

**Report on the Draft Common Frame of Reference: a report prepared
for the Scottish Government by Laura Macgregor, University of
Edinburgh, on the document known as ‘Principles, Definitions and
Model Rules of European Private Law’
Executive Summary
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1. Introductory

The subject of the report is the document known as “Principles, Definitions and Model Rules of European Private Law” (“Draft Common Frame of Reference,” or “DCFR”). The numbering used in this Executive Summary reflects the numbering used in the report. The report considers the role and content of the DCFR from the perspective of Scots law. The existing published edition of the DCFR is an interim outline edition. An expanded version is due to be published by end 2008.

2. Role and Function

The DCFR is an academic initiative, the product of collaboration by two bodies: the Study Group on a European Civil Code and the Research Group on EC Private Law. It is intended to function as a “toolbox.” This word encapsulates its function as a “bank” of terms and concepts to be used by European legislators. It will help to ensure greater consistency and coherence of legislation in the European private law field. At national level, it may act as an inspiration for national legislators. In the future, the DCFR could perform more significant roles, either as an “opt-in” instrument which parties could adopt as the law governing their contracts, or as the basis for a European Contract Code. The current version is insufficiently sophisticated to fulfil either of these latter two functions, and so they are not commented on in the report.

The scope of the DCFR is wide, extending beyond the law of contract to include much of private law, for example, the law of unilateral promise and unjustified enrichment.

3. General conclusions of the report

The DCFR provides a welcome opportunity to develop Scots law into a more modern and coherent system of contract law. Scots law is a “mixed” legal system, comprising civilian foundations overlaid with the influence of English law. As such, Scots law contains many similarities to the DCFR, itself the product of collaboration between common and civilian lawyers. The DCFR therefore offers to Scots law the opportunity for development in a manner that is consistent with the theoretical foundations of Scots law.

4. Good faith in contract

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Good faith in contract law has been a central focus of debate in European contract law circles over the last ten years. It is present (if at all) only in weak form in the Scottish (and English) legal systems. The most significant reference to good faith in the DCFR can be found in III – 1:103, which, generally, obliges parties to act in accordance with good faith and fair dealing in performing obligations or pursuing remedies. The report analyses this article and concludes that it is relatively weak in nature. Because of this, it is likely to be acceptable to Scots (and English) lawyers.

5. The DCFR: beneficial aspects from a Scots perspective

- 5.1** The DCFR offers modernised and rationalised contract terminology, preferable to existing Scots terminology in many cases.
- 5.2** The DCFR's carefully worked-out schemes are highly attractive in areas where there is little Scots law, for example, the law of services. In these areas the DCFR rules could act as a "fall back" regime, applicable where the parties have not entered into a written contract.
- 5.3** Parts of the DCFR display a high degree of resemblance to several un-enacted recommendations of the Scottish Law Commission. In the future, the DCFR could act as a route for enacting these particular reforms.

6. The DCFR from a consumer's perspective

The DCFR is significantly beneficial to consumers, both consolidating existing protections and extending protection into new areas.

- 6.1** The scheme of consumer protection provided through existing European Directives is fragmented, and the terminology often inconsistent. The "toolbox" function of the DCFR will ensure consistency in new consumer protection Directives. This will be of significant benefit to consumers.
- 6.2** In its information duties, the DCFR consolidates and extends measures of a consumer protection nature contained in existing Directives, applicable, for example, where the consumer contracts at a distance, probably using the internet. One criticism of this part of the DCFR is the failure clearly to delineate the duties applicable in business to business ("B2B") contexts from those applicable in business to consumer ("B2C") contexts.
- 6.3** The DCFR includes rules on non-discrimination which have no equivalent in Scots law. The protections are comprehensive and balanced, and will be beneficial to consumers.
- 6.4** The provisions of the DCFR on unfair terms are not yet agreed. The more extensive formulation (which applies a fairness test to negotiated terms in addition to non-negotiated terms) would be more beneficial to consumers.

7. The DCFR from a business perspective

Parts of the DCFR may raise significant concerns for businesses. Further consultation with stakeholders is required to discuss, in particular, the following issues:

- 7.1** Some parts of the DCFR impose such detailed obligations that they verge on over-regulation, an example being the rules on information duties. Although protective of consumers, the cost is increased administrative burdens for businesses.
- 7.2** Although there will be gains for Scottish businesses through standardisation of terminology and concepts, some terms, and particularly the structure of the DCFR, will be unfamiliar to them. This may limit its effectiveness as a “toolbox” at national Scottish level.
- 7.3** The provisions of the DCFR on unfair terms are not yet agreed. To apply the more extensive formulation (which applies a fairness test to negotiated in addition to non-negotiated terms) to a B2B context is likely to be wholly unacceptable to businesses.
- 7.4** The information duties in the DCFR place an extensive burden on businesses. It is debatable whether they ought to have extended to B2B in addition to B2C contexts. The DCFR also contains duties to negotiate in accordance with good faith and fair dealing. These duties are separate from the more general duty to perform obligations in accordance with good faith and fair dealing, imposed by DCFR III – 1:103, and commented on at **4** above. Although an innovation on Scots law, the duties to negotiate in accordance with good faith in the DCFR are balanced, and address a clear need. As a result, they are probably justifiable, even in a B2B context.
- 7.5** The DCFR grants to the courts power to amend contract terms in certain circumstances. Such powers are almost entirely absent from Scots (and English) law. Although the powers contained in the DCFR are limited, they may still be unpopular with businesses, tending to undermine the reliance businesses place on the actual wording of the contract.
- 7.6** The DCFR, in comparison to Scots (and English) law, permits a court to consider a wider class of evidence in order to interpret a contract. This is likely to be unpopular with the business community because it tends to undermine the reliance businesses place on the actual wording of the contract.

8 Disclaimer

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