution via arbitration (or otherwise) is not a viable alternative. Having the US history of private enforcement in sight, however, one may legitimately fear that the gradually increasing regulatory restrictions might drive the European private collection industry towards controlled arbitration as well.\(^{365}\) Obviously this is an issue that goes beyond the confines of the DCFR itself, yet one should not forget that the DCFR put forward that daring model which is set to open wide the doors to out-of-court enforcement.

It is also of importance that Book IX of the DCFR is largely aspirational (programmatic). Two particular important consequences follow from that: firstly, much of the content is new and unknown in Europe, and secondly, Book IX cannot be implemented for the time being as the sheer physical preconditions for functioning of the system are lacking. It is not only that a common European registry for security interests is nothing but wishful thinking at the moment, but additionally in those jurisdictions where some registry is in existence, they are fragmented, of limited reach if compared to the DCFR, are maintained differently and hence today upgrading them to a pan-European network seems utopian. Sales and franchise law suffer from no such malady; the “physical” preconditions are given and the DCFR’s franchise law stands ready for perusal by arbitrators. Furthermore, similarly to American UCC Article 9, the material of Book IX is very complex and hard to grasp; what obviously stems easy exploitation.

Bearing these impediments in mind, one could be accused of writing prematurely about the linkages of this field of law and arbitration. Such criticism could only be countered by

\(^{365}\) According to the statement of F. Paul Bland, Jr., Staff Attorney, Public Justice, tens of thousands of debt collection-related cases (34,000 publicly reported cases alone in California) were decided by the National Arbitration Forum “largely owned or owned by 40 percent by the debt collectors themselves.” The control of the industry included also putting aside of all arbitrators who sided with the consumers or as he aptly formulated: “blackballing anybody who acted for the consumers.” It has to be noted here, however, that these statements typically applied to collection of credit card debts and less to paradigm secured transactions. See Arbitration or “Arbitrary”: the Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing before the Subcommittee on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform, at 133-34. Document available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg64915/pdf/CHRG-111hhrg64915.pdf>; last visited on 8 May 2013.

For example, the First USA Bank (as disclosed in court proceedings) paid, at least, $5million in fees to Nat’l Arbitration Association for the period between 1998 and 2000. During the same period this bank won about 99.6% out of its 50,000 cases. Id. at 140. On the subject see also Hiro N. Aragaki, Arbitration’s Suspect Status, 159 U. Pa. L. Rev. 1233 (2011).
pointing to real life cases – like the *Hong Kong & Shanghai Banking Corp. v. HFH* 366 – which do require planning for and deciding about security interests crossing borders. In fact, as Dalhuisen hinted at, arbitrators are in the position to innovate and more freely resort to a-national rules – potentially invoking the DCFR as a form of common European position – to better serve justice in such novel situations. This could occur via *lex mercatoria*: the more cross-border secured transactions surface, there will be more instances in which the gaps and dissonance between national systems could not be solved but by resorting to a-national rules of law. 367 Hence, the future perusal of the developed system of Book IX of the DCFR by arbitrators should not be a priori excluded. 368 Here, it is also of relevance that the DCFR managed to make such a single comprehensive system in which all security forms known in Europe are subject to the same set of rules in lieu of often fundamentally differing national laws. 369 The degree of novelty in Book IX of the DCFR, however, raises enforceability concerns as well.

The chances of exploitation of the DCFR’s coherent franchise law, either as source of inspiration for law makers, or by arbitrators in any one form, seem to be higher compared to secured transactions law. This is so because the modern business franchise model has the same origins and similar, if not equal, features throughout Europe – what however is not necessarily reflected in the franchise laws of present time Europe. Moreover, franchise experts tend to look favorably on arbitration in international – but not in domestic – context. 370 Logically, the DCFR could become an attractive toolbox for arbitrators, especially compared to systems having no franchise-specific law whatsoever. The same applies also to jurisdictions with incomplete,

366 See sub-section 3.2.2.1. supra.

367 If these thoughts seem to be too farfetched, ask what the outcome of the Hong Kong case would be if arbitrators were to decide the case – and whether the availability of the DCFR would be of any relevance.

368 Dalhuisen’s thoughts deserve to be quoted: “[…] International arbitrators have substantial power of transformation which for them are founded not in the arbitration clause, but institutionally in the transnational commercial and financial order or in transnational public order itself. This power finds its limits in the evolving *lex mercatoria* which international arbitrators at the same time develop further in an autonomous manner. In fact, it was found that all private law, in order to remain living, needs this kind of facility. Hence, the emergence of equity judges in Common law countries and earlier the function of the Praetor in Roman Law. There is no waiting here for legislators, which are in any event absent from the transnational commercial and financial order. […]” See Jan H. Dalhuisen, International Arbitrators as Equity Judges, in: Pieter H.F. Bekker, Rudolf Dolzer and Michael Waisel (eds.), Making Transnational Law Work in the Global (Cambridge, 2010), at 510, 530.

369 To illustrate all this, let us point to the quite well-known dilemmas related to the enforceability of the English floating charge in Germany. Namely, German law knows, neither for the floating charge (or equivalent), nor is its enforcement system prepared for the physical enforcement of the English device. Hence, it is hard to imagine that anything would change in the respect just because an arbitral award would be the basis for enforcement in Germany.

370 Konigsberg finds arbitration benefitting both parties in international context because here “termination can have significantly adverse effects for the franchisor, for the franchise system and for individual sub-franchisees. [As a consequence of what, in international context] the use of arbitration may very well prove to be a more advantageous method of settling disputes, even for the franchisor, than having to resort to litigation.” See Alex S. Konigsberg Q.C., International Franchising (Juris Publ., 3rd ed., 2008), at 265.
fragmented or otherwise deficient laws – no matter whether consisting of soft or hard (statutory) law, or combination thereof. Furthermore, it seems that the DCFR is a step ahead of, for example, the Unidroit Guidelines as the latter does not offer panacea to key intrinsic problems of franchise, but rather “advises municipal governments to consider a long list of factors in determining the need for and nature of legislative intervention,”371 what is per se less directly exploitable by arbitrators.

Still, none of this should lead to the conclusion that industry self-regulation that make the gist of the franchise law of some European countries is to be doomed. The standards in these sources of law have superior advantages over the DCFR as they are the products of the industry itself, which has not just adapted them to fit local realities, needs and expectations, but has also disseminated the knowledge about them and franchise generally.372 At the moment, thus it looks that such a complex and voluminous instrument as the DCFR – that was additionally forged by academics with little industrial input – hardly could make a successful debut without the benevolent support of the franchise industry. The industry, however, seems to be satisfied with the present non-interventionist state of affairs and obviously has no interest to let the dirty laundry see the daylight. The rosy picture one may canvass by browsing franchise-related scholarly articles, court or arbitral cases, as well as various industry publications in Europe might hide, however, that the beneath the façade franchisors tend to be very much in control, what is otherwise especially characteristic to early evolutionary stages of franchise.373

Yet again, if gaining some insight from the other side of the Atlantic, it might sooner or later be questioned whether the now predominant European industrial self-regulatory model is the appropriate one given the concerns that could be generated by the fact that these were drafted (more or less) unilaterally by the industry and hence the balance in the rules is – or, at least, it might be presumed – tilted for the benefit of the industry (i.e., franchisors). Once that issue becomes a seriously debated concern in Europe, it will require decision on whether the panacea to the perceived problems should ensue through regulations, by making out of

371 Quoted from Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 117. In the light of the above, the author of this article agrees with Spencer that the Unidroit Guide, even though it addresses also the nature of the evidence of abuse, it is of different nature. It is something prepared for lawmakers and less for those applying the law. As Spencer, Id. at 116-17, stated, it “instead of stating the harms that franchising regulation is intended to address,” it comes forward only with a list of factors for regulators.

372 The first version of the European Code of Ethics for Franchising of the European Franchise Federation was accepted already in 1972. Section III.(b) of the same requires the member national franchise organizations to “accept and comply with” the Code of Ethics, though the individual national organizations can pass their own codes, which cannot contradict the one of the Federation. See at <http://www.eff-franchise.com/spip.php?rubrique13>; last visited on 8 May 2013.

373 As Spencer put it “Franchisors’ interest in the dissemination of information only about the sunnier aspects of the sector is due not only to their motivation to avoid further scrutiny and intervention by regulators, but also, and perhaps more importantly, to their interest in marketing franchising to potential franchisees. This interest generally prevails over the need to analyse the sector through an objective lens in order to ensure and improve the quality of franchising generally [Such state of affairs is characteristic of] the early stage of the market interaction [with] franchisor control over the system, the interaction and information.” See Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 65.
franchise a nominated contract with the concomitant private law remedies, or through combination of these. Until that point in time, the DCFR’s novel paradigm model could serve as a benchmark, most importantly, displaying what level of asymmetry is to be tolerated or accepted as normal for franchise contracts in Europe. If such role is ascribed to the DCFR by the parties to individual franchise contracts – let alone organized industries\(^\text{374}\) – then the DCFR’s franchise provisions could directly be resorted to by arbitrators to find a “commonly acceptable solution” to problems originating from franchise asymmetry.

Due to the scarcity of empirical data, it could hardly be substantiated what forms of franchisor opportunistic behavior (if any) is present in Europe today. The sheer fact that a huge number of the US franchise companies are doing business here and presumably apply the same business patterns, manuals and contracts as back home in America, however, does give reasons for concern. Apart from the obvious remark that franchise would require focused empirical research in Europe, it ought to be stressed that the drafters of the DCFR are to be praised for making the omnipresence and hardly negligible economic importance of franchise in Europe conspicuous by morphing it into a nominated contract.

\(^{374}\) The quest for the appropriate formula is not the far-fetched idea only of scholars. In fact, the industry (or industries in some parts of the world) itself is also interested in solving this query. The words of Andrew Terry given at the 23\(^{rd}\) Annual International Society of Franchising Conference held in San Diego, California (February 2009) properly express that: “In the time of the legendary King Arthur, the quest for the Holy Grail was the highest spiritual pursuit for a knight. Today, franchise reformers search for their own Holy Grail – a convenient formula to deliver balance and equity to the franchise relationship which is commonly characterized by both a power and an information imbalance.” See Andrew Terry, Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?, 23\(^{rd}\) Annual International Society of Franchising Conference, San Diego, California, February 2009, cited by Elizabeth Crawford Spencer, the Regulation of Franchising in the New Global Economy (Edward Elgar, 2010), at 1.
3. THE TOPICAL MAP: CRYSTALLIZED AND IMPOSED COMMON EUROPEAN STANDARDS

Each of the four sets of private law topics analyzed (micro-level analysis) above – to wit: force majeure, pre-contractual liability (culpa in contrahendo), as well as remedies for breach of contracts and for non-conforming performance – sheds light not just on some peculiar trait of the DCFR, but also on their arbitrability. As a preliminary: the DCFR standards, if compared to what Anglo-Saxon or civilian systems offer, are as suitable for orientation – or teaching – as a topographic map. This is so as the DCFR always represents some kind of amalgam, a standard that may sometimes be close to one of the known models, yet at other instances it may be equally distanced from them. With respect to remedies for non-conforming performance, the DCFR is “civil-law biased.” In case of frustration and force majeure, where the primary dividing line is not between the two legal families, but additionally significant subdivisions exist among civilian systems themselves, the DCFR standard is more of a hybrid common or equally distant from all.

As we are, however, primarily interested in about how the DCFR rules on these institutions of private law could be exploited by arbitrators to find what the perceived common European standard is or “in search for a commonly acceptable solution to a given problem,” we may conclude that the four analyzed problems are not susceptible to equal treatment. Besides the already hinted at rules on the remedies for non-conforming performance, the DCFR sides with Continental European traditions also in case of pre-contractual liability. This is why it is fair to designate these as examples of ‘imposed common European standards.’ Yet, even in the case of these two, the chances of finding the ‘commonly acceptable solution’ are not the same; naturally lest the parties have disposed of these dilemmas in their contracts. The probabilities could be said to be minimal in case of culpa in contrahendo, because what common laws offer to remedy some of the injustices in the pre-contractual phase are very exceptional. Finding of the common ground between the DCFR’s more lenient standard for non-conforming performance – rules on what were likewise borrowed from civil laws – and the perfect-tender-based common law paradigm rule are equally hard, yet, perhaps, a bit easier. Theoretically, the two approaches may seem irreconcilable, were it not for the exceptions to this strict common law rule both in England and, perhaps even more so, in the US.

The other two focused upon topics represent crystallized rather than imposed common European standards, in case of which the task of spotting the commonalities obviously is easier as what the DCFR offers is itself a middle-ground. When the issue of the remedies for breach of contracts is concerned, the DCFR proceeds similarly though more daringly than the CISG. Instead of prioritizing between specific performance and damages depending on what the forum law would dictate, it does not impose, but makes specific performance generally available though subject to some conditions. This solution in essence tries to forge a pragmatic formula that would primarily turn on the circumstances of the concrete case, including a realistic projection about the enforceability of the chosen remedy, but at the exclusion of court discretion.

The single force majeure article of the DCFR, on the other hand, manages to come forward with a common solution for the otherwise quite diverse Europe. On local level, the spectrum of variants ranges from complete absence of force majeure-specific provisions,
through (at least) four differing doctrinal underpinnings – spiced with potentially misleading terminology. The DCFR departed from the realization that force majeure – both as a legal category and as a frequent boilerplate contractual clause – is known and used throughout Europe with pretty similar contents notwithstanding the doctrinal differences. Today, additionally, European laws tend to give the parties substantial freedom to add and structure their force majeure clauses according to their needs. The DCFR’s formula, notwithstanding the dense language, seems to be closer to the more liberal end of the spectrum of European solutions; some resolving force majeure disputes by resort to the inherently strict impossibility rules and yet, others through the per se more lenient ones based on the clausula rebus sic stantibus (and similar) doctrine(s). The DCFR’s liberal position should, however, not be mistaken for an easy escape from contractual obligations. In any event, a more exact positioning of the DCFR is awaiting some better future times when the first awards or decisions applying the DCFR will see the daylight.
4. THE FUTURE: DA CAPO AL FINE OR SOMETHING MORE?

To underline again: this paper was written with the full awareness of the fact that the main research questions posed herein could not be answered but tentatively given that at this point in time the fate of the entire DCFR project is indeterminate. Not much more could be done than plan for revisits of the topics raised in this paper to make projections hopefully more precise and empirically backed up in the future. The tentativeness of the conclusions should not, however, conceal that many of the issues that have been raised herein are pragmatic and living; irrespective that some tend to survive unnoticed by the academia, businessmen or the lawmakers – and no related caveats could be traced back even on the pages of the DCFR Comments.

Skeptics, unmoved by the seeming merits of the DCFR canvassed above, may eventually recognize that with proper exploitation of comparative methodology tools, the triad of documents making the DCFR could turn into valuable educational tool for teaching not just the often mentioned common European, but also the private law of the individual states of the Old Continent. Those who have read this article, or have at least tried to position their own national laws vis-à-vis the DCFR and the related discussion, may have realized that point. Since the DCFR manages to overcome the local deviations and come forward with common European standards, it is also suitable for comparisons of what non-European models offer. In our globalized 21st century, with harmonization ongoing on multiple tracks and with increasing cross-border activities, it could serve thus as an invaluable benchmark not just for arbitrators, but more importantly also to businessmen and their counsel. Though not as the ultimate and single source to be relied on.

Realists, would quite justly add three more points. Firstly, arbitrators offering their services to businesses as usual will undoubtedly stand ready to arbitrate also on the basis of, or by exploiting the DCFR, though somebody would obviously have to cover the costs of their training to make them capable of doing that. Secondly, as the Eurozone being doomed to remain mired in recession for some time it is to be expected that the concomitant strong position of centripetal forces in Europe would work undoubtedly against the cause of the DCFR. As a result, no EU-sponsored initiative of the DCFR-type would be welcomed enthusiastically. Finally, although the future of the optional instrument that grew out of the DCFR – the Common European Sales Law – is likewise dubious, it is a fact that it is that product coming from Brussels that is these days still talked of – unlike the DCFR. This overshadowing of the DCFR by the CESL is such a negative development that should be highlighted as it has diverted the attention of Brussels from two such important fields of law – franchise and secured transactions – that do not deserve to be chucked away by the EU together with the DCFR.

375 The text of CESL is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF> and related press releases and publications of the EU Commission are available at <http://ec.europa.eu/justice/newsroom/news/20111011_en.htm>; both last visited on 8 May 2013. The CESL is an optional instrument on the application of which parties to cross-border sales transactions could agree. It is a voluminous document made of three parts, out of which the second part named unusually as “Annex I” is what contains the gist of sales law. One of its main characteristics is that it contains consumer and SMEs-protecting rules to the so far unprecedented level.
## APPENDIX I: COMPARATIVE MATRIX OF FRANCHISE LAW MODELS

<table>
<thead>
<tr>
<th>MODEL</th>
<th>Type of norms</th>
<th>Enforcement</th>
<th>Remedies</th>
<th>Content</th>
<th>Effects</th>
<th>Arbitrability</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Regulation</td>
<td>Mandatory</td>
<td>Dedicated administrative agencies</td>
<td>US FCT: - Injunctions - civil penalties - refund of money to franchise purchasers[^378] - no private cause of action State level: - cease and desist orders - civil action by attorney general - subpoena &amp; investigation</td>
<td>Federal: - Pre-sale disclosure State: - Pre-sale disclosure with or without registration - relationship laws</td>
<td>Predominantly ex ante</td>
</tr>
<tr>
<td>2</td>
<td>Industry standards (law)</td>
<td>Ethical norms - mixed</td>
<td>1. Industry 2. parties 3. evidence from some countries: courts as well</td>
<td>1. Exclusion and other industry measures 2. available private law remedies</td>
<td>1. Rights and obligations of the parties 2. duty to inform 3. arbitration</td>
<td>Both: - ex ante (depending on the strength of the industry) - ex post</td>
</tr>
<tr>
<td>3</td>
<td>Private law (e.g., DCFR)</td>
<td>Predominantly default rules (dispositive)</td>
<td>Contractual parties</td>
<td>- specific performance - injunctions - damages</td>
<td>Rights and duties of the parties</td>
<td>Primarily ex post effects</td>
</tr>
<tr>
<td>4</td>
<td>Mixed</td>
<td>Mixed</td>
<td>Mixed</td>
<td>Mixed</td>
<td>Mixed</td>
<td>Mixed</td>
</tr>
<tr>
<td>5</td>
<td>Peculiar solutions</td>
<td>N/A</td>
<td>Depends on policy choices</td>
<td>Depends on the aim and goals &amp; policy choice</td>
<td>Depends on the contents and</td>
<td>Depends on the nature</td>
</tr>
</tbody>
</table>
This work endeavors to blaze a trail to the uncharted relationship of the most meaningful recent product in the area of European private and commercial law – the Draft Common Frame of Reference – and international commercial arbitration. The focus is on three areas of private and commercial law – i.e., sales, franchise and secured transactions (collateral) law (systemic mapping) – and on the specific issues of culpa in contrahendo (liability for breaking the negotiations), remedies for breach of contracts and force majeure (topical mapping).
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